

**STATE OF VERMONT  
LIQUOR CONTROL BOARD**

**In Re: PORTSIDE, INC., DBA NESBITT'S PORTSIDE TAVERN  
101 GOVERNOR HUNT ROAD  
VERNON, VERMONT**

**BOARD DECISION AND ORDER**

Portside, Inc. d/b/a Nesbitt's Portside Tavern ("Licensee"), which holds First and Third Class Liquor Licenses, appeared before the Liquor Control Board ("Board") on December 14, 2016 in Montpelier for a contested case hearing to consider alleged violations of General Regulation Nos. 16, 17 and 36. Jacob A. Humbert, Esq., Assistant Attorney General, represented the Department of Liquor Control ("DLC"). Licensee appeared through its owner, Cameron D. Nesbitt. The Board, by a quorum, decides this matter as follows:

**FINDINGS OF FACT**

1. At all relevant times, Licensee held First and Third-Class Liquor Licenses that permit the sale of beer, wine, fortified wine and spirits to the public for on-premises consumption.
2. DLC asserts that Licensee violated the following Regulation on March 26, 2016:
  - a. **General Regulation No. 17:** No licensee shall sell or furnish alcoholic beverages to any individual displaying signs of intoxication from alcoholic beverages or other drugs / substances. No licensee shall allow alcoholic beverages to be consumed on the licensed premises by any individual displaying such signs of intoxication. No licensee shall allow any individual displaying such signs of intoxication to stay on the licensed premises, except under direct personal supervision by a licensee or licensee employee in a segregated nonpublic area when the patron's immediate departure could be expected to pose a risk of bodily injury to the patron or any other individual.
  - b. **General Regulation No. 36:** All licensees shall control the conduct of all individuals on their licensed premises. All licensees must ensure the safety of individuals entering, leaving, or remaining on the licensed premises. No licensee shall permit or suffer any disturbances, brawls, fighting or illegal activity upon the licensed premises; nor shall a licensee permit or suffer

such premises to be conducted in such a manner as to render such premises or the streets, sidewalks, parking lots or highways adjacent thereto a public nuisance.

3. DLC asserts that Licensee violated the following Regulation on April 8, 2016:

**General Regulation No. 16:** No licensee or licensee employee, or any individual involved in the sale, preparation or furnishing of alcoholic beverages, or sale of tobacco products and/or the enforcement on the premises of the laws, rules and regulations of this State pertaining to the sale or furnishing of alcoholic beverages, or sale of tobacco products, shall consume or display the effects of alcohol or any illegal substance while in the performance of their duties.

4. The Board has granted DLC investigators discretion to resolve violations of our General Regulations directly with licensees. If a licensee admits or pleads “no contest” to such an alleged violation, the matter may be resolved by payment of a fine and without a mandatory hearing before the Board. Licensee elected, as is its right, to pursue a hearing on the merits of the alleged violations.
5. Michael Welch, a DLC Investigator testified on DLC’s behalf. He is a full time law enforcement officer as certified by the Vermont Criminal Justice Training Council. He performed two undercover details at Licensee’s establishment on two dates: March 26, 2016 and April 8, 2016.
6. On March 26, 2016 and, we believe, into the morning of March 27, 2016, Inv. Welch observed a gentleman sitting to his left who was “kinda loud.” He exhibited a lethargic posture and was slurring his words as he frequently yelled out to no one in particular. The man was drinking a bottle of Bud Light beer.
7. After about 15 minutes of Inv. Welch’s direct observation, the gentleman started interrupting other patrons’ conversations. He continued to slur his words. Another patron threatened to assault the gentleman, stating “do you want to get thrown across the bar again?” At that point, Mr. Nesbitt intervened and diffused the situation. There was no fight.

8. According to Inv. Welch, approximately 20 minutes later, and while still exhibiting signs of intoxication, Licensee's staff served the gentleman another Bud Light bottle.
9. Subsequently, Inv. Welch overheard the gentleman tell another patron, a female, that he was "pretty drunk."
10. The gentleman had difficulty figuring out which credit or debit card to use to pay his bar tab. The female patron had to retrieve the card out of the gentleman's wallet and present the card to Licensee's staff on his behalf.
11. Licensee was not informed of these observations or that they constituted violations of our Regulations on the night that they happened.
12. On April 8, 2016, Inv. Welch returned to the Licensee's establishment. It was a quiet evening with only a few patrons inside. At 11:23 p.m., Inv. Welch observed the Licensee's female bartender pour herself a Jägermeister shot and consume it in his presence. Inv. Welch had observed this same individual working behind the bar and observed her serve alcoholic beverages drinks to patrons. He had no doubt that this individual was Licensee's bartender.
13. Inv. Welch did not confront or cite the bartender or contact the owner to discuss his observations at the time.
14. In fact, DLC took no action with respect to Inv. Welch's observations on March 26, 2016 or April 8, 2016 for approximately four (4) months.
15. On July 27, 2016, a different DLC Investigator, Inv. Kimberly McLeod served DLC Enforcement Division Administrative Notice of Agency Action administrative tickets ("Tickets") on Licensee. Ticket No. 2124 related to an alleged violation of General Regulation No. 16 with a "waiver fine" of \$510.00; Ticket No. 2125 related to an alleged violation of General Regulation No. 17 with a "waiver fine" of \$510.00; and Ticket No. 2126 related to an alleged violation of General Regulation No. 36 with only a written warning and

no fine. At Hearing, DLC did not seek any further sanction than that which was contemplated in the Tickets.

16. Mr. Nesbitt testified credibly that he did not know of any alleged violations at issue here until July 27, 2016. He does not necessarily contest the alleged violations, but with regard to General Regulation No. 36, Mr. Nesbitt testified that the “fight” between patrons occurred at a time before any participants in said fight had been served an alcoholic beverage; service occurred only after the dispute settled down.
17. Before being served with notice of the alleged violations here, Licensee served a suspension on April 22, 2016 for unrelated violations, including Education Regulation No. 3b (an employee serving alcoholic beverages prior to being DLC certified) and General Regulation No. 45 (paying staff off payroll). DLC did not present testimony why the instant alleged violations were not addressed in connection with the April suspension and the recent, separate violations, which undoubtedly placed Licensee in contact with DLC personnel while those matters were pending.
18. Mr. Nesbitt testified that he would have preferred to know of these alleged violations closer in time to when they were said to have happened in order to address them and to be proactive in doing a better job going forward.

### **CONCLUSIONS OF LAW**

Consistent with the above *Findings of Fact*, the Board concludes as follows:

1. When passing upon the question whether a licensee should be sanctioned for the violation of a liquor statute or regulation, the Board sits as a tribunal with a judicial function to perform and has statutory authority under to suspend or revoke any license or impose a monetary penalty on a licensee for violating the provisions of Title 7 or any regulation. *See In Re: Wakefield*, 107 Vt. 180, 190 (1935).

2. Licensee holds First and Third-Class Liquor Licenses as defined by 7 V.S.A. §2(10) and §(22) and is, therefore, subject to this Board's jurisdiction.
3. Licensee was properly notified of its alleged violations and of its right to appear at a hearing to respond to these alleged violations consistent with 3 V.S.A. §809(a)-(c). The Hearing was held and the evidence closed on December 14, 2016.
4. DLC must prove all alleged violations by a preponderance of the evidence. If any violations are found, then the Board has concluded that DLC has met its burden.
5. The Board concludes that the alleged violations occurred. DLC provided sufficient evidence that Licensee served a beer to a visibly intoxicated patron on March 26, 2016. DLC provided sufficient evidence that the same patron's intoxicated state contributed to a disturbance on the licensed premises, though it did not escalate to a fight or brawl due to Ms. Nesbitt's intervention. This was certainly a sufficient factual basis to supporting a finding of violation of General Regulation No. 36 and to result in a warning to the Licensee. Finally, DLC provided sufficient evidence to prove that an on-duty employee of Licensee consumed an alcoholic beverage during her shift on April 8, 2016, constituting a violation of General Regulation No. 16.
6. DLC's decision to wait nearly four months to cite the Licensee for the alleged violations prejudiced the Licensee. Inherent in this process is the opportunity for a licensee to have a meaningful opportunity to respond to the allegations, investigate them and, if necessary, take prompt corrective action. If an Investigator sees a bartender consuming alcohol on duty, it is imperative that DLC to address this violation with that licensee's management as soon as practicable. Citing a licensee months after a violation such as this does little to promote public safety, as the misconduct could continue unabated and with disastrous results. Moreover, the passage of time diminishes the Licensee's ability to investigate and/or respond to the allegations.
7. In this instance, the Licensee served a suspension on April 22, 2016 for unrelated violations, a time after all the incidents in question here occurred. It would have been reasonable for

Licensee to conclude, at that time, that it had served its punishment for all pending violations of our Regulations. Had Licensee known that there were other violations pending, Licensee may have chosen to pursue its right to a hearing before the Board on those other violations or worked with DLC on a resolution that would have addressed all outstanding violations at one time.

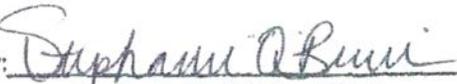
8. The delay in citing Licensee also frustrates the Board's role in sanctioning conduct by Licensees that violate our Regulations. When a violation is found, the Board's role goes beyond merely crafting an appropriate sanction for that misconduct. Our goal is to deter future, similar misconduct by all of our licensees, encourage adherence to our Regulations and, above all, educate licensees and the public at large about our Regulations. By swiftly addressing rule violations, especially those that bear so greatly on public safety, we can achieve our purpose.
9. In light of DLC's delay in citing the Licensee, the Board concludes that the only appropriate sanction against this Licensee for all three violations is a warning.

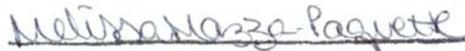
**ORDER**

Based on the foregoing *Findings of Fact* and *Conclusions of Law*, the Board imposes a **WARNING** on Licensee's First and Third Class Liquor Licenses for violations of General Regulations 16, 17 and 36.

**DATED** at Montpelier, Vermont this 13<sup>th</sup> day of January 2017.

**VERMONT LIQUOR CONTROL BOARD**

By:   
Stephanie M. O'Brien, Chair

  
Melissa Mazza-Paquette, Member

  
Julian Sbardella, Member

**RIGHT TO APPEAL**

Within 30 days after copies of this Order have been mailed, either party may appeal to the Vermont Supreme Court by filing a Notice of Appeal with the Department of Liquor Control and paying the requisite filing fee. *See* 3 V.S.A. § 815(a); V.R.A.P. 4 and 13(a).