

**STATE OF VERMONT
DEPARTMENT OF LIQUOR AND LOTTERY
LIQUOR CONTROL DIVISION
BOARD OF LIQUOR AND LOTTERY**

**IN RE: SNOW REPUBLIC, LLC
33 ROUTE 100
WEST DOVER, VERMONT 05356**

DOCKET NO. 2020-005

BOARD DECISION AND ORDER

The Board of Liquor and Lottery held a contested case hearing (“Hearing”) on December 9, 2020 to consider allegations that Snow Republic, LLC (“Licensee”) violated multiple counts of General Regulations Nos. 12, 13 and 17. Licensee denied the alleged violations and requested the Hearing. Walter C. Bansley IV, Esq. appeared for the Licensee, as its owner and counsel. Assistant Attorney General Jacob A. Humbert, Esq. appeared for the Department of Liquor and Lottery (“DLL”). DLL specifically alleges that the Licensee violated the following General Regulations on December 31, 2019 – January 1, 2020:

General Regulation No. 12 (3 Counts): No licensee or licensee employee shall sell or furnish alcoholic beverages to any individual who is less than twenty-one years of age, nor shall a licensee or the licensee employee permit or suffer alcoholic beverages to be consumed upon the licensed premises by any individual who is less than twenty-one years of age.

General Regulation No. 13 (3 Counts): For individuals of questionable age, all liquor and tobacco licensees and their employees shall demand that such individual exhibit a valid operator’s license, valid non-driver identification card, or enhanced driver’s license, which has been issued by this state or another state or foreign jurisdiction, a valid United States military identification card, a valid passport card or valid passport all of which bear the person’s photograph and signature, name, date of birth, and expiration date.

General Regulation No. 17 (3 Counts): 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.

The Board considered all exhibits admitted into evidence and the testimony of: Dover Police Sergeant Michael Arbogast, Dover Police Officer Frank Dornburgh, Connor Gurnham, Jack Gurnham, Austin Baird, Attorney Bansley, Sergio Estrada and DLL Investigator Kimberly McCloud, and renders the following *Findings of Fact, Conclusions of Law and Order*:

FINDINGS OF FACT

1. Licensee holds First and Third-Class liquor licenses for premises located at 33 Vermont State Route 100, West Dover, Vermont and was open for business during the evening of New Year's Eve, December 31, 2019 to January 1, 2020.
2. At approximately 1:30 a.m. on January 1, 2020, Dover Police Department Sergeant Michael Arbogast was driving in his police cruiser southbound on Vermont State Route 100, a road with a posted speed limit of 50 miles per hour. He saw a lone male ahead of him. As Sgt. Arbogast approached the male in his cruiser, the male jumped over snowbank and into a ditch, perhaps so as not to be seen. Sgt. Arbogast stopped and turned his blue lights on. He also activated his body camera. The Board reviewed footage from Sgt. Arbogast's body camera.
3. Sgt. Arbogast approached the male, later identified as Connor Gurnham ("Connor")¹ and found him unresponsive. Sgt. Arbogast assisted Connor out of the ditch and back over a snowbank. Unsteady on his feet, Sgt. Arbogast grabbed Connor to keep him out of the roadway. Connor resisted. Sgt. Arbogast returned Connor to the snowbank.
4. It was apparent to the Board from the video that Connor had significant difficulty standing back up; he was unsteady on his feet, and spoke incoherently (which was observable to the Board via the body camera video footage). Sgt. Arbogast testified that Connor had bloodshot and watery eyes, was emitting a moderate odor of intoxicants and was visibly confused. Connor was intoxicated.

¹ Mr. Gurnham's first name is used for clarity as his twin brother, Jack Gurnham, discussed below, is involved in this matter.

5. Sgt. Arbogast asked Connor for his identification. Connor had difficulty reaching for his wallet and eventually flung it at Sgt. Arbogast.
6. Inside Connor's wallet, Sgt. Arbogast first found a New Jersey driver's license. Notably, based on the body camera footage, Sgt. Arbogast did not immediately identify this as a fake ID; instead, he ran it through the computer in his police cruiser and ultimately determined that it was invalid. Sgt. Arbogast then looked through Connor's wallet further and located a second identification, a valid Connecticut identification, confirming Connor was then 20 years old with a birthdate of [redacted].
7. Licensee does not dispute that Sgt. Arbogast found Connor walking north on Route 100 or that Connor was displaying signs of intoxication at that time.
8. Sgt. Arbogast asked Connor if there was someone he could call to pick him up. Connor ultimately said that his father could. But, Connor only provided a few digits of a phone number, which made contacting Connor's father difficult. Based on testimony at Hearing, Connor was staying with his parents at a condominium approximately a five-minute drive from where this roadside encounter occurred.
9. Besides Licensee, there are no other liquor-licensed establishments nearby within walking distance of where Sgt. Arbogast found Connor. Headed southbound on Vermont State Route 100, Snow Republic is the last liquor-licensed business in West Dover; one would need to travel to Wilmington, about seven minutes by car, to reach the next liquor-licensed business. Headed northbound from Licensee's establishment, the next business serving alcoholic beverages in West Dover is approximately a mile and half away. Given these facts, Sgt. Arbogast asked Connor if he had been to Licensee's establishment that night. Connor confirmed that he had. This encounter between Sgt. Arbogast and Connor occurred less than 100 yards from the front entrance to Licensee's establishment.

10. Connor and Sgt. Arbogast were ultimately able to reach Connor's father by telephone, who agreed to meet Sgt. Arbogast and Connor at Licensee's establishment; he arrived around 1:30 a.m. Connor's twin brother, Jack Gurnham ("Jack"), and Austin Baird ("Austin") (born redacted) were at Licensee's establishment. There is no dispute regarding that these three minors were under age 21 at all times relevant to this matter.
11. Sgt. Arbogast called for assistance because he understood that Connor have been with other people. Dover Police Officer Frank Dornburgh responded directly to Licensee's establishment, arriving at approximately 1:45 a.m. The events preceding Sgt. Arbogast and Connor's encounter on Rt. 100 are as follows:
12. At approximately 8:00 p.m.-9:00 p.m. on December 31, 2019, the Gurnhams and Austin went to a house where Austin was staying. All three minors consumed Bud Light beer there. Austin, for example, estimated he had four or five beers before leaving. From there, the Gurnhams and Austin took a taxi to Licensee's establishment, arriving between 10:00 p.m. and 11:00 p.m.
13. Sergio Estrada, one of Licensee's bartenders, testified that Connor, Jack and Austin had been to Licensee's establishment before, perhaps earlier that same week with their families, and that he had asked for identification from all of them in the past.
14. Licensee's establishment was crowded during the evening of December 31, 2019, with most patrons arriving after 9:00 p.m. Licensee's patrons are, consistent with Attorney Bansley's Hearing testimony: "middle aged, second home owner crowd that prices out young kids looking to drink and get drunk."
15. Connor testified that when he arrived at Licensee's establishment, he was "buzzed." Jack testified that he was slightly intoxicated when he arrived, but did not believe he was drunk.
16. The three minors were inside Licensee's establishment for at least two hours, until shortly after 1:00 a.m. on January 1, 2020.

17. Mr. Estrada was working with one other bartender on the evening of December 31, 2019 into January 1, 2020. Licensee's staff walked through the establishment from time to time to observe their patrons. Mr. Estrada confirmed that Connor, Jack and Austin were at Licensee's establishment on December 31, 2019, but does not recall the time of their arrival.
18. Mr. Estrada served alcoholic beverages to Connor and Jack. Mr. Estrada demanded, prior to service, that both of them present identification indicating they were both over 21 years of age before serving them. In response, Connor and Jack presented identification to Mr. Estrada purporting to confirm that they were both over 21 years of age. Licensee did not contest at Hearing the purchasers were underage, but did not concede that this was known to Mr. Estrada at the time.
19. Mr. Estrada never served Austin directly, nor did he ask for Austin's identification. Austin testified that he consumed beers brought to him by Connor. Connor and Jack admitted that they used a fake identification to purchase drinks for themselves and Austin, who did not possess a fake ID.
20. According to Licensee's *Proposed Findings of Fact* submitted post-Hearing (at ¶ 8) and consistent with the evidence produced at Hearing, including Mr. Estrada's testimony, "at some point after midnight, Estrada cut off all three males and refused to serve them any more alcohol." This suggests that Mr. Estrada knew that Austin had been drinking there despite having not directly served him any alcoholic beverages. Mr. Estrada confirmed that, by this point, the three minors displayed glassy eyes, were slurring their speech and were unsteady on their feet.
21. After cutting off the three minors, which Mr. Estrada estimated occurred at 12:15 a.m., Mr. Estrada allowed them to remain near the pool table, where they continued to play pool. The minors tried to persuade Mr. Estrada that they were not intoxicated. Mr. Estrada did not serve the three minors any alcoholic beverages after that time.

22. As the other patrons left the bar around near closing time, 1:00 a.m., the three minors still would not leave. Austin told Mr. Estrada that he would leave if he could use the restroom. Mr. Estrada agreed, but later observed that Austin had vomited and urinated in and around the toilet.
23. At this point, Mr. Estrada forcibly removed all three minors from the bar and locked the door behind them.
24. The three minors told Mr. Estrada that they planned to take a taxi home from Licensee's establishment. At the Hearing, when asked about whether he recalled the minors saying they were going to take a cab, Mr. Estrada replied "it didn't matter, I just wanted them out of the building."
25. After being locked out, the three minors banged on the door to be let back inside for approximately 20-30 minutes.
26. Mr. Estrada tried to ignore them as he was cleaning up. Mr. Estrada did hear that one of the minors (most likely Connor) indicated that he was leaving. The other two stayed at the front door for roughly five more minutes, continuing to try to get inside.
27. At 1:45 a.m., in response to Sgt. Arbogast's call (*See Findings of Fact*, ¶ 11, above), Officer Dornburgh arrived at the front door of the Licensed establishment. Mr. Estrada unlocked the front door. Officer Dornburgh explained that someone had been found walking up Route 100 and claimed to have come from Licensee's establishment. Officer Dornburgh asked whether this individual was alone. Mr. Estrada confirmed that there were two other patrons with him, but they had just run off, likely given the officer's arrival. Mr. Estrada believed that the other two patrons were likely out back. He welcomed Officer Dornburgh to search the area. Given these facts, Mr. Estrada knew that the minors had remained on or near the premises after being kicked out, that they were in the cold, and that they were without a safe and immediate way home.

28. As Officer Dornburgh walked around the corner to the back of the building, he observed two younger males (later identified as Jack and Austin) hunched over, appearing to think they were hiding out of view near the back corner of the building, even though they were readily visible.
29. Officer Dornburgh observed that Jack and Austin both had a hard time standing up or talking and were wet, which he believed was from stumbling around in the snow behind the building while attempting to hide.
30. While outside the Licensed establishment, none of the minors had any alcoholic beverage containers on their person, nor were any found near them.
31. When Officer Dornburgh asked Jack and Austin for identification, Jack stated that he did not have his wallet, and Austin was unable to pull his identification out of his wallet. Both exhibited substantial signs of intoxication. Officer Dornburgh placed them in his cruiser to get warm because they were not wearing winter coats. After roughly five minutes inside the cruiser, Austin vomited in the back seat. Officer Dornburgh opened the cruiser door and observed that Austin could not get out on his own and required assistance. Austin was covered in his own vomit and proceeded to vomit outside the cruiser, too.
32. Officer Dornburgh released the minors to the custody of Mr. Gurnham's father.
33. Based on their testimony at Hearing: Connor did not remember how many drinks he consumed at Licensee. He recalls purchasing more than one drink for Austin. Jack consumed approximately 10 drinks, including beer, shots, and champagne at midnight. He did not recall either being cut off by Licensee staff or what happened when he left the bar. Jack's first recollection after being at Licensee's establishment was waking up in bed with his dad very mad at him. Austin remembered being outside, having police officers show up and ultimately vomiting as he was getting out of the police cruiser and being brought home by the Gurnhams' father.

CONCLUSIONS OF LAW

1. The Board is established as the paramount authority in the administration of Vermont's liquor and tobacco statutes and regulations. *See Verrill, Jr. v. Daley, Jr.*, 126 Vt. 444, 446 (1967).
2. When passing upon the question whether a license shall be revoked or suspended 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 7 V.S.A. §210(a)(1) to suspend or revoke any license for violating the provisions of Title 7 or any regulation. *See In Re: Wakefield*, 107 Vt. 180, 190 (1935).
3. Licensee holds valid First and Third-Class liquor licenses and is, therefore, subject to this Board's jurisdiction.
4. This Board has confirmed that General Regulations No. 12 is one of strict liability: an absolute prohibition on the sale of alcoholic beverages to persons under 21 years of age. *In re: Wellfleet, Inc. d/b/a Saxtons River Village Market*, Docket No. 2017-12 (June 26, 2017). There is no dispute that the three minors: Connor Gurnham, Jack Gurnham and Austin Baird were under 21 years of age and consumed alcoholic beverages at Licensee on December 31, 2019-January 1, 2020. The conduct described above constitutes three violations of General Regulation No. 12.
5. Licensee raises an issue not considered by this Board: whether 7 V.S.A. § 658 provides an affirmative defense to a Licensee who violates General Regulation No. 12 when, as Licensee argues, Mr. Estrada's good faith sale of alcohol stemmed from the reasonable belief that Connor and Jack presented valid identification. We conclude that, in this forum, it does not. We agree with DLL that 7 V.S.A. § 658 addresses criminal and civil liability for individual *persons*, not liquor licensees, who "sell or furnish alcoholic beverages to a person under 21 years of age" or "knowingly enable the consumption of alcoholic beverages by a person under 21 years of age." 7 V.S.A. § 658(a)(1)-(2). An individual person, such as a server or store clerk, can violate either of these prohibitions, but avoid criminal and/or civil sanctions, if that person is able to demonstrate:

(A) the purchaser exhibited and the employee carefully viewed photographic identification that complied with section 589 of this title and indicated the purchaser to be 21 years of age or older; (B) an ordinary prudent person would believe the purchaser to be of legal age to make the purchase; and (C) the sale was made in good faith, based upon the reasonable belief that the purchaser was of legal age to purchase alcoholic beverages.

Id. § 658(c)(2). Accordingly, the statute provides a potential protection to a person, specifically a bartender such as Mr. Estrada from criminal sanction, but does not absolve his employer, a licensee, of administrative sanctions. Under the principle of statutory construction, *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the omission of licensees from this immunity is considered deliberate.

6. With respect to General Regulation No. 13 (set forth above), the Board finds that Connor, Jack and Austin were all of questionable age at all relevant times and as the Board observed by their youthful physical appearance during their testimony at the Hearing. We find that Licensee did demand that Connor and Jack:

exhibit a valid operator's license, valid non-drive identification card, or enhanced driver's license, which has been issued by this state or another state or foreign jurisdiction, a valid United States military identification card, a valid passport card or valid passport all of which bear the person's photograph and signature, name, date of birth, and expiration date.

Accordingly, there is no violation of General Regulation No. 13 with respect to Connor and Jack. It is undisputed that Licensee's staff did not demand that Austin exhibit any identification and undisputed that Austin consumed alcoholic beverages at Licensee to the point of being "cut off." The testimony that Jack and Connor possessed a fake ID at Licensee while Austin did not is consistent with this. Having not demanded any such identification as set forth in General Regulation No. 13, the Board finds one violation of this General Regulation with respect to Austin, but will dismiss the other two alleged violations with respect to Connor and Jack.

7. General Regulation No. 17 (set forth above) requires every holder of a liquor license to ensure that any individual intoxicated through alcohol and/or other drugs/substances is not served, or allowed to consume, any alcoholic beverages and, further, is immediately removed from the

licensed premises, unless public safety justifies keeping the patron on the premises, but then only in a supervised and segregated non-public area.

8. During the early morning hours of January 1, 2020, three patrons of Licensee displayed multiple obvious signs of intoxication outside the Licensee's establishment. This is based on Sgt. Arbogast and Officer Dornburgh's credible testimony and Sgt. Arbogast's body camera video. While these signs of intoxication displayed during the 1:00 a.m. hour on January 1, 2020 can be presumed to have been continuous from the point that the three minors were removed from the Licensed establishment, we need not presume. *See In Re Tweet*, 146 Vt. 36, 38, 498 A.2d 499, 501 (1985). Licensee concedes that the patrons were cut off approximately 45 minutes before closing time, and exhibited behavior consistent with significant intoxication, including vomiting in the Licensee's restroom, while still inside Licensee's establishment. The evidence, therefore, demonstrates that, in the early morning hours of January 1, 2020, the three minors were likely displaying the same level of obvious and significant signs of intoxication at the time the Licensee's bartender locked them outside.
9. Licensee allowed these significantly intoxicated minors to remain inside the bar for approximately 45 minutes, without being taken to a non-public area and put under direct supervision by staff. Even if there was evidence upon which to conclude that segregating the three minors by the pool table was a non-public area, the Board is more concerned with the forcible removal of the three minors to the cold outside, which put them in peril of physical harm. The most serious of these violations relates to Connor, who while heavily intoxicated walked to and along a major highway, Vermont Route 100, alone.² The conduct described

² Given the three minors' conduct outside of the Licensed establishment and on Vermont State Route 100 during the early morning hours of January 1, 2020, Licensee's conduct likely ran afoul of General Regulation Nos. 36 and/or 36(a) as well:

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.

- a. The Board may find, that a licensee suffered a disturbance, brawl, fight or illegal activity upon the licensed premises or upon the streets, sidewalks, parking lots or highways adjacent thereto if any individual engaged in such conduct had been allowed to stay on the licensed premises while displaying signs of intoxication from alcohol, drugs or other substances, and/or if it would be reasonable to expect that such individual would be intoxicated as a result of the amount of alcohol

above constitutes three violations of General Regulation No. 17, though the sanction with respect to Connor must be more significant as discussed below:

CONCLUSION

DLL has established, by a preponderance of the evidence, three (3) violations of General Regulation No. 12, one (1) violation of General Regulation No. 13 and three (3) violations of General Regulation No. 17. Under 7 V.S.A. § 210(a)(1), the Board shall have power to suspend or revoke any permit or license granted pursuant to this title in the event the person holding the permit or license shall at any time during the term of the permit or license conduct its business in violation of this title, the conditions pursuant to which the permit or license was granted, or any rule prescribed by the Board. Under 7 V.S.A. § 210(b)(1), in addition to the authority to suspend or revoke any permit or license, the Board of Liquor and Lottery may impose an administrative penalty of up to \$7,500.00 per violation against Licensee (the maximum here could be \$52,500.00). For the violation of General Regulation No. 17 with respect to Connor Gurnham, which was the most egregious violations, we suspend the First- and Third-Class Licenses of Licensee for the period of five days and impose a fine of \$500.00 for each of the six (6) remaining violations, for a total fine of \$3,000.00.

ORDER

Based on the foregoing *Findings of Fact* and *Conclusions of Law*, Licensee, Snow Republic violated General Regulation Nos. 12 (3 Counts), 13 (1 Count) and 17 (3 Counts), and is hereby **FINED** \$3,000.00 and its First and Third-Class liquor licenses **SUSPENDED** from the opening of business on Wednesday, April 7, 2021 to the close of business on Sunday, April 11, 2021. The fine is to be paid within 120 days of the date of this decision.

Two counts of alleged violations of General Regulation No. 13 are hereby dismissed.

served to that individual. Under such facts, the Board may conclude that any such individual's conduct should have been anticipated.

We will not address this because no such violation(s) are properly alleged, or before, this Board.

DATED at Montpelier, Vermont this 10th day of February 2021.

VERMONT BOARD OF LIQUOR AND LOTTERY

A handwritten signature in black ink, appearing to read "Mark Wainwright", written over a horizontal line.

Board Chair

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 and Lottery and paying the requisite filing fee. *See* 3 V.S.A. § 815(a); V.R.A.P. 4 and 13(a).