

New Hampshire Liquor Commission

Robert J. Hart Building, 50 Storrs Street, Concord, NH 03301



Joseph W. Mollica
Chairman

**Nicole Brassard
Jordan**
Deputy Commissioner

Decision and Order

Petition in the Matter of

**Black Bear Tavern
151 Main Street
Colebrook, NH 03576**

HEARING DATE: February 1, 2022
LICENSE #: 368802
LICENSE TYPE #: Hotel/Cocktail Lounge
DOCKET #: 2022-Liq-0002

AUTHORITY: RSA 179:5, 179:8, 179:56,
179:57, 507-F4, 5 & 6, 541-
A:30, II, RSA 541-A:31-36, Liq
200 seq., et al., 601.03, 603.02,
603.03

STATE PROSECUTOR: Deputy Chief Danielle Ellston
Division of Enforcement & Licensing

STATE PETITIONER: Investigator Michelle Soares
Division of Enforcement & Licensing

LICENSEE: Mr. Richard Nadig

REPRESENTATIVE: Attorney Len Harden, Esq.

OTHERS PRESENT: Nancy Couture, Investigative Paralegal, Christina Bouchard,
Bar Manager and witness for Black Bear Tavern.

HISTORY:

It is alleged on September 17, 2021, pursuant to Administrative Notices 6078, 6653, and 6654 Black Bear Tavern committed violations of 179:5, I service to an intoxicated individual (aggravated), 179:5, I service of alcohol to an underage individual, and 179:8, statement from purchaser as to age. Docket Number 2022-Liq-0002 was assigned and is referenced within this justification.

The licensee was served the administrative notices on October 6, 2021 in-hand pursuant to Liq 205.04 and 205.12. The matter was scheduled for a pre-hearing conference and adjudicatory hearing on January 26, 2022. The parties had settlement discussions without the presence of the Chief Hearings Officer prior to the hearing. Those discussions led to the licensee electing to plead no contest to the alleged violations and proceed directly to a sentencing hearing. Upon the request of the parties the matter was continued to February 1, 2022 for sentencing only. The licensee plead no contest to the allegations without any admissions.

Mr. Joseph S. Plaia, Chief Hearings Officer, conducted the sentencing hearing via ZOOM at the request of the parties, as designee on behalf of Chairman Joseph W. Mollica, New Hampshire Liquor Commission.

OPENING REMARKS:

Everyone present was informed of the following either on the record or in the Notice of Hearing:

- The Notice of Hearing advised an adjudicatory hearing would be conducted in accord with Administrative Rule Liq 205.12 Notice and Conduct of Hearings including, but not limited to: that the administrative notices and all supporting documents shall be available for review.
- That the hearing is recorded.
- The opportunity for each participant to present testimony at the hearing, explaining that persons shall give an oath or affirmation and state their name and for the record; Liq 205.06 Appearance before the Commission.
- That either party if discontent with the decision would have an opportunity to appeal for a rehearing, referencing RSA 541:3.

PROCEDURAL INQUIRY:

After receiving notice that the respondent may have an attorney present to represent him, Mr. Richard Nadig appeared with Attorney Len Harden, Esq.

OFFICIAL NOTICE:

- The Scope of Hearing and published authority within the Notice of Hearing issued to the Respondent.
- The respondent acknowledged receipt of the Division of Enforcement's file, witness list and exhibits.
- The State acknowledged receipt of the licensee's witness list and exhibits.

EXHIBITS:

Petitioner

Exhibit #01 AN #6078, Statement from Purchase as to Age;

Exhibit #02 AN #6653 Service of Alcohol to an Underage Individual (aggravated);

Exhibit #03 AN #6654 Service of Alcohol to an Intoxicated Individual (aggravated).

Respondent

Exhibit #1 Proposed Order and Penalties;

Exhibit #2 M.T.S. Training Certificates;

Exhibit #3 Witness List;

Exhibit #4 TEAM Training Certificates;

Exhibit #5 Signed Receipts for Employee Handbook;

Exhibit #6 Employee Handbook.

SYNOPSIS OF TESTIMONY:

The licensee stipulated to admit into evidence State's exhibits 1, 2 and 3, the Administrative Notices of Agency Action for Black Bear Tavern. The licensee entered exhibits 1-6 into evidence without objection from the State. The parties advised the only matter in dispute was consideration of penalties.

By way of proffer, Deputy Chief Ellston stated that on September 17, 2021, an underage individual (Mr. Andre Dostie, 19 years of age) was a patron at Black Bear Tavern in Colebrook, NH between approximately 4:30 P.M. and 5:45 P.M. He was served alcoholic beverages while seated with three adults without being asked for his identification. During a period of approximately 68 minutes he was served eight (8) Tito's Vodka and Cranberry drinks. Several of those drinks were consumed in a matter of seconds. Following his departure from the establishment, he made one other stop and then proceeded to Vermont where he subsequently crashed his motorcycle into a tree and died from his injuries. Deputy Chief Ellston provided the following aggravating factors associated with the above violations:

- Failure to train employees in liquor education classes
- Failure to train Title XIII requirements for an employee
- Serving an intoxicated minor
- Failure to ID anyone who appears younger than 21 years of age
- Failure to monitor the quantity of alcohol served to a patron
- Service of more than 4 drinks in an hour or 6 drinks in total to a person who becomes intoxicated
- Service of alcohol to a patron that is so continuous and excessive that it creates a risk of death by alcohol poisoning
- Any factor that increases hazard to public safety which is due to the consumption of alcoholic beverages
- Culpable mental state as defined by RSA 626:2, II – aggravated factor when “purposefully” or “knowingly” is proven
- Violation of RSA 179:5 when it conforms to the provision of RSA 507-F:4 & RSA 507-F:5
- Negligent or reckless service of alcoholic beverages pursuant to RSA 507-F:4 & RSA 507-F:5

Deputy Chief Ellston provided the following mitigating factors associated with the above violations:

- The licensee has no record of like violations
- The licensee cooperated with the investigation including preserving video surveillance before it's destruction
- The licensee has no record of any violations
- Responsible business practices pursuant to RSA 507-F:6 (employee handbook)

Given the serious nature of the incident the Division of Enforcement recommended the penalties for aggravated violations for RSA 179:5, a 10-day suspension and a fine of \$2,500 for each violation, and for the violation for RSA 179:8 a fine of \$100. Several other conditions were recommended by the Division that are not in dispute.

Attorney Harden stated the licensee did not contest the allegations in the administrative notices and appeared only to argue against the imposition of the maximum penalties for aggravated violations of 179:5. Attorney Harden proffered that the Black Bear Tavern was one of only three establishments in the town of Colebrook where its approximately 2,000 residents could go out for a meal or drink. The owner, Mr. Nadig, took over the establishment approximately 10 years ago, seeking legal counsel to establish an employee handbook. Attorney Harden, a notable DUI attorney in the north country has not received a DUI case from the establishment in over 7 years. Attorney Harden pointed specifically to page 8 of the handbook referencing an alcohol serving policy, which provides that employees shall not knowingly serve alcohol to intoxicated or underage individuals.

Attorney Harden further pointed out that every employee must certify by signature that they have read and received the handbook, a policy that was in place prior to the incident in this case. The bartender who served Mr. Dostie was John Kenny, a 57-year-old employee hired in June, 2021 with several years' experience as a bartender/server at the Balsams Resort in Colebrook. Mr. Kenny was terminated immediately following the incident and is facing criminal charges for his actions. During his time at Black Bear Tavern, Mr. Dostie sat with three adults. Shortly after leaving the Black Bear Tavern, Mr. Dostie came into contact with multiple other adults at a house party. Adults there recognized he was intoxicated and refused to provide him an alcoholic beverage.

Following this incident, the licensee took several steps to ensure it would not happen again, to include the termination of Mr. Kenny, a meeting with all employees regarding the service of alcohol, and ensured all employees received training from the Division of Enforcement at the licensed premises. It should be noted that the majority of employees' TEAM training certificates are dated prior to the incident. Other considerations proffered were that the Black Bear Tavern has taken in workers from a nearby establishment that recently burned down, and that several of the employees are single parents without other means of assistance or income to support their dependents. The licensee estimates a twenty-day suspension would result in a loss of approximately \$60,000 to the establishment in addition to the maximum penalty of \$5,000 in fines, which would possibly result in its closure. Further, the Black Bear Tavern employs 20 people, and many of the employees would not be able to endure such a loss to their personal income, and again cited the lack of other establishments in the area available for such employment.

LEGAL ANALYSIS:

In gathering findings of fact, the following is considered:

Pursuant to Revised Statutes Annotated Title XIII ALCOHOLIC BEVERAGES, Chapter 175 through and including Chapter 180 (as applicable) along with New Hampshire Code of Administrative Rules, Liq. 100 through and including Liq. 500 (et seq.) defines and controls fact-finding, formulation of a Conclusion of Law, and Disposition.

RELEVANT STATUTES

179:5 Prohibited Sales. –

I. No licensee, salesperson, direct shipper, common carrier, delivery agent, nor any other person, shall sell or give away or cause or allow or procure to be sold, delivered, or given away any liquor or beverage to a person under the age of 21 or serve an individual who is visibly intoxicated or who a reasonable and prudent person would know is intoxicated. For all deliveries of packages by common carrier or delivery agent marked "alcoholic beverages" or "alcoholic products," the carrier shall obtain an adult signature.

II. No licensee, manager or person in charge of a licensed premises shall allow or permit any individual, who is under the age of 21, to possess or consume any liquor or beverage on the licensed premises.

179:8 Statement From Purchaser as to Age. –

I. For the purposes of RSA 179:7, any person making the sale of beverages or liquor to any person whose age is in question shall require the purchaser to furnish any of the following documentation that such person is 21 years of age or over:

(a) A motor vehicle driver's license issued by the state of New Hampshire, or a valid driver's license issued by another state, the District of Columbia, a United States territory, or a province of Canada, which bears the date of birth, name, address, and picture of the licensee.

(b) An identification card issued by the director of motor vehicles under the provisions of RSA 260:21, RSA 260:21-a, or RSA 260:21-b, or any picture identification card issued by another state, the District of Columbia, or a United States territory, which bears the date of birth, name, and address of the individual.

(c) An armed services identification card.

(d) A valid passport from a country with whom the United States maintains diplomatic relations.

II. Photographic identification presented under this section shall be consistent with the appearance of the person, and shall not be expired and shall be correct and free of alteration, erasure, blemish, or other impairment.

179:56 Hearings; Investigations; False Statement; Enforcement Policy. –

I. The commission shall adopt and publish rules pursuant to RSA 541-A, to govern its proceedings and to regulate the mode and manner of all investigations and hearings before it. All hearings before the commission shall be in accordance with RSA 541-A:31-36. In any such investigation or hearing the commission shall not be bound by the technical rules of evidence. The commission may subpoena witnesses and administer oaths in any proceeding or examination instituted before or conducted by it, and may compel, by subpoena, the production of any accounts,

books, contracts, records, documents, memoranda, and papers of any kind whatever. A summons issued by any justice of the peace shall have the same effect as though issued for appearance before such court.

II. If any false statement is knowingly made in any statement under oath which may be required by the provisions of this title or by the commission, the person making the same shall be deemed guilty of perjury. The making of any such false statement in any such application or in any such accompanying statements, whether made with or without the knowledge or consent of the applicant, shall, in the discretion of the commission, constitute sufficient cause for the revocation of the license.

III. (a) The commission shall adopt by rule under RSA 541-A a formal enforcement policy for licensees under its jurisdiction. This policy shall specify the disciplinary action which the commission shall take for violations of various laws under its jurisdiction. The enforcement policy shall also specify mitigating and aggravating factors which the commission shall consider in determining penalties for specific actions. Except as provided in subparagraph (c), the commission shall not suspend or revoke a license until the licensee has been provided a hearing under RSA 541-A.

(b) In applying its enforcement policy, the liquor commission shall establish and enforce specific determinate penalties for specific offenses. The commission shall not apply penalties such as license suspensions for indefinite periods of time.

(c) The commission may suspend, for a period of not more than 24 hours, any license issued under the provisions of this title, if a risk to public health, safety, or welfare constitutes an emergency requiring such suspension. Any such suspension shall be approved directly by at least one member of the commission before taking effect.

Source. 1990, 255:1. 1991, 204:4, 5. 1994, 412:23. 2004, 142:2. 2013, 258:10, eff. Sept. 22, 2013. 2019, 346:156, eff. July 1, 2019.

179:57 Suspension or Revocation; Administrative Fines. –

I. The commission shall cause frequent inspections to be made of all the premises with respect to which any license has been issued under the provisions of this title. If any licensee violates any of the provisions of law or any of the rules of the commission adopted under this title or fails to superintend in person or through a manager approved by the commission the business for which the license was issued or allows the premises with respect to which the license was issued to be used for any unlawful purposes or knowingly designates to be in charge of the premises any person who has been convicted of a felony, unless the person has been approved by the commission pursuant to RSA 179:23, V, or otherwise fails to carry out in good faith the purposes of this title or if the premises are regularly the site of violence the license of such licensee may be suspended or revoked after notice and hearing, in accordance with RSA 541-A:31-36. Notwithstanding any other provisions of this chapter, the commission after the appropriate hearing may impose a fine of a specific sum, which shall not be less than \$100 nor more than \$5,000 for any one offense. Such a fine may be imposed instead of, or in addition to, any suspension or revocation of a license by the commission.

I-a. Notwithstanding any other provision of law, the commission may accept at any time, a petition from the governing body of a city or town who has voted to accept the provisions of RSA 663:5, I(b), (c) and (d), to revoke a license to sell alcoholic beverages held by a licensee who is located within that community. Any petition filed under this paragraph shall state with particularity all relevant facts and circumstances that sustain the opinion of the petitioner to revoke a license. A licensee against whom a petition is filed shall be entitled to a public hearing before any decision by the commission. All proceedings conducted in conjunction with this paragraph shall conform to the requirements of RSA 541-A.

II. Appeals from a decision of the commission shall be in accordance with RSA 541.

III. The commission shall, upon notification by the commissioner of the department of revenue administration of a tobacco tax violation, suspend or revoke any tobacco license issued under RSA 178. Any challenge to such suspension or revocation shall be made to the commissioner of the department of revenue administration.

507-F:4 Negligent Service of Alcoholic Beverages. –

I. A defendant who negligently serves alcoholic beverages to a minor or to an intoxicated person is liable for resulting damages, subject to the provisions of this chapter.

II. Service of alcoholic beverages to a minor or to an intoxicated person is negligent if the defendant knows or if a reasonably prudent person in like circumstances would know that the person being served is a minor or is intoxicated.

III. Proof of service of alcoholic beverages to a minor without request for proof of age as required by RSA 179:8 shall be admissible as evidence of negligence.

IV. Service of alcoholic beverages by a defendant to an adult person who subsequently serves a minor off the premises or who is legally permitted to serve a minor does not constitute service to the minor unless a reasonably prudent person in like circumstances would know that such subsequent service is reasonably likely to occur and is illegal.

V. A defendant does not have a duty to investigate whether a person being served alcoholic beverages intends to serve the alcoholic beverages to other persons off the premises.

VI. A defendant is not chargeable with knowledge of a person's consumption of alcoholic beverages or other drugs off the defendant's premises, when the person misrepresents such consumption or the amount of such consumption, unless the defendant's service to such person qualifies as reckless under RSA 507-F:5.

VII. A defendant is not under a duty to recognize signs of a person's intoxication other than those normally associated with the consumption of alcoholic beverages except for intoxication resulting in whole or in part from other drugs consumed on defendant's premises with defendant's actual or constructive knowledge.

Source. 1986, 227:11. 1990, 255:17. 1993, 48:18, eff. Jan. 1, 1994.

507-F:5 Reckless Service of Alcoholic Beverages. –

I. A person who becomes intoxicated may bring an action against a defendant for serving alcoholic beverages only when the server of such beverages is reckless. The service of alcoholic beverages is reckless when a defendant intentionally serves alcoholic beverages to a person when the server knows, or a reasonable person in his position should have known, that such service creates an unreasonable risk of physical harm to the drinker or to others that is substantially greater than that which is necessary to make his conduct negligent.

II. A defendant who recklessly provides alcoholic beverages to another is liable for resulting damages.

III. Specific serving practices that are admissible as evidence of reckless conduct include, but are not limited to, the following:

(a) Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages.

(b) Service of alcoholic beverages to a person, 16 years of age or under, when the server knows or should reasonably know the patron's age.

(c) Service of alcoholic beverages to a patron that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning.

(d) The active assistance by a defendant of a patron into a motor vehicle when the patron is so intoxicated that such assistance is required, and the defendant knows or should know that the intoxicated person intends to operate the motor vehicle.

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507-F:6 Responsible Business Practices Defense. –

I. Service of alcoholic beverages is not negligent or reckless if the defendant, at the time of the service, is adhering to responsible business practices. Responsible business practices are those business policies, procedures, and actions which an ordinarily prudent person would follow in like circumstances.

II. The service of alcoholic beverages to a person with actual knowledge that such person is intoxicated or is a minor is not a responsible business practice. Evidence of responsible business practices pursuant to this section is relevant to determining whether a defendant who does not have such actual knowledge should have known of the person's intoxicated condition or age.

III. With respect to service to intoxicated persons, evidence of responsible business practices may include, but is not limited to, comprehensive training of the defendant and the defendant's employees and agents who are present at the time of service of alcoholic beverages and responsible management policies, procedures, and actions which are in effect at the time of such service.

IV. With respect to service to intoxicated persons, evidence of comprehensive training includes, but is not limited to, the development of knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. Such training shall be appropriate to the level and kind of responsibility for each employee and agent to be trained.

V. With respect to service to intoxicated persons, evidence of responsible management policies, procedures, and actions may include, but is not limited to, those policies, procedures, and actions which:

(a) Encourage persons not to become intoxicated if they consume alcoholic beverages on the defendant's premises.

(b) Promote availability of nonalcoholic beverages and food.

(c) Promote safe transportation alternatives other than driving while intoxicated.

(d) Prohibit employees and agents of defendant from consuming alcoholic beverages while acting in their capacity as employee or agent.

(e) Establish promotions and marketing efforts which publicize responsible business practices to the defendant's customers and community.

(f) Implement comprehensive training procedures.

(g) Maintain an adequate number of trained employees and agents for the type and size of defendant's business.

VI. With respect to service to minors, evidence of responsible business practices may include, but is not limited to:

(a) Management policies which assure the examination of proof of age as required by RSA 179:8, for all persons seeking service of alcoholic beverages who may reasonably be suspected to be minors.

(b) Comprehensive training of employees who are responsible for such examination regarding the detection of false or altered identification.

VII. Proof of responsible business practices shall be based on the totality of the circumstances, including but not limited to: the availability of training programs and alternative public transportation; the defendant's type and size of business; and the nature of the defendant's previous contacts with the intoxicated person or minor who is served. Evidence of the existence or omission of one or more elements of responsible business practices does not conclusively prove or disprove the responsible business practices defense.

541-A:30 Agency Action Against Licensees.

I. If a timely and sufficient application has been made in accordance with agency rules for renewal of a license for any activity of a continuing nature that does not automatically expire by law, the existing license shall not expire until the agency has taken final action upon the application for renewal. If the agency's final action is unfavorable, the license shall not expire until the last day for seeking judicial review of the agency's action, or a later date fixed by the reviewing court.

II. An agency shall not revoke, suspend, modify, annul, withdraw, or amend a license unless the agency first gives notice to the licensee of the facts or conduct upon which the agency intends to base its action, and gives the licensee an

opportunity, through an adjudicative proceeding, to show compliance with all lawful requirements for the retention of the license.

III. If the agency finds that public health, safety or welfare requires emergency action and incorporates a finding to that effect in its order, immediate suspension of a license may be ordered pending an adjudicative proceeding. The agency shall commence this adjudicative proceeding not later than 10 working days after the date of the agency order suspending the license. A record of the proceeding shall be made by a certified shorthand court reporter provided by the agency. Unless expressly waived by the licensee, agency failure to commence an adjudicative proceeding within 10 working days shall mean that the suspension order is automatically vacated. The agency shall not again suspend the license for the same conduct which formed the basis of the vacated suspension without granting the licensee prior notice and an opportunity for an adjudicative proceeding.

RSA 541-A:31 Availability of Adjudicative Proceeding; Contested Cases; Notice, Hearing and Record.

I. An agency shall commence an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case or, if the matter is one for which a provision of law requires a hearing only upon the request of a party, upon the request of a party.

II. An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

III. In a contested case, all parties shall be afforded an opportunity for an adjudicative proceeding after reasonable notice. The notice shall include:

- (a) A statement of the time, place, and nature of the hearing.
- (b) A statement of the legal authority under which the hearing is to be held.
- (c) A reference to the particular sections of the statutes and rules involved.
- (d) A short and plain statement of the issues involved. Upon request an agency shall, when possible, furnish a more detailed statement of the issues within a reasonable time.

(e) A statement that each party has the right to have an attorney present to represent the party at the party's expense.

(f) For proceedings before an agency responsible for occupational licensing as provided in paragraph

VII-a, a statement that each party has the right to have the agency provide a certified shorthand court reporter at the party's expense and that any such request be submitted in writing at least 10 days prior to the proceeding.

IV. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

V. (a) Unless precluded by law, informal disposition may be made of any contested case, at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or default.

(b) In order to facilitate proceedings and encourage informal disposition, the presiding officer may, upon motion of any party, or upon the presiding officer's own motion, schedule one or more informal prehearing conferences prior to beginning formal proceedings. The presiding officer shall provide notice to all parties prior to holding any prehearing conference.

(c) Prehearing conferences may include, but are not limited to, consideration of any one or more of the following:

- (1) Offers of settlement.
- (2) Simplification of the issues.
- (3) Stipulations or admissions as to issues of fact or proof, by consent of the parties.
- (4) Limitations on the number of witnesses.

(5) Changes to standard procedures desired during the hearing, by consent of the parties.

(6) Consolidation of examination of witnesses by the parties.

(7) Any other matters which aid in the disposition of the proceeding.

(d) The presiding officer shall issue and serve upon all parties a prehearing order incorporating the matters determined at the prehearing conference.

VI. The record in a contested case shall include all of the following that are applicable in that case:

(a) Any prehearing order.

(b) All pleadings, motions, objections, and rulings.

(c) Evidence received or considered.

(d) A statement of matters officially noticed.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, or report by the officer presiding at the hearing.

(g) The tape recording or stenographic notes or symbols prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding.

(h) Staff memoranda or data submitted to the presiding officer, except memoranda or data prepared and submitted by agency legal counsel or personal assistants and not inconsistent with RSA 541-A:36.

(i) Matters placed on the record after an ex parte communication.

VII. The entirety of all oral proceedings shall be recorded verbatim by the agency. Upon the request of any party or upon the agency's own initiative, such record shall be transcribed by the agency if the requesting party or agency shall pay all reasonable costs for such transcription. If a transcript is not provided within 60 days of a request by a person who is a respondent party in a disciplinary hearing before an agency responsible for occupational licensing, the proceeding shall be dismissed with prejudice. Any party may record an oral proceeding, have a transcription made at the party's expense, or both, but only the transcription made by the agency from its verbatim record shall be the official transcript of the proceeding.

VII-a. At the request of a party in any oral proceeding involving disciplinary action before an agency responsible for occupational licensing except for an emergency action under RSA 541-A:30, III, the record of the proceeding shall be made by a certified shorthand court reporter provided by the agency at the requesting party's expense. A request shall be submitted to the agency in writing at least 10 days prior to the day of the proceeding.

VIII. Findings of fact shall be based exclusively on the evidence and on matters officially noticed in accordance with RSA 541-A:33, V.

Selected Administrative Rules

Liq 206.02 Commission Consideration.

(a) The commission shall hear and/or view any testimony or evidence offered by the prosecuting investigator, the licensee, and by all witnesses.

(b) The commission, when hearing testimony or evidence regarding a violation of a statute or an administrative rule, shall consider any aggravating factor or mitigating factor which is offered in any defense or prosecution, as required by RSA 179:56 III (a) in determining any administrative action or penalty.

(c) Aggravating factors for violations as defined by Liq 601.03(x), shall include:

(1) The failure to train employees in liquor education classes;

- (2) The failure to have adequately trained managers;
- (3) The failure to take advantage of education classes offered by the bureau of enforcement;
- (4) The failure to have any training with regard to RSA Title XIII requirements for an employee;
- (5) The failure to request identification of a person who appears younger than age 21 before sale of alcoholic beverage;
- (6) Service of more than 4 drinks in an hour, or 6 drinks total, to a person who becomes intoxicated;
- (7) The failure to detect poor quality identification documents as being false;
- (8) The reckless serving of alcohol to a person under age 16 years;
- (9) Serving a minor who is legally intoxicated;
- (10) Failure to monitor the quantity of alcohol served to a patron;
- (11) The active encouragement of intoxicated patrons to consume more alcohol;
- (12) The service of alcohol to a patron that is so continuous and excessive that it creates a risk of death by alcohol poisoning;
- (13) Actively assisting by a person of a patron into a motor vehicle when the patron is so intoxicated as to need assistance, when he knows or should have known that the intoxicated person will operate the motor vehicle;
- (14) The failure to properly manage the premises, such as allowing over crowding, unaccompanied minors in lounges, standees to drink, lack of effort to clear aisles, or areas of ingress or egress and blocked fire exits;
- (15) The failure to take corrective action on previously cited violations;
- (16) A culpable mental state, as defined by RSA 626:2, II, General Principles, of the New Hampshire Criminal Code shall be an aggravating factor when "purposefully" or "knowingly" is proved;
- (17) A violation of RSA 179:5 when it conforms to the provisions of RSA 507-F:4, II, III, & IV or RSA 507-F:5, III;
- (18) Negligent or reckless service of alcoholic beverages pursuant to RSA 507-F:4 and RSA 507-F:5; and
- (19) Any factor which increases the hazard to public safety and which is due to the sale or consumption of alcoholic beverages.

(d) Mitigating factors for violations as defined by Liq 601.03 (x) shall include but not be limited to:

- (1) The licensee having no record of like violations;
- (2) The licensee having no record of any violation;
- (3) The licensee admitting to problems detected and taking steps to rectify the situation;
- (4) The documented attendance of the licensee's personnel at a commission sponsored educational program as provided by RSA 507-F:6, III & VI;
- (5) Implementing training for managers to make them aware of the liquor laws and rules;
- (6) Maintaining an adequate number of trained employees to supervise the sale and consumption of alcoholic beverages on the premises to assure compliance with the liquor laws and rules;
- (7) The licensee has requested a liquor education program, not yet conducted, when the problem occurred;
- (8) A new employee with instruction from management, but not having attended a liquor education program;
- (9) Established management policies of ensuring persons of questionable age are checked as to age before service of alcohol;
- (10) Training for those checking IDs in the detection of false or altered documents;
- (11) Publicizing responsible service of alcohol;
- (12) Encouraging patrons not to drink too much;

- (13) Encouraging patrons to consume non-alcoholic beverages or food;
- (14) Encouraging patrons to use alternate forms of transportation;
- (15) The display of any correct form of identification in any sale or attempted purchases of alcoholic beverages as outlined by RSA 179:7 and RSA 179:8;
- (16) The physical appearance of any person, and the prudent application of reasonableness to an estimation of age as required by RSA 179:7 and RSA 179:8;
- (17) Service of alcoholic beverage for a violation of RSA 179:5 shall be considered mitigating if RSA 507-F:4, V, VI, and VII apply; and
- (18) Responsible business practices pursuant to RSA 507-F:6.
- (19) Service of only one drink to a person who becomes intoxicated.

(e) The commission or presiding officer shall decide each case after the hearing is closed by a preponderance of the evidence.

Liq 603.02 Penalties After Commission Hearings.

After hearing all evidence regarding a violation and considering all aggravating and mitigating factors presented, the commission shall:

(a) Determine, based on the preponderance of evidence presented at hearing, whether the violation alleged in the report of violation occurred; and:

(1) If the violation was not proven, order the licensee record cleared of the allegation and all records of the charge removed from the licensee file; or

(2) If the violation was proven:

- a. Consider the aggravating and mitigating factors presented;
- b. Consider the licensee's record of past violations;
- c. Consider the danger posed to public health and safety by the violation; and
- d. Consider any adverse impact of the licensee's business as operated on the community; and

(b) Impose an appropriate penalty considering all circumstances, subject to the limitations of RSA 179:57, I.

Liq 603.03 Special Penalty Exceptions.

(a) For any violation of RSA 179:19, VII or Liq 404.01, which includes the use of a gambling machine as defined in RSA 647:2, illegal lotteries or the booking of horses, sports, or other similar events, the commission shall impose the following penalties:

(1) For the first offense, license suspension for 30 consecutive days or a fine not to exceed \$1,500 and a license suspension of not more than 30 consecutive days;

(2) For the second offense, license suspension for 60 consecutive days or a fine not to exceed \$2,500 and a license suspension of not more than 60 consecutive days; and

(3) For the third offense, license revocation.

(b) For any aggravated violation as defined in Liq 601.03 the commission shall impose the following penalties:

(1) For the first offense, license suspension for 10 consecutive days and an administrative fine which shall not exceed \$2,500;

(2) For the second offense, license suspension for 30 to 60 consecutive days or an administrative fine which shall not exceed \$5,000 and a suspension of not less than 10 nor more than 60 consecutive days; and

(3) For the third offense, license revocation.

(c) The penalties provided for in Liq 603.04 (a) and (b) shall be in lieu of any other penalty provided for in Liq 603.02.

(d) On the second violation of RSA 179:5 within a 24 month period, excluding any violations resulting from compliance checks, the commission shall:

(1) Consider the complete record of all violations at the licensed location which occurred after July 7, 2002;

(2) Consider the record of the license holder and the management team at all current or previous licensed locations after July 7, 2002;

(3) Consider the circumstances of the violations of RSA 179:5; and

(4) Determine if the licensee shall be required to provide security under the requirements of RSA 178:5.

(e) If security for liability is required, the commission shall immediately suspend the license until such time as security is provided.

(f) Security shall consist of insurance meeting the requirements of RSA 178:5, I (a), except:

(1) If the licensee cannot obtain insurance, a bond in the amount of \$300,000 to cover liquor liability claims shall be accepted; or

(2) If the licensee provides proof that the licensee cannot obtain either insurance or a bond, the commission shall accept \$300,000 in cash or marketable securities to be held by the state treasurer in an escrow account with any interest going into the general fund.

(g) The requirement for security of liquor liability shall be in effect:

(1) So long as the license holder maintains control of the license; or

(2) Until the commission determines the requirement is no longer necessary, but in no case less than a calendar year.

(h) Cash or marketable securities held by the state treasurer in escrow shall be returned only after the statute of limitations for claims against the required security deposit has expired.

(i) The security required in Liq 603.04 (d) shall be in addition to any penalties imposed under Liq 603.01 and Liq 603.02.

LEGAL ANALYSIS ~ DISCUSSION:

After carefully considering the exhibits, testimony presented, Findings of Fact are issued (Infra).

FINDINGS OF FACT:

1. A hearing was held on February 1, 2022 at approximately 10:00 A.M., pursuant to Administrative Notices 6078, 6653 and 6654, and conducted pursuant to RSA 541-A:30, II; and Administrative Rule, Liq 205.06-12 via ZOOM per agreement of the parties.
2. Specifically, the licensee plead no contest to violations of 179:5, I, service of an alcoholic beverage to an underage individual (aggravated), 179:5, I, service of an alcoholic beverage to an intoxicated individual, and 179:8, statement from purchaser as to age. On September 17, 2021, at approximately 4:30 P.M., Mr. Andre Dostie, 19 years of age, entered the Black Bear Tavern and was served eight (8) Titos Vodka and Cranberry drinks within a 68-minute period. Mr. John Kenny was the bartender, who also failed to ask Mr. Dostie for any identification. Mr. Dostie left the Black Bear Tavern at approximately 5:45 P.M. and at approximately 6:15 P.M. he crashed his motorcycle into a tree and died of his injuries. A toxicology report revealed his blood alcohol content was .18.
3. Following the incident, Mr. Kenny was terminated, and the licensee held a meeting with all employees to discuss the incident, over service of alcohol, service to underage individuals, and all employees were required to attend a liquor commission training at the establishment.
4. Pursuant to Liq. 206.02, I find the following aggravating factors surrounding this incident included serving an intoxicated minor, failure to ID anyone who appears younger than 21 years of age, failure to monitor the quantity of alcohol served to a patron, service of more than 4 drinks in an hour or 6 drinks in total to a person who becomes intoxicated, service of alcohol to a patron that is so continuous and excessive that it creates a risk of death by alcohol poisoning, any factor that increases hazard to public safety which is due to the consumption of alcoholic beverages, culpable mental state as defined by RSA 626:2, II-aggravated factor when purposely or knowingly is proven, violation of RSA 179:5 when it conforms to the provision of RSA 507-F:4 & RSA 507-F:5, and negligent or reckless service of alcoholic beverages pursuant to RSA 507-F:4 & RSA 507-F:5.
5. Pursuant to Liq 206.02, I find the following mitigating factors: the licensee has no record of any like violations, the licensee has no record of any violations, the licensee cooperated with the investigation including preserving video surveillance before its destruction, and the licensee employed responsible business practices, specifically, an employee handbook with alcohol service policies that included the

prohibition of service to intoxicated or underage individuals, which all employees were required to sign a receipt stating they had received and read the handbook.

6. Other facts considered are the Black Bear Tavern carries liquor insurance well over the minimum amount required. The licensee, Mr. Richard Nadig, has owned the business for ten years and transformed the culture to a family atmosphere with virtually no DUI arrests or simple assaults coming from his establishment. The licensee provided exhibits showing the majority of employees did receive either MTS or TEAM training prior to the incident, and asserts his employees were trained to comply with Title XIII.

7. Mr. Kenny was a new hire, 57 years old, and had several years' experience as a server at the Balsams Resort. It may have been an oversight to assume he had received the recommended training from his prior employer. The facts indicate Mr. Kenny did not conform to the policies of the licensed establishment.

8. As pointed out by Attorney Harden, Mr. Dostie was at the table where he was served alcoholic beverages with three adults, and shortly after leaving the Black Bear Tavern came into contact with multiple sober adults during a brief stop at a party prior to his crash. It appears there were several adults who could and should have prevented him from operating a motor vehicle.

I recommend that the following Conclusion of Law be approved based upon the Findings of Fact listed within this report.

Respectfully,

Joseph S. Plaia
Chief Hearing Officer

CONCLUSION OF LAW:

The Petitioner has presented **sufficient proof** to sustain the licensee committed violations of 179:5, I service of alcohol to an intoxicated individual (aggravated), 179:5, I service of alcohol to an underage individual (aggravated) and a violation of 179:8 on September 17, 2021.

DISCUSSION - DISPOSITION:

There is no dispute that aggravated violations of 179:5, I occurred on September 17, 2021 at the Black Bear Tavern. The incident, in which John Kenny, a 57-year-old experienced bartender/server did not ask for identification of a 19-year-old man and proceeded to serve him 8 alcoholic beverages in just over an hour is nothing short of egregious and a complete deviation of Title XIII and all laws and rules associated with it. These violations, among other factors, resulted in the death of this young man. This is nothing short of tragic. Pursuant to 601.03 and 603.03, the Division of Enforcement is both justified and required to seek the penalty of a 10-day suspension of the liquor license and a \$2,500 fine for each violation of RSA 179:5. Liq. Rule 603.03 states these penalties shall be imposed for a violation resulting in the death of a person.

Although the licensee has made no admissions, they do not contest the violations and are taking responsibility for them. There are no facts to argue against the proffer made by the Division of Enforcement or points of law which relieves the licensee from liability as far as the administrative process is concerned. The only thing to consider is what penalties are just and appropriate under the circumstances.

Although several aggravating factors exist to support harsh penalties for these aggravated violations, there are several mitigating factors contemplated both by Liq. 206.02 and the proffer by Attorney Harden. First, it is evident that the majority of Black Bear Tavern's employees had received liquor commission training prior to the incident. The licensee consulted counsel to develop an employee handbook and required their employees to certify they had received and read it. This handbook specifically discussed the service of alcohol to intoxicated and underage individuals. The licensee changed the culture of the establishment when he took it over 10 years ago creating a family atmosphere. Attorney Harden proffered that he hasn't received a DUI case from the establishment in over seven years. The licensee had zero violations in its 10-year history prior to this incident.

Following the incident, the licensee took several steps in response: he terminated the employee responsible for overserving the underage patron, cooperated fully with the investigation to include preserving and providing all video evidence in their possession, had a meeting with all employees to discuss the incident and the importance of complying with Title XIII, hosted a liquor commission training at their

establishment for all of their employees including those who had already received the training, and established a policy that requires all new hires to receive Liquor Commission training within 30-days of being hired.

Other factors to consider are that Black Bear Tavern is one of three establishments in Colebrook that offer dining and libations, employs 20 people in a region where similar employment opportunities are not readily obtainable, several are single parents who depend on that income to support their dependents, the licensee has provided employment opportunities for those whose employment was lost due to another establishment having a fire. By all accounts, the Black Bear Tavern is a family friendly environment with a focus on being a part of the community.

Finally, the facts bear out that the licensee is a responsible business owner who does train his employees to be cognizant of Title XIII. Although not all sections of RSA 507-F:6 are part of this licensee's regular practice, it is clear these types of practices are addressed in the employee handbook and the majority of employees had received training prior to the incident. I find that under the facts presented this tragic event was the result of one employee who grossly deviated from the normal culture and practices of the Black Bear Tavern. Further, there were several adults who interacted with Mr. Dostie both at his table while being served and following his departure from the Black Bear Tavern who could have prevented him from operating a motor vehicle and possibly prevented this incident.

Penalty

For the aggravated violation of RSA 179: 5, I (service of alcohol to an intoxicated individual):

1. The license to sell alcohol shall be suspended for a period of ten (10) days with three (3) days held in abeyance for a period of one year conditioned on no like violations. The suspension shall commence on April 1, 2022 and re-granted on April 8, 2022; last call shall occur no later than 11:30 pm on March 31, 2022 and the bar, all tables and any other effected area shall be cleared of glasses, bottles or other containers utilized for the service/consumption of alcohol by 12:00 am on April 1, 2022; during the suspension period, the dining room(s) and any other approved area shall not allow over-flow from the cocktail lounge or be used as a substitute for the cocktail lounge. Restocking of

alcohol is not permitted during the suspension period. The licensee is fined in the amount of \$2,500. \$1,500 shall be paid within 5 days of receipt of this order, and \$1,000 of the fine shall be held in abeyance for a period for one year conditioned on no like violations. Four (4) points shall be assessed to the liquor license.

2. All employees have already received the appropriate training from the Division of Enforcement and proof has been provided to the Commission. The licensee has already implemented a policy for all new hires to receive the appropriate training within 30 days of being hired. It is strongly recommended the licensee enforce this policy. It is further recommended the licensee review and adhere to the provisions of RSA 507-F:6 to better ensure the policies and culture of the establishment are followed by all employees.
3. The Licensee has already and shall continue to furnish sufficient security for liquor liability of the license in the amount of \$100,000 and shall provide an Insurance Binder or Declaration of Coverage to the Division of Enforcement & Licensing within thirty (30) days from the date of this Order and yearly at the time of license renewal.

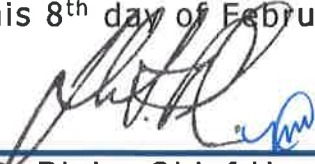
For the aggravated violation of RSA 179:5, I (aggravated service of alcohol to an underage individual).

4. The license to sell alcohol shall be suspended for a period of ten (10) days held in abeyance for a period of one year conditioned on no like violations. The licensee is fined in the amount of \$2,500 all held in abeyance for a period of one year conditioned on no like violations. Four (4) points shall be assessed to the liquor license.

For the violation of RSA 179:8:

5. A licensee is fined in the amount of \$100 to be paid within 5 days of receipt of this order.
6. Failure to comply with any of the terms, limitations and conditions of this decision and order during this one-year period will result in the suspended penalties being imposed and subject the licensee to being in violation of a Commission order.

So Ordered this 8th day of February, 2022



Joseph S. Plaia, Chief Hearings Officer



NEW HAMPSHIRE

Liquor Commission

APPEAL FROM ADMINISTRATIVE HEARING:

Please be advised of your right to appeal the decision of the Liquor Commission pursuant to RSA Chapter 541. 541:3 Motion for Rehearing.

“WITHIN 30 DAYS AFTER ANY ORDER OR DECISION HAS BEEN MADE BY THE COMMISSION, ANY PARTY TO THE ACTION OR PROCEEDING BEFORE THE COMMISSION, OR ANY PERSON DIRECTLY AFFECTED THEREBY, MAY APPLY FOR A REHEARING IN RESPECT TO ANY MATTER DETERMINED IN THE ACTION OR PROCEEDING, OR COVERED OR INCLUDED IN THE ORDER, SPECIFYING IN THE MOTION ALL GROUNDS FOR REHEARING, AND THE COMMISSION MAY GRANT SUCH REHEARING IF IN ITS OPINION GOOD REASON FOR THE REHEARING IS STATED IN THE MOTION.”

I certify that a copy of the Report of the Hearings Officer has been forwarded to the below named via certified mail as applicable:

Date: February 8, 2022

Wendy Klantz

CC:

Chief Mark Armaganian
Division of Enforcement & Licensing

Len Harden, Esq.

Harden Law Offices
Via email: info@lenharden.com
dwilliams@sistilawoffices.com