Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150

Jean M. Lorizio, Esq.
Chair

DECISION

COFFEESHOP LLC D/B/A UPPERWEST
1 CEDAR STREET, BASEMENT
CAMBRIDGE, MA 02140
LICENSE#: 00441-GP-0166
HEARD: 3/7/2019, 4/9/19, 5/6/19, 5/7/19, 6/24/19, 6/25/2019.

This is an appeal of the action of the City of Cambridge Licensing Commission ("Local Board" or "Cambridge") for suspending the § 12 all alcoholic beverages license of Coffeeshop LLC d/b/a UpperWest ("Licensee" or "Coffeeshop") located at 1 Cedar Street Basement, Cambridge, Massachusetts for five (5) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and hearings were held on the following dates: March 7, 2019; April 9, 2019; May 6, 2019; May 7, 2019; June 24, 2019; and June 25, 2019. Nine witnesses testified at the hearing.

At the close of the June 25, 2019 hearing, the Commission left the record open for each party to submit a post-hearing memorandum by close of business on August 5, 2019. Each Party submitted its memorandum in a timely manner. The record is now closed.
The following documents are in evidence as exhibits:

EXHIBITS OF COFFEESHOP LLC:

1. Email to Ms. Courtney from Mr. O'Neil, dated 10/12/18 attaching Local Board's notice of violation hearing to Licensee with various memoranda, reports, correspondence, and codes/regulation (18 pages);
2. ACLU Memorandum of Law, 3/5/2019 (34 pages);
3. Ms. Courtney & Mr. Dietrich's Complaint to Office of the Attorney General re: Open Meeting Law, with attachments, 2/19/2019 (89 pages);
4. Ms. Courtney & Mr. Dietrich's Complaint to Office of the Attorney General re: Open

Meeting Law, with attachments, 2/23/2019 (22 pages);

5. Ms. Courtney & Mr. Dietrich's Citizens Complaint to Cambridge Police Department, dated 3/5/2019 with attachments (70 pages);
6. Ms. Courtney's appeal to Board of Fire Prevention Regulations, dated 11/7/2018 with attachments (38 pages);
7. Letter from Ms. Levy to Ms. Courtney regarding public records response, dated 9/29/2018 with attachments (6 pages);
8. Screenshots from Cambridge Fire Department website (5 pages);
9. Email from Ms. Courtney to the Cambridge Fire Department regarding candle usage, dated 11/8/18 with attachments (13 pages);
10. Photographs of candles (14 pages);
11. Letter from Ms. Levy to Ms. Courtney regarding public records response, dated 12/21/2018 (1 page);
12. Letter from Ms. Levy to Ms. Courtney regarding public records response, dated 12/28/18 (2 pages);
13. Letter from Ms. Levy to Ms. Courtney regarding public records response, dated 12/27/2018 (2 pages);
14. Letter from Ms. Levy to Ms. Courtney regarding public records response, dated 1/8/19 with attached 10/12/18 memorandum from Officer Szeto to Board of License Commissioners (2 pages);
15. Letter from Ms. Levy to Ms. Courtney regarding public records response, dated 2/19/2019 with attachment (2 pages);
16. Email from Ms. Courtney to Cambridge Fire Department requesting notices, dated 10/2/18 with attachments (6 pages);
17. Email from Ms. Courtney to Chief Mahoney, dated 11/24/2018 with attachments (3 pages);
18. Email from Ms. Levy to Ms. Glowa, dated 11/6/2018 (7 pages);
19. Thumb drive with audio and video recordings, dated 8/3/2018 and 9/29/2018;
20. Email from Cambridge Fire Department to Ms. Courtney, dated 8/4/18 with attachments (18 pages);
21. Contract Agreement for Cambridge Police Commissioner, dated 8/21/2017 (7 pages);
22. Email from Ms. Courtney to Ms. Murati Ferrer regarding Hong Kong document, dated 10/3/18 with attachments (3 pages);
23. Email from Ms. Courtney to Ms. Levy regarding document request- 2017 candle permits, dated November 1, 2018 with attachment (2 pages);
24. Email from Ms. Lint to Ms. Courtney, dated 11/13/18 with attachments (18 pages);
25. Excerpts from M.G.L. Chapter 138, Acts, Plan E Charter; email from Ms. Woods to Cambridge regarding Licensee (6 pages);
26. Emails to Cambridge officials from various persons in support of licensee; Comments in

support of Licensee's package store application (28 pages);

27. Email to Ms. Courtney from Mr. Warnick, dated 10/25/17 regarding Hong Kong incident with attachments (16 pages);
28. Cambridge Police Department Policy on Use & Access of CORI System (11 pages);
29. Ms. Courtney's and Mr. Dietrich's CORI Request Forms with attachments (14 pages);
30. Email from Ms. Hathaway to Ms. Courtney regarding public records request, dated 6/14/16 with attachments (8 pages);
31. Cambridge Day Article, dated 4/7/2015 with attachments (9 pages);
32. Memorandum from Mr. Gardner to Ms. Jackson, dated 6/15/15 regarding investigation related to license holder at 991 Massachusetts Avenue (1 page);
33. Thumb drive with exhibits 25-32 (including the entirety of the memorandum in exhibit 32) and exhibit 34;
34. Screenshot of Phone Search for Grendel's Den Restaurant & Bar; (1 page);
35. Email from Ms. Courtney to Cambridge officials regarding birthday candles, dated 4/25/19 with attachments (4 pages);
36. Photo of people seated at table, with notation, "By Kim Courtney, April 28, 2019, Henrietta's Table, Charles Hotel" (1 page);
37. Letter from Cambridge City Councilor Zondervan to Ms. Courtney and Mr. Dietrich, dated 4/16/19 regarding challenges (1 page);
38. Email from Mr. Rossi to Ms. Courtney, dated February 20, 2015 with attachments (36 pages);
39. Boston Globe articles, dated 11/11/2017 and 11/15/2017 regarding Cambridge liquor licenses (19 pages);
40. Email from Ms. Levy to Mr. Dietrich regarding response to public records request, dated 6/13/19 with attached response (30 pages);
41. Email from Cambridge Fire Department to Ms. Courtney, dated 12/31/18 with attached inspection report for Licensee dated 12/31/18 (2 pages);

EXHIBITS OF CITY OF CAMBRIDGE:

A. Letter from Hieu M. Do to the Cambridge License Board, dated 7/17/18 regarding Weber grill a fire hazard with photographs (6 pages);
B. City of Cambridge Information Technology Department's Record of contents and revisions to the Cambridge Fire Department web site regulations section concerning open air fires covering the period of September 20, 2011 to November 27, 201 8 (12 pages);
C. Cambridge Fire Department's Open Air Fires Regulation, as printed on 5/10/17 (2 pages);
D. Section 1.7.7.2 of the Massachusetts Comprehensive Fire Safety Code (1 page);
E. Portion of Section 3, Definitions of the Massachusetts Comprehensive Fire Safety Code (1

page);

F. Section 10.10.2 of the Massachusetts Comprehensive Fire Safety Code (1 page);

G. Local Board's Rules and Regulations, as amended through 2016 (17 pages);

H. Copy of Licensee's GOP Liquor License, expiring 12/31/18 (1 page);

I. Local Board's 10/12/2018 notice of disciplinary hearing for Licensee to appear on 11/7/18 (1 page);

J. Local Board's Statement of Reasons for Licensee, 11/20/2018 (3 pages);

K. Massachusetts Fire Prevention Regulations Appeals Board's letter to Ms. Courtney and Mr. Dietrich regarding appeal of order of Cambridge Fire Department, dated 11/28/2018 (2 pages);

L. Local Board's Notice of stay of Licensee's suspension, dated 12/20/2018 (1 page);

M. Local Board's Statement of Reasons for Licensee related to allegations of violations, dated 2/1/2019 (2 pages);

N. Local Board's Statement of Reasons for Chazumba, LLC d/b/a Felipe's Taqueria, dated 6/29/2017 (3 pages);

O. Local Board's Statement of Reasons for Hoppy, Inc. d/b/a Daedalus, dated 9/19/2017 (2 pages);

P. Local Board's Statement of Reasons for LaFabrica Central, LLC d/b/a La Fabrica, dated 5/17/2018 (2 pages);

Q. Local Board's Statement of Reasons for Hoppy, Inc. d/b/a Daedalus, dated 7/25/2018 (1 page);

R. Local Board's Statement of Reasons for Winding Road, LLC d/b/a Abigail's, dated 8/13/2018 (2 pages);

S. Local Board's Statement of Reasons for Cambridge Craft, LLC d/b/a World of Beer, dated 9/25/2018 (3 pages);

T. Cambridge Fire Department inspection form for Licensee, dated 8/3/2018 (1 page);

U. Letter from Cambridge Fire Department to Ms. Courtney, dated 8/6/2018 regarding use of candles by Licensee (1 page);

U-1. Fire Safety Regulation 20.1.5.2.4

V. Cambridge Fire Department, Memorandum from Deputy Chief Donovan to Fire Chief re: inspection at licensed premises, 10/1/2018 (2 pages);

W. Cambridge Fire Department, inspection form re: 2465 Massachusetts Avenue, 10/28/2004 (1 page);

X. Cambridge Fire Department, inspection form re: 1193 Cambridge Street, 3/13/1997 (1 page);

Y. Cambridge Inspectional Services Department task force inspection report re: UpperWest, 8/3/2018 (1 page);

Z. Cambridge Police Department Officer McGinty's incident report, 9/29/2019 (3 pages);

AA. Cambridge Police Department CAD incident report #18077678, 9/29/2018 (3 pages);

BB. Email from Cambridge Fire Department to Ms. Courtney regarding code references, dated 10/1/18 (5 pages);

CC. Cambridge Fire Department inspection report for Licensee, 12/26/2017 (1 page);

DD. Local Board's notice to Aku Aku of task force inspection, dated 10/31/1990 (1 page);

EE. Cambridge Fire Department inspection form for Rangzen, dated 11/17/2011 (1 page);

FF. Cambridge Fire Department inspection form for Asmara, 11/17/2011 (1 page);

GG. Cambridge Historical Commission's Architectural Inventory sheet for 1 Cedar Street, dated 8/1972 (1 page);

HH. Email from Cambridge Fire Captain Paul Marinelli to Chief, dated 12/1/2017 regarding attempted inspection at 1 Cedar Street (1 page).

FINDINGS OF FACT

The Commission makes the following findings based on the evidence presented at the hearing:[1]

1. Coffeeshop, LLC, d/b/a UpperWest ("Coffeeshop" or "Licensee"), is a § 12 all alcohol general on premises licensee operating at 1 Cedar Street, Basement, Cambridge. (Exhibit H)
2. Kimberly Courtney and Xavier Dietrich co-own Coffeeshop, and Ms. Courtney is the license manager. (Testimony, Exhibit H)
3. On Saturday, September 29, 2018, at approximately 7:00 p.m., Officer Daniel McGinty of the Cambridge Police Department received a call to assist in an enforcement matter at Coffeeshop's licensed premises. (Testimony; Exhibit V, Z, AA)
4. Officer McGinty arrived at Coffeeshop's premises at 7:10 p.m., where he met with Deputy Chief Paul Donovan and Captain Philip Arsenault, both of the Cambridge Fire Department, who updated Officer McGinty on why he was called. (Testimony, Exhibit Z)
5. Officer McGinty, Deputy Chief Donovan, and Captain Arsenault entered the licensed premises, which is on the basement level. (Testimony, Exhibit V, Z)
6. When they entered the licensed premises, they each observed five to ten lighted votive candles in glass on the bar and tables. No one was cooking with the candles, and they did not appear to be for cooking purposes. (Testimony, Exhibit V, Z)
7. They asked an employee to speak with the license manager. Ms. Courtney and Mr. Dietrich appeared and began to record the interaction. (Testimony; Exhibit V, Z, 19)
8. Deputy Chief Donovan and Captain Arsenault asked Ms. Courtney and Mr. Dietrich to extinguish the candles. (Testimony, Exhibit V, Z)
9. Ms. Courtney's behavior with the officers quickly became what was described as "agitated," "argumentative," "aggressive," "insulting," "rude," "very loud," and "confrontational." (Testimony; Exhibit V, 19)

[1] Both parties spent considerable time introducing evidence immaterial to the appeal. The Commission only recites those findings of fact that are germane to the Licensee's appeal of violations arising from September 29, 2018.

10. Deputy Chief Donovan and Captain Arsenault warned Ms. Courtney and Mr. Dietrich that if they did not extinguish the candles as ordered, the establishment could be shut down that night. (Testimony, Exhibit V, Z, 19)
11. Ms. Courtney and Mr. Dietrich repeatedly refused to extinguish the candles. (Testimony; Exhibit V, Z, 19)
12. Ms. Courtney demanded that they be provided the text of the laws that Coffeeshop was violating, but as Deputy Chief Donovan and Captain Arsenault attempted to read them the law, Ms. Courtney repeatedly interrupted them and claimed that the law was inapplicable to Coffeeshop. (Testimony, Exhibit V, Z, 19)
13. Because Ms. Courtney was becoming more confrontational, the conversation moved outside to the parking lot. (Testimony)
14. Ms. Courtney had to be warned several times to back up from Deputy Chief Donovan and Captain Arsenault. At one point, Ms. Courtney entered Deputy Chief Donovan's and Captain Arsenault's personal space. (Testimony; Exhibit V)
15. She then aggressively pulled papers out of Deputy Chief Donovan's hands, making contact with his body. Deputy Chief Donovan asked Ms. Courtney not to make any further contact with his body. (Testimony, Exhibit Z)
16. In total, Ms. Courtney and Mr. Dietrich were asked at least ten to fifteen times by Deputy Chief Donovan and Captain Arsenault, and once by Officer McGinty, to extinguish the candles, and they refused every request. (Testimony, Exhibit 19)
17. At 7:25 p.m., Officer McGinty called his supervisor, Sergeant William Bates, to explain what was happening and to tell him that there was a good chance the establishment would have to be shut down. (Testimony; Exhibit V, Z, AA)
18. Sergeant Bates informed Officer McGinty that Ms. Courtney may have to be arrested for disorderly conduct in order to have her comply with their request to extinguish the candles. (Exhibit V, Z)
19. Sergeant Bates arrived at the scene at 7:35 p. m. (Testimony; Exhibit AA)
20. While Ms. Courtney was still arguing with Deputy Chief Donovan and Sergeant Bates, Officer McGinty and Captain Arsenault went back inside the licensed premises and decided they would have to shut down the establishment. (Testimony, Exhibit V, Z)
21. Captain Arsenault asked an employee of Coffeeshop to turn the music down or off. At that point, Ms. Courtney extinguished the candles, as she said, "under protest." (Testimony, Exhibit V, Z)
22. After she extinguished the candles, Ms. Courtney asked the officers for their business cards or identification. After these were produced by all the officers, and as the officers were leaving, Ms. Courtney stated to Deputy Chief Donovan and Captain Arsenault, "you will live to regret this." (Testimony; Exhibit V)
23. Deputy Chief Donovan and Captain Arsenault interpreted this comment to be a threat of retaliation against their employment for conducting the inspection of her premises.
24. When the officers left, it was 7:53 p.m. (Testimony; Exhibit AA)
25. Deputy Chief Donovan and Captain Arsenault at all times were patient and professional despite Ms. Courtney's and Mr. Dietrich's behavior. (Testimony, Exhibit Z, 19)
26. On October 12, 2018, the Cambridge License Commission ("Local Board") issued a notice of disciplinary hearing regarding the incident on September 29, 2018. (Exhibit I, 1)
27. In it, the Local Board notified Coffeeshop that it was being charged with the following violations arising out of the September 29, 2018 incident (Exhibit I, J, 1):

a. Count 1: "Failed to comply with the Massachusetts Comprehensive Fire Safety Code, § 20.1.5.2.4(2), in violation of it and GL c. 148, § 28; GL c. 238 §§ 23 and 64, and Board's Rules 2.2-2.3, 2.5-2.6, 5.1-5.2, and 13.1";
b. Count 2: "Failed and/or refused to cooperate with agents of the Fire Department, and/or hindered an investigation, and/or the enforcement of the law, in violation of GL c. 138 § 23, 63-63A and 64, and Board's Rules 2.2-2.3, 2.5-.2.6, 5.1-5.2, 13.1, 13.3, and 13.5";
c. Count 3: "Threatened/intimidated a witness, to wit, public official(s), in violation of GL c. 268, § 13B, GGL c. 138, §§ 23 and 64, and Board's Rules 2.3, 2.5, 5.1-5.2, 13.1, 13.3, and 13.5"; and
d. Count 4: "Threatening public official(s) in violation of G.L. c. 275, §§2-4, G.L. c. 138, §§ 23 and 64, and Board's Rules 2.3, 2.5, 5.1-5.2, 13.1, 13.3 and 13.5."[2]

28. On November 20, 2018, after a hearing, the Local Board in a Statement of Reasons found Coffeeshop in violation of all the charges against it and imposed a three-day suspension. The Local Board reserved imposing discipline on Count One pending the resolution of an appeal filed by Coffeeshop with the Fire Prevention Regulation Appeals Board. (Exhibit J)
29. On November 28, 2018, the Fire Prevention Regulations Appeals Board dismissed Coffeeshop's appeal. (Exhibit K, 6)
30. After the denial of the Fire Prevention Regulations Appeals Board appeal, the Local Board issued a second Statement of Reasons on February 1, 2019, imposing two additional days' suspension for Count One, for a total of five days' suspension to serve. (Exhibit M)
31. On March 5, 2019, Ms. Courtney and Mr. Dietrich filed a Citizens Complaint Form with the Cambridge Police Department's Department of Professional Standards, against Office McGinty, Sergeant Bates, and others, in part arising from events of September 29, 2018. (Exhibit 5)

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm'n., 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975).

Chapter 138 was "enacted . . . to serve the public need and . . . to protect the common good." M.G.L. c. 138, § 23. In order to effectuate the purpose of Chapter 138, the Commission has "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages. . . ." M.G.L. c. 10, § 71. As part of these "comprehensive powers of supervision over licensees," Connolly, 334 Mass. at 617, the Commission has the authority to grant, revoke and suspend licenses. "[T]he purpose of discipline

[2] The text of the Local Board's Rules and Regulations were introduced at the hearing. (Exhibit G)

is not retribution, but the protection of the public." Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981).

The law is well-settled that "the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is "'bound at his own peril to keep within the condition of his license.'" Rico's of the Berkshires, Inc. v. Alcoholic Beverages Control Comm'n, 19 Mass. App. Ct. 1026, 1027 (1985) (quoting Commonwealth v. Gould, 158 Mass. 499, 507 (1893), and citing Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Comm'n., 7 Mass. App. Ct. 186, 190 (1979)).

In order for the Commission to make a finding, there must be substantial evidence that a violation has occurred. "Substantial evidence of a violation is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); accord Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm'n, 12 Mass. App. Ct. 879 (1981). The Local Board has the burden of producing satisfactory proof that the Licensee committed the violations that occurred on September 29, 2018. As explained below, the Local Board sustained its burden on Counts Two, Three, and Four but did not sustain its burden on Count One.

Count One: Violation of the Massachusetts Comprehensive Fire Safety Code

As to Count One, the Local Board charged the Licensee with a violation of Massachusetts Comprehensive Fire Safety Code ("Code") § 20.1.5.2.4(2). That section of the Code states:

> Portable cooking equipment that is not flue-connected shall be permitted only as follows: .... (2) Candles shall be permitted to be used on tables used for food service where securely supported on substantial noncombustible bases located to avoid danger of ignition of combustible materials and only where approved by the AHJ.

See Exhibit U-1. The plain language of this section confirms that subsection 2 relates only to the use of candles *as a part of portable cooking equipment*. See Comm'r of Revenue v. Cargill Inc., 429 Mass. 79, 82 (1999) (courts are "constrained to follow" the plain language of a statute when its "language is plain and unambiguous," and its application would not lead to an "absurd result," or contravene the Legislature's clear intent); see also Commonwealth v. Hourican, 85 Mass. App. Ct. 408, 410 (2014), quoting Young v. Patukonis, 24 Mass. App. Ct. 907, 908 (1987) ("When the language of a regulation is 'plain it must be given its ordinary meaning, and the language used constitutes the principal source of insight into regulatory purpose.'")

While there is arguably sufficient evidence to find a violation of a different section of the Code and/or Local Board Rules, the Local Board only charged and found the Licensee violated § 20.1.5.2.4(2) -- a section of law pertaining to the use of candles with portable cooking equipment. There is no dispute that the votive candles that were lighted on September 29, 2018 were not being used as part of portable cooking equipment such as for a chafing dish or fondue pot. Deputy Chief Donovan, Captain Arsenault, and Officer McGinty all agreed that the candles were not being used for portable cooking equipment. Indeed, in its decision, the Local Board highlighted that one of the Licensee's main arguments before the Local Board "was that the candles were not being used

as open flames for cooking." The Local Board dismissed this argument in its decision, finding "this was not the basis for the request [to put the candles out]." Then, on appeal, at no point before the Commission did the Local Board advance an argument that the candles were being used for portable cooking equipment. Even in its post-hearing memorandum, the Local Board did not address what the Licensee had actually been charged with (and the date upon which the charge arose from), and instead argued that there was substantial evidence that "UpperWest violated the No Lit Candles Prohibition on both dates."

While it is undisputed the candles at the Licensee's establishment were not used for portable cooking equipment, the Local Board charged and found a violation for precisely that. Because the Local Board introduced no evidence that the lighted candles were being used for portable cooking equipment, the Local Board has not met its burden in establishing by substantial evidence a violation of Code § 20.1.5.2.4(2) or Local Board Rule 5.1 with regard to the use of candles.[3]

Count Two: Hindering or Delaying an Investigation

Although the Commission finds a lack of substantial evidence for Count One, that does not end the inquiry. The Local Board also found that the Licensee "[f]ailed and/or refused to cooperate with agents of the Fire Department, and/or hindered an investigation, and/or the enforcement of the law, in violation of G.L. c. 138, § 23, 63-63A and 64, and Board's Rules 2.2-2.3, 2.5-2.6, 5.1-5.2, 13.1, 13.3, and 13.5."

Chapter 138, § 63A, prohibits, in relevant part, any licensee from "hinder[ing] or delay[ing] any authorized investigator of the [ABCC] or any investigator, inspector or any other authorized agent of local licensing authorities in the performance of his duties . . . ." The Local Board has a similar Rule, prohibiting the "refus[al] to cooperate with the License Commission or its agents, hinder[ing] an investigation, or fail[ure] to respond to a request for documents or information from the license Commission or its agents . . . ." See Local Board Rule 13.5 (Exhibit G).

It is undisputed that Officer McGinty is a police officer, and that Officer McGinty, Deputy Chief Donovan, and Captain Arsenault are authorized agents of the Local Board. See Local Board Rule 13.3 (Exhibit G). RJA Corporation d/b/a Jo Angelo's Café (ABCC Decision March 5, 2014) (evidence must establish that Local Board authorized police officers to investigate licensed premises).

The Licensee's refusal to cooperate, on its own, constitutes hindering and delaying an investigation. See Lion Distributors v. Alcoholic Beverages Control Comm'n, 15 Mass. App. Ct. 988 (1983) (§ 63A is not confined to a refusal of entry to the premises but all types of hindering and/or delaying investigators); see also Speakeasy Inc. d/b/a Speakeasy (ABCC Decision March 18, 2015) (refusal to cooperate violates § 63A); William J. Chamness d/b/a Chamness Bar & Grill (ABCC Decision August 31, 2004) (same); Prudencio Gomez d/b/a Pruddy's (ABCC Decision January 12, 1999) ("defiant act" of refusing to cooperate); Gerald Ely II d/b/a The Menu (ABCC

[3] M.G.L. c. 148, § 28; M.G.L. c. 138, §§ 23 & 64, and Local Board Rules 2.2, 2.3, 2.5, 2.6, 5.2 and 13.1, are administrative in nature and cannot be violated.

Decision September 17, 1997) (refusal to cooperate); J.D.T.P. Inc. d/b/a Dineen's (ABCC Decision November 13, 1995) (same).

Ms. Courtney and Mr. Dietrich undoubtedly hindered and delayed the investigation by the authorized agents of the Local Board into the use of candles at the licensed premises. For at least 35 minutes they argued with agents of the City of Cambridge and refused to extinguish the candles despite more than 10 or 15 requests that they do so. Ms. Courtney, especially, was "agitated," "argumentative," "aggressive," "insulting," "rude," "very loud," and "confrontational" throughout the entire investigation. She repeatedly entered the agents' personal space to the point she was asked to back away from them, and at one point, she grabbed papers out of Captain Arsenault's hands, making contact with his body. Ms. Courtney escalated the situation so much that there was discussion regarding whether to have her arrested for disorderly conduct.

Where Ms. Courtney and Mr. Dietrich hindered and delayed the Police and Fire Departments' investigation as authorized agents of the Local Board by refusing to cooperate and delaying the investigation and resolution of the investigation by at least 35 minutes, the Local Board established by substantial evidence that Coffeeshop violated M.G.L. c. 138, § 63A and Local Board Rule 13.5.[4] Because the Licensee permitted this illegality on its licensed premises, it also violated Local Board Rule 5.1.[5]

Counts Three and Four: Threatening/Intimidating Deputy Chief Donovan and Captain Arsenault

The Local Board charged the Licensee in Counts Three and Four with intimidating a witness under M.G.L. c. 268, § 13B, and making threats under M.G.L. c. 275, § 2, as well as violations of M.G.L. c. 138, §§ 23 & 64, and Local Board Rules 2.3, 2.5, 5.1-5.2, 13.1, 13.3, and 13.5. The Commission reads the charges of criminal violations to be charges of a violation of Local Board Rule 5.1, permitting an illegality on the licensed premises, to wit: violations of M.G.L. c. 268, § 13B, and M.G.L. c. 275, § 2.

As an initial matter, the Licensee argues it cannot be held liable for criminal conduct because it is a corporate entity. While the allegations of violations of criminal statutes are directed to Ms. Courtney's conduct, the Licensee can still be liable. A corporate entity can be held criminally liable "for criminal conduct, performed for its benefit, by its agent authorized to act for the corporation in relation to the particular sphere of corporate business in which the agent was

[4] Local Board Rule 13.5 provides that "[a]ny licensee, its agents or employees who refuse to cooperate with the License Commission or its agents, hinders an investigation, or fails to respond to a request for documents or information from the License Commission or its agents, may have its license suspended and/or revoked." See Exhibit G.

[5] Local Board Rule 5.1 provides that "[n]o licensee shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. The licensee shall be responsible therefor whether present or not." The remaining charges of violations of M.G.L. c. 138, §§ 23, 63, and 64, and Local Board Rules 2.2, 2.3, 2.5, 2.6, 5.2, 13.1, and 13.3 are administrative and cannot be violated.

engaged when the criminal conduct took place." Commonwealth v. L.A.L. Corp., 400 Mass. 737, 744 (1987), citing Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 256–257 (1971); accord Massachusetts Practice: Summary of Basic Law § 7:124 Corporations (2015 edition). Therefore, the allegations of criminal acts in Counts Three and Four by Ms. Courtney, acting on behalf of the Licensee as an agent of the Licensee as co-owner and license manager acting to advance the Licensee's interests, can be imputed to the Licensee through this respondeat superior theory of liability.

It is also important to reiterate that the Commission does not consider whether the Local Board proved beyond a reasonable doubt that the Licensee violated these criminal statutes; rather the Commission's inquiry is limited to considering whether the Local Board proved these allegations by substantial evidence, which is "evidence as a reasonable mind might accept as adequate to support a conclusion." M.G.L. c. 30A, § 1.

Finally, any findings of violations of M.G.L. c. 268, §13B, and M.G.L. c. 275, § 2, do not implicate First Amendment or Article 16 concerns. United States v. Fulmer, 108 F.3d 1486, 1492–1493 (1st Cir.1997) Robinson v. Bradley, 300 F.Supp. 665, 668–669 (D.Mass.1969); Commonwealth v. Sholley, 432 Mass. 721, 726-727 (2000); Commonwealth v. Simeone, 86 Mass. App. Ct. 1116 at *2 (memo and order pursuant to Mass. R. App. P. 1:28, October 22, 2014); Commonwealth v. Cruz, 28 Mass. L. Rptr. 546 (Whitehead, J., August 11, 2011).

Count Three: Intimidating Deputy Chief Donovan and Captain Arsenault

The Local Board found that the Licensee threatened/intimidated a witness, to wit, public official(s), in violation of M.G.L. c. 268, § 13B, M.G.L. c. 138, §§ 23 and 64, and Board's Rules 2.3, 2.5, 5.1-5.2, 13.1, 13.3, and 13.5.

To prove that the Licensee here violated Local Board Rule 5.1, by violating M.G.L. c. 268, § 13B, the Local Board needed to prove by substantial evidence that the Licensee, through its agent Ms. Courtney, willfully threated or attempted to cause economic injury to another person who was a witness or potential witness, and did so with the specific intent to punish, harm, or otherwise retaliate against any such persons for participating in an administrative proceeding. See M.G.L. c. 268, § 13B(b); Commonwealth v. Ruano, 87 Mass. App. Ct. 98, 100-101 (2015).

There is substantial evidence that the Licensee, through Ms. Courtney acting as its agent, violated § 13B(b). Ms. Courtney threatened two Cambridge Fire Department officials with retaliation by means of economic injury against their professional careers, because of their investigation into a matter that could result in an administrative proceeding against the Licensee.

Significant time was spent at the hearing before the Commission arguing about whether Ms. Courtney said, "you will live to regret this," because it was not heard on either of the Licensee's audio or video recordings of the events, Exhibit 19. The Commission credits Deputy Chief Donovan's, Captain Arsenault's, and Officer McGinty's testimony that Ms. Courtney did make this statement. There is nothing to indicate that every word spoken was captured by the recordings. In fact, this interaction lasted at least 35 minutes if not longer, but the audio recording is only 22 minutes long, and the video is only 20 minutes long.

While Deputy Chief Donovan's, Captain Arsenault's, and Officer McGinty's testimony regarding Ms. Courtney's statement constitutes hearsay, the Commission finds that it constitutes substantial evidence because it bears adequate indicia of reliability. "Substantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability.'" Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), quoting Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530 (1988). Deputy Chief Donovan's, Captain Arsenault's, and Officer McGinty's testimony was credible and consistent, based on their own personal observations, and they corroborated each other's recollection of Ms. Courtney's statement. They had no motive to make false accusations against her, while she had motivation in this circumstance to deny having made this statement. See Covell, 439 Mass. at 786-787 (indicia of reliability include 1) corroboration of the hearsay statements; 2) the speaker's motive, or lack thereof, to make false accusations; 3) the consistency and detail of the reports; 4) whether the hearsay was made under oath; and 5) the credibility of other witnesses contesting the hearsay declarant's account); *Edward E. v. Department of Social Services*, 42 Mass. App. Ct. 478, 484, 486 (1997) (courts look to "the circumstances under which" the hearsay statements were made); Costa v. Fall River Housing. Authority, 453 Mass. 614, 636-627 (2009) (police report was sufficiently reliable because it was based on personal observations); Commonwealth v. Purling, 407 Mass. 108, 121 (1990) (two police reports were deemed sufficiently reliable, in part, because they were based on personal observations).

While the Licensee contends that this was not retaliation with a threat of economic injury, evidence of intent can be inferred from circumstantial evidence.[6] Commonwealth v. Rosario, 83 Mass. App. Ct. 640, 643 (2013), citing Commonwealth v. Riley, 73 Mass. App. Ct. 721, 730 (2009). "An 'action does not need to be overtly threatening to fall within the meaning of 'intimidation.'" Commonwealth v. Cohen, 456 Mass. 94, 124 (2010), quoting Commonwealth v. Casiano, 70 Mass. App. Ct. 705, 708 (2007). Instead, the Commission should consider "[t]he place, time, and circumstances" of the alleged intimidating conduct. Commonwealth v. McCreary, 45 Mass. App. Ct. 797, 800 (1998). Here, the Commission has before it ample evidence of Ms. Courtney's intent to retaliate against Deputy Chief Donovan and Captain Arsenault, both through testimony and viewing/listening to Exhibit 19. In considering the time, place and circumstances, Ms. Courtney was immediately hostile, argumentative, and confrontational, challenging Deputy Chief Donovan's and Captain Arsenault's authority and arguing with them about the licensed establishment violating the fire code. Then, she followed through with her threat of retaliation against their employment by filing a complaint against them in part arising out of their investigation on September 29, 2018, which only gives credence to the fact she intended her statement to mean that she, acting on behalf of the Licensee, was going to retaliate against them for their investigation of the licensed premises.

When they saw the lighted candles, Deputy Chief Donovan and Captain Arsenault became potential witnesses before an administrative hearing at the Local Board based on the potential violation of the law as a licensee under the Cambridge License Commission. It is of no import that this was in the investigation stage and that the Licensee had not yet been charged in an

[6] Ms. Courtney's subjective intent is irrelevant. Commonwealth v. Cohen, 456 Mass. 94 (2010); Commonwealth v. Gordon, 44 Mass. App. Ct. 233 (1998).

administrative proceeding. See, e.g., Rosario, 83 Mass. App. Ct. at 644, quoting Commonwealth v. Drumgoogle, 49 Mass. App. Ct. 87, 91 (2000) ("The fact that the intimidation occurred before the indictments were returned is not determinative of the issue. 'Intimidating statements made well in advance of trial and outside of the courthouse may be punished if their content warrants it.'"); accord Commonwealth v. King, 69 Mass. App. Ct. 113, 121 (2007), citing Commonwealth v. Belle Isle, 44 Mass. App. Ct. 226, 229 (1998) ("A criminal investigation need not have commenced"). It also is irrelevant whether they actually felt threatened by Ms. Courtney's statement. Commonwealth v. Rivera, 76 Mass. App. Ct. 530, 535 (2010) (It is not "necessary to establish that the intimidation was successful in the sense that the target of the intimidating conduct was actually frightened and made reluctant to testify").

The Commission finds that there is substantial evidence that the Licensee, through Ms. Courtney's actions representing the Licensee as a co-owner and license manager, violated § 13B and because the Licensee permitted this illegality on its licensed premises, also a violation of Local Board Rule 5.1.[7]

Count Four: Threatening to Commit a Crime

Finally, the Local Board found that the Licensee violated M.G.L. c. 275, §§2-4, M.G.L. c. 138, §§ 23 & 64, and Local Board Rules 2.3, 2.5, 5.1-5.2, 13.1, 13.3, and 13.5, for threatening to commit a crime against Deputy Chief Donovan and Captain Arsenault.

Section 2 of M.G.L. c. 275 states, "If complaint is made to any such court or justice that a person has threatened to commit a crime against the person or property of another, such court or justice shall examine the complainant and any witnesses who may be produced, on oath, reduce the complaint to writing and cause it to be subscribed by the complainant." To find a violation of Local Board Rule 5.1, to wit: a violation of M.G.L. c. 275, § 2, the Local Board must prove by substantial evidence that the Licensee, through Ms. Courtney, "express[ed an] intention to inflict a crime on another and [had] an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat." Commonwealth v. Sholley, 432 Mass. 721, 724–725 (2000), quoting Commonwealth v. Robicheau, 421 Mass. 176, 183 (1995); accord Commonwealth v. Milo M., 433 Mass. 149, 151 (2001).

With Count Three, the Commission found that there was substantial evidence that the Licensee was attempting to retaliate against Deputy Chief Donovan and Captain Arsenault by causing economic injury, in violation of M.G.L. c. 268, § 13B. Section 13B is a criminal violation.

Ms. Courtney's statement was a threat to commit a crime, to wit: a violation of M.G.L. c. 268, § 13B. And as explained above, while making this threat, as co-owner and license manager, Ms. Courtney was acting as an agent of the Licensee and to the Licensee's perceived benefit. Therefore, this violation can be imputed to the Licensee.

[7] As explained in Footnotes 4 and 5, the remaining charges of violations of M.G.L. c. 138, §§ 23 & 64, and Local Board Rules 2.3, 2.5, 5.2, 13.1, and 13.3 are administrative and cannot be violated.

While Deputy Chief Donovan and Captain Arsenault did not testify that they personally felt apprehensive or otherwise fearful that Ms. Courtney would actually cause them economic injury, that is not the question but is instead an objective inquiry of whether a reasonable person would have felt threatened. Commonwealth v. Milo M., 433 Mass. 149, 151-152 (2001); Commonwealth v. Maiden, 61 Mass. App. Ct. 433, 436 (2004). Based on a totality of the circumstances of the September 29, 2018, investigation, a reasonable person could be apprehensive that the Licensee would in fact retaliate against them for their investigation.

The Commission finds there was substantial evidence that the Licensee violated M.G.L. c. 275, § 2 and because the Licensee permitted this illegality, also a violation of Local Board Rule 5.1.[8]

CONCLUSION

The Alcoholic Beverages Control Commission **APPROVES** the action of City of Cambridge Licensing Commission in finding that Coffeeshop LLC d/b/a UpperWest committed violations of M.G.L. c. 138, § 63A, Local Board Rule 13.5, Local Board Rule 5.1, M.G.L. c. 268, § 13B, and M.G.L. c. 275, § 2 (Counts Two, Three, and Four). The Commission **DISAPPROVES** the action of the Local Board in finding a violation of Massachusetts Comprehensive Fire Safety Code § 20.1.5.2.4(2) (Count One).

The Local Board initially suspended the Licensee's license for three days on Counts Two, Three, and Four, reserving punishment on Count One to a later date. The Commission agrees and finds that the Local Board's suspension of three days for Counts Two, Three, and Four, is appropriate.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner Kathleen McNally

Jean M. Lorizio, Chairman Jean M. Lorizio

Elizabeth A. Lashway, Commissioner Elizabeth A. Lashway

Dated: October 3, 2019

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

[8] M.G.L. c. 275, §§ 3 & 4; M.G.L. c. 138, §§ 23 & 64, and Local Board Rules 2.3, 2.5, 5.2, 13.1, and 13.3 cannot be violated.

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cc: Kimberly Courtney, Esq.
Xavier Dietrich
Keplin Allwaters, Esq.
Kate Hoffman, Esq.
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