

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

COFFEESHOP LLC d/b/a UpperWest,
Plaintiff,

v.

ALCOHOLIC BEVERAGES CONTROL
COMMISSION and CAMBRIDGE
LICENSING COMMISSION,
Defendants

No. 1984-CV-3415

**ALCOHOLIC BEVERAGES CONTROL COMMISSION'S MEMORANDUM IN
SUPPORT OF ITS CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS AND IN
OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

On September 29, 2018, municipal inspectors went to the plaintiff's bar in Cambridge to conduct a safety inspection arising from a recurrent issue with open-flame candles. The plaintiff's license manager, Kimberly Courtney, greeted them with argument, dithering, derision, and threats that went on for some 35 minutes; she extinguished the candles only when they began to close the bar. Following disciplinary proceedings, the co-defendant Cambridge Board of License Commissioners ("Board") suspended the plaintiff's liquor license for five days.¹ On appeal, the defendant Alcoholic Beverages Control Commission ("Commission") approved that order in part, disapproved it in part, and ordered a three-day suspension.

As discussed in greater detail below, this Court should affirm the Commission's decision. First, the Commission correctly found that Courtney's actions violated G.L. c. 138, § 63A, and a similar Cambridge municipal rule by hindering, delaying, and refusing to cooperate with the inspectors. Second, the Commission correctly found that Courtney's actions constituted

¹ Although neither the plaintiff nor Courtney continues to hold any liquor license today, this Court previously rejected the Commission's contention that this case is moot. See P #5.

intimidation of a witness under G.L. c. 268, § 13B, and thereby violated the Cambridge municipal rule that prohibits a licensee from tolerating illegality on its premises. Third, the Commission correctly found that Courtney's actions constituted a threat to commit a crime under G.L. c. 275, § 2, and thereby violated the same municipal rule.

FACTS

The Plaintiff Operates a Bar Licensed Pursuant to G.L. c. 138, § 12

During the events underlying this case, the plaintiff was licensed, pursuant to G.L. c. 138, § 12, to dispense alcoholic beverages at its premises. ABCC Dec. at 5.² The plaintiff's license managers were Courtney and Xavier Dietrich. *Id.* The plaintiff's premises were located in the basement of One Cedar Street, a wood-framed building built in 1886. AR III:1080, VII:2145-46, 2154-55. That basement lacks sprinklers and has only one useful means of egress. AR III:1732-33.

Courtney Is Placed on Notice that the Cambridge Fire Department Enforces a Prohibition on Open-Flame Candles at Restaurants

On December 26, 2017, the plaintiff was inspected by the Cambridge Fire Department. AR III:1076. That inspection revealed several issues related to fire code compliance, including the lack of a fireproof kitchen curtain, items stored beneath a staircase, and three running and unattended space heaters. *Id.* Most pertinent to this case, however, it revealed that the plaintiff was using candles in a prohibited fashion. *Id.* Consistent with the Cambridge Fire Department's technique of using inspections to educate licensees about the requirements of the fire code, Courtney and the plaintiff were placed on notice that the Cambridge Fire Department would, in the future, enforce its prohibition on lit candles at the plaintiff's premises. AR VI:1722-24.

² This memorandum cites the plaintiff's memorandum in support of its motion for judgment on the pleadings by page (e.g., "(p. [page])"). It cites the Commission's "Decision," a copy of which is attached to this memorandum at Tab A, as "ABCC Dec. at [page]." And it cites the seven-volume, consecutively paginated administrative record as "AR [vol]:[page]."

On August 3, 2018, the plaintiff was again inspected by a team including Deputy Chief Peter Donovan of the Cambridge Fire Department. *Id.* at 1675-76. During that inspection, Deputy Chief Donovan observed lit open-flame candles on the tables. *Id.* at 1676-77. He informed Courtney and Dietrich that the candles would have to be extinguished. *Id.* at 1676-77. But Courtney, repeatedly noting that she was a lawyer, accused Deputy Chief Donovan of “violating municipal law” and refused to extinguish the candles. *Id.* at 1677. Rather than escalate the situation, Deputy Chief Donovan offered to follow up with Courtney regarding the applicable law, completed his inspection, and left. *Id.*

Three days later, he sent Courtney a letter enclosing a copy of § 20.1.5.2.4(2) of the fire code, which prohibits candles from being used as portable cooking equipment on tables unless certain precautions are taken. AR III:1058-59; see also 527 C.M.R. § 1.04 (adopting fire code).

When Inspectors Conduct a Follow-Up Inspection, Courtney Insists that She Need Not Extinguish the Candles

On September 29, 2018, Deputy Chief Donovan conducted a follow-up inspection accompanied by Fire Department Capt. Philip Arsenault and Police Off. Daniel McGinty. AR VI:1685, VII:2019,2141. The inspection was led by Deputy Chief Donovan and Capt. Arsenault; Off. McGinty played a “support[ing]” role, chiefly standing ready to assist the firefighters in case Courtney refused to comply and the bar had to be shut down. AR VII:2023.

Deputy Chief Donovan, Capt. Arsenault, and Off. McGinty entered the premises and observed lit open-flame candles on the tables and bar. AR VI:1685; VII:2020,2142. Deputy Chief Donovan asked to speak with a manager. AR VI:1685. When Courtney came over, Deputy Chief Donovan presented her with copies of four regulations:

1. **Section 20.1.5.2.4(2) of the fire code**, the same regulation that he had mailed Courtney the previous month;

2. **Section 10.10.2 of the fire code**, which provides that municipal authorities “shall have the authority to prohibit any or all open flames, candles, and . . . other sources of ignition, or establish special regulations on the use of any form of fire or smoking material where circumstances make such conditions hazardous”;
3. **The City of Cambridge’s “Open Air Fires” regulation**, which similarly empowers the Cambridge Fire Department “to prohibit any or all open flames, candles, and . . . other sources of ignition, or establish special regulations on the use of any form of fire or smoking material where circumstances make such conditions hazardous”;
4. **General Laws c. 148, § 28**, which empowers municipal fire departments to adopt “orders and rules not inconsistent” with the fire code.

AR VI:1732, VII:2142-43; see also AR III:1072-75 (copies of these regulations). Deputy Chief Donovan asked Courtney to extinguish the candles and informed her that, if she did not, the bar would be shut down for the evening. AR VI:1685-86.

Courtney refused, adopting a tone that was “agitated, argumentative, aggressive, insulting, rude, very loud, and confrontational.” ABCC Dec. at 10. She moved the conversation into the bar’s entry vestibule and, when a patron entered the vestibule, further suggested that they move the conversation outside to the parking lot behind One Cedar Street. AR VII:2143. Just before moving outside, Courtney began, mid-conversation, to record her interaction with the inspectors.³

Courtney Crowds, Interrupts, Fights, and Delays the Inspectors for Another Twenty Minutes

Outside, Deputy Chief Donovan attempted to read the four regulations to Courtney, but she “kept interruptin[g] him, grabbin[g] the paperwork from him, sayin[g] that notwithstanding, that law doesn’t abide to her.” AR VII:2143. Indeed, Deputy Chief Donovan testified that Courtney “aggressively” pulled the papers out of his hands, making contact with his arm. AR

³ A copy of Courtney’s 20-minute recording, entitled “September 29 2018 license commission task Force Inspection UpperWest Courtney.mov,” was admitted into evidence before the Commission. It is contained, along with other audio-visual exhibits, on a thumbdrive that was submitted to this Court as part of the administrative record. See AR I:v. This memorandum cites that video as “Video at [approximate timestamp].”

VI:1686,1688, see also VII:2022,2143 (Off. McGinty’s testimony characterizing Courtney as having “ripped” the paperwork from Deputy Chief Donovan’s hands). Courtney was told to keep her distance and to not make contact with Deputy Chief Donovan. AR VII:2022.

Over the next twenty minutes, the inspectors requested or ordered Courtney to extinguish the candles at least seventeen times. Video at 0:57, 1:07, 5:13, 7:07, 9:26, 9:30, 9:45, 9:48, 10:52, 11:00, 11:42, 12:08, 12:19, 12:22, 13:19, 17:34, 17:48; see also AR VI:2022,2143. They repeatedly explained that the Cambridge Fire Department prohibits open-flame candles at restaurants as a “consistent” policy. Video at 3:30-4:00, 6:35. They also informed Courtney that, after she had challenged the Fire Department’s actions at the previous inspection, the City Solicitor had reviewed the issue and had specifically authorized the Fire Department to enforce that policy at the plaintiff’s premises. Id. at 6:20-6:35, 13:05-13:20, 16:48-17:01.

Courtney accepted none of this. She continued to refuse the inspectors’ requests to extinguish the candles. Id. at 1:08, 5:15. More frequently, though, she refused even to acknowledge those requests, interrupting and talking over the inspectors when they attempted to discuss the relevant regulations.⁴ See generally Video. Her response to the notion of a citywide policy against open-flame candles was not to dispute the existence of such a policy,⁵ but rather to accuse the Fire Department of “bully[ing]” restaurants and “overstep[ping]” its authority. Id. at 15:00-15:25, 17:35-17:50. And her response to the notion that counsel for the City had vetted the inspectors’ actions was to demand some phantom “letter” confirming as much. Id. at 13:05-13:20, 16:48-17:01.

⁴ The video reveals that Courtney’s ire was focused on § 20.1.5.2.4(2)—which, as we will see, was probably the least pertinent of the regulations that Deputy Chief Donovan presented to her. Nonetheless, the video confirms that Courtney was presented with all of the regulations and chose to ignore the other, more pertinent, ones. Video at 2:50, 4:55, 16:00-16:10.

⁵ In fact, the evidence before the Commission corroborated the existence of such a policy. AR III:1078-79, IV:1325,1328.

Courtney also continued to usurp the inspectors' personal space. *Id.* at 2:30, 5:25, 14:45. At one point, after Capt. Arsenault politely asked Courtney to keep an appropriate distance, she responded in an agitated tone: "Oh my God, Jesus Christ, are we European or are we American, I mean by whose standards?," and accused Capt. Arsenault of being "obnoxious" and "ridiculous." *Id.* at 5:27-6:00. And she rejected the inspectors' attempts to de-escalate the situation by, for example, telling Deputy Chief Donovan in a raised voice: "No, we don't agree to disagree!" *Id.* at 12:52. The video corroborates Off. McGinty's testimony that Deputy Chief Donovan and Capt. Arsenault were "patient and professional" throughout the encounter. AR VII:2022.

The Inspection Ends With Courtney Extinguishing the Candles and Telling the Inspectors that They Would "Live to Regret This"

Deputy Chief Donovan eventually informed Off. McGinty that they would need to shut down the bar. Video at 11:42-12:00. Off. McGinty summoned his superior, Sgt. William Bates, who came to the bar prepared to arrest Courtney if necessary. AR III:1060, VII:2023. The inspectors began to turn away arriving patrons, Video at 13:40-14:12, and Capt. Arsenault and Off. McGinty re-entered the bar and instructed the staff to turn down the music in preparation for ordering the patrons to leave. AR VII:2024,2144,2182. Courtney then extinguished the candles, proclaiming that her obstructionism is "not freedom of speech, it's freedom to operate my business without being attacked and bullied." *Id.* at 2024,2144; Video at 18:30-18:40.

As the inspectors left the bar, the video captured Courtney telling them "you guys are going to regret behaving this way" just before the video ended. Video at 20:00-20:03. Deputy Chief Donovan and Capt. Arsenault both testified to the Commission that Courtney also told them "you will live to regret this," AR VI:1687, VI:2144, and the Commission specifically credited that testimony. ABCC Dec. at 6 & 11. The whole encounter had lasted approximately 35 or 40 minutes. AR VI:1689, VII:2027-28,2144.

The Cambridge Board Suspends the Plaintiff's License for Five Days

As a result of these events, the Board sought discipline against the plaintiff's license on four grounds:

1. Failure to comply with § 20.1.5.2.4(2) of the fire code, which, as noted, regulates the use of candles as a tabletop food preparation device ("Count One");⁶
2. Refusal to cooperate with agents of the Fire Department and/or hindering an investigation in violation of G.L. c. 138, § 63A, and Board Rule 13.5 ("Count Two");⁷
3. Intimidating a witness under G.L. c. 268, § 13B, and thereby violating Board Rule 5.1 ("Count Three");⁸ and
4. Threatening to commit a crime under G.L. c. 275, §§ 2-4, and thereby violating Board Rule 5.1 ("Count Four").⁹

AR III:1035. After a hearing, the Board found against the plaintiff on all counts and imposed a "collective" three-day suspension of its license for Counts Two, Three, and Four. *Id.* at 1038.

The Board deferred taking any action on Count One until after resolution of the plaintiff's parallel appeal to the Fire Prevention Regulations Appeals Board. *Id.* After that parallel appeal was denied, *see id.* at 1039-40, the Board imposed an additional two days' suspension to be served consecutively with the suspension arising out of the other counts.¹⁰ *Id.* at 1042-43.

⁶ Significantly, the plaintiff was not charged with violating the other provisions of the fire code and local regulations presented by Deputy Chief Donovan during the inspection.

⁷ Board Rule 13.5 provides that "[a]ny licensee, its agents or employees who refuse to cooperate with the [Board] or its agents, hinders an investigation, or fails to respond to a request for documents or information from the [Board] or its agents, may have its license suspended and/or revoked." AR III:1033. Relatedly, Board Rule 13.3 requires that "[a]ny licensed premises shall be subject to inspection by members, agents or representatives of the Cambridge Police; Inspectional Services, Fire, and [Board] and their duly authorized agents." *Id.*

⁸ 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." AR III:1022.

⁹ Each Count each also cited other state and local laws that, as the Commission found, are "administrative in nature" and did not provide support for that charge. ABCC Dec. at 9, 10, 13.

¹⁰ The plaintiff (p. 5) inaccurately characterizes the Board's final suspension as including "two days based upon Count 1 and one day each on the remaining Counts."

The Commission Upholds Three of the Four Charges Against the Plaintiff and Orders the Plaintiff's License Suspended for Three Days

The plaintiff appealed to the Commission which, following a multi-day evidentiary hearing, disapproved the Cambridge Board's finding as to Count One. ABCC Dec. at 8-9. Specifically, the Commission determined that, although "there is arguably sufficient evidence to find a violation of a different section of the [Fire] Code," the plaintiff was charged only with violating § 20.1.5.2.4(2)—which, the Commission found, was inapplicable to the plaintiff's candles. *Id.* at 8. The Commission, however, approved the Board's findings as to Counts Two, Three, and Four. *Id.* at 9-14. Adopting the Board's dichotomy between the suspension associated with Count One and that associated "collectively" with Counts Two, Three, and Four, the Commission ordered a three-day suspension of the plaintiff's license. *Id.* at 14.

ARGUMENT

As pertinent here, this Court reviews the Commission's decision to determine whether it was "[i]n violation of constitutional provisions" or "[b]ased upon an error of law."¹¹ G.L. c.30A, § 14(7)(a) & (c). "[R]eview of the Commission's decisions under the Liquor Control Act, G.L. c. 138, is undertaken within the context of the Commission's considerable statutory powers." eVineyard Retail Sales-Mass. v. Alcoholic Beverages Control Comm'n, 450 Mass. 825, 828 (2008); see also G.L. c. 10, § 71 (Commission enjoys "general supervision of the conduct of the

¹¹ The plaintiff briefly argues (p. 6 & n.8) that G.L. c. 30A, § 14(7)(f) obligates this Court "to make independent findings of fact" where material aspects of the Commission's findings are disputed. This misconstrues § 14(7)(f), which speaks to a court's authority to find facts based on supplemental factfinding done by the agency in accordance with § 14(6). This argument also contravenes the plain language of § 14(7)(e), which authorizes a court otherwise to contradict an agency's factfinding only where it is "[u]nsupported by substantial evidence."

The plaintiff also argues (p. 20) in conclusory fashion that, "if this Court finds that some version of the facts in the record could [justify the Commission's decision] . . . such facts are not supported by sufficient, substantial and reliable evidence." The plaintiff does not further develop this argument and it must be deemed waived for failure to support it with legal authority and citations to the record.

business of . . . selling alcoholic beverages”). As such, this Court “do[es] not substitute [its] judgment for that of the [Commission],” RK&E Corp. v. Alcoholic Beverages Control Comm’n, 97 Mass. App. Ct. 337, 340 (2020), but rather “give[s] due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” G.L. c. 30A, § 14(7).

Here, this Court should affirm the Commission’s decision. First, the Commission correctly found that Courtney’s actions violated G.L. c. 138, § 63A, and Board Rule 13.5 by hindering, delaying, and refusing to cooperate with the inspectors. See pp. 9-16 below. Second, the Commission correctly found that Courtney’s actions constituted intimidation of a witness under G.L. c. 268, § 13B, and thereby violated Board Rule 5.1. See pp. 16-19 below. Third, the Commission correctly found that Courtney’s actions constituted a threat to commit a crime under G.L. c. 275, § 2, and thereby also violated Board Rule 5.1. See pp. 19-20 below.

I. The Commission Correctly Found that Courtney’s Actions Violated G.L. c. 138, § 63A, and Board Rule 13.5 by Hindering, Delaying, and Refusing to Cooperate with the Inspectors.

The plaintiff challenges the Commission’s conclusions that the plaintiff violated § 63A and Rule 13.5 on two grounds, but neither is availing. First, contrary to the plaintiff’s contention, the Commission’s decision correctly construed and applied the elements of § 63A and Rule 13.5. See pp. 9-14 below. Second, and also contrary to the plaintiff’s contention, the First Amendment did not immunize Courtney’s actions. See pp. 14-16 below.

A. The Commission’s Decision Correctly Construed and Applied the Elements of § 63A and Board Rule 13.5.

Section 63A prohibits, and prescribes criminal penalties for, any person “hinder[ing] or delay[ing] any authorized investigator of the commission or any investigator, inspector or any other authorized agent of local licensing authorities in the performance of his duties” It has

been interpreted to forbid more than a mere refusal to permit inspectors to enter the premises. Lion Distributors, Inc. v. Alcoholic Beverages Control Comm'n, 15 Mass. App. Ct. 989 (1983) (licensee “selectively produced” records requested by investigators, in some cases producing records containing “misrepresentations”). Rule 13.5 similarly prohibits a licensee from, and provides license-related penalties for, “refus[ing] to cooperate with the [Board] or its agents, hinder[ing] an investigation, or fail[ing] to respond to a request for documents or information from the [Board] or its agents” AR III:1033.

Here, the Commission concluded that both provisions were violated. ABCC Dec. at 9-10. The Commission found it “undisputed” that the inspectors were authorized to conduct the inspection. Id. at 9; accord AR III:1033. And the Commission found that Courtney’s refusal to obey the inspectors’ requests and orders to extinguish the candles, her confrontational tone, her transgressions of the inspectors’ personal space, her physical removal of papers from Deputy Chief Donovan’s hands, and the delay caused by her actions had the collective effect of hindering, delaying, and refusing to cooperate with the inspectors. ABCC Dec. at 10.

The plaintiff does not contend that these findings were unsupported by substantial evidence.¹² Instead, it asserts a hodgepodge of at least five distinct theories of why Courtney’s actions did not actually satisfy the legal elements of § 63A and/or Rule 13.5.

The plaintiff first argues (pp. 7-8), somewhat semantically, that Courtney’s actions did not hinder or delay an “investigation” because any investigation was complete as soon as the inspectors entered the bar and observed candles. But § 63A prohibits hindering or delaying an inspector “in the performance of his duties,” and Rule 13.5 prohibits “refus[ing] to cooperate

¹² The plaintiff does contend (p. 7 n.11) that the episode lasted only 20 minutes, not the “at least 35” found by the Commission. But the exclusive basis for that contention is the length of the video recording. Deputy Chief Donovan testified, and the Commission specifically found, that the video captured only a portion of the whole incident. AR VI:1718-20; ABCC Dec. at 11.

with the License Commission or its agents” Under neither provision is the prohibited conduct tied to the duration of any “investigation,” and it is immaterial that the Commission used the word “investigation” as shorthand to describe the inspectors’ activities.

The plaintiff next cites (p. 8) a provision of the fire code to argue that the inspectors’ verbal orders and requests to extinguish the candles were “not lawful,” because any such orders had to be provided in writing. Looking past this argument’s pedantry, the plaintiff ignores another provision of the fire code that provides that authorities may “abate or require abatement” of “conditions [that] are deemed to be an imminent danger.” AR III:1014. Substantial evidence before the Commission established the danger posed by the plaintiff’s use of open-flame candles. AR VI:1732-33.

Third, the plaintiff argues (pp. 10-11) that the Commission’s findings violated due process insofar as prior judicial and administrative applications of § 63A and Rule 13.5 did not put Courtney on notice that her conduct could be deemed to violate those provisions. This contention, for which the plaintiff cites no authority, contravenes established law and common sense. See Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) (judicial interpretation of criminal statute does not violate due process unless “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue”). Far from being “unexpected and indefensible,” the Commission’s findings are faithful to both the respective texts of § 63A and Rule 13.5, as well as the underlying policy that licensed entities are subject to appropriate inspection and enforcement. See Commonwealth v. Springfield Term. Ry. Co., 80 Mass. App. Ct. 22, 34 (2011) (court’s application of law, although apparently novel in Massachusetts, is not “unexpected and indefensible” due to “ample sound legal and policy arguments” supporting it).

Fourth, the plaintiff argues (p. 11) that the rule of lenity requires the Court to interpret § 63A and Rule 13.5 such that Courtney’s conduct did not violate them. But the rule of lenity “is a guide for resolving ambiguity [in a criminal statute], rather than a rigid requirement that we interpret each statute in the manner most favorable to defendants.”¹³ Commonwealth v. Cruz, 90 Mass. App. Ct. 60, 64 (2016), quoting Simon v. Solomon, 385 Mass. 91, 102-103 (1982). As such, it “has no application” where, as here, its proponent identifies no ambiguity in the relevant statute. Commonwealth v. Biagiotti, 451 Mass. 599, 607 (2008). Nor does the rule of lenity have any application to the interpretation of a civil regulatory provision such as Rule 13.5.

Finally, the plaintiff argues (pp. 8-10) that, in view of Commonwealth v. Adams, 482 Mass. 514 (2019), which construed the common law offense of interfering with a police officer, § 63A must be interpreted to require proof: (1) of a specific intent to hinder or delay the inspectors; (2) of a physical act that obstructs or hinders an inspector, or verbal pronouncements that have the same effect;¹⁴ and (3) that the inspectors were engaged in executing a lawful duty.

At the threshold, it is not clear that importing these tenets from Adams to § 63A would actually benefit the plaintiff. Courtney’s persistent refusals to follow the inspectors’ orders, and to let them speak uninterrupted, formed substantial evidence of her intent to hinder or delay their work. E.g., State v. Willey, 46 N.E.3d 1121, 1125 (Ohio App. 2015) (similar evidence evinces

¹³ It is an open question whether the rule of lenity applies when, as concerns § 63A here, the court is interpreting a criminal statute in the context of a suit seeking civil relief for violation of that statute. See Cook v. Patient Edu, LLC, 465 Mass. 548, 555–56 (2013); see also Perez-Olivo v. Chavez, 394 F.3d 45, 53 (1st Cir. 2005) (“[T]he rule of lenity does not foreclose deference to an administrative agency’s reasonable interpretation of a statute.”). The plaintiff offers no argument, and cites no authority, to support its premise that the rule does apply here.

¹⁴ More precisely, the plaintiff argues (p. 9) that the statute requires either a physical act or a “threat of violence.” But this cherry-picks the reasoning of Adams, which looked to the presence of “fighting words or any other words that . . . have the effect of physically obstructing or interfering with a police officer in the performance of his duties.” 482 Mass. at 528 (emphasis added), quoting State v. Krawsky, 426 N.W.2d 875, 877 (Minn. 1988).

such an intent); see also Video at 18:30-18:40 (Courtney disclaiming that her intent is to engage in free speech). Her actions toward the inspectors—including her crowding them, “ripp[ing]” papers from Deputy Chief Donovan’s hands, and making contact with his body—involved physicality.¹⁵ AR VI:1686,1688; VII:2022,2143. The inspectors were plainly engaged in executing lawful duties related to § 10.10.2 of the fire code and the City’s Open Air Fires regulation, regardless of the plaintiff’s theory (p. 10) that Courtney’s eventual vindication on § 20.1.5.2.4(2) rendered the inspectors’ attempt to enforce that provision unlawful.¹⁶ And the plaintiff makes no argument that Adams should or could affect the interpretation of Rule 13.5, which formed an independent basis for the Commission’s finding of a violation on Count Two.

But, even if the principles set forth in Adams were capable of benefiting the plaintiff, those principles have no application here because they were unique to Adams’ construction of the common law offense of interfering with a police officer. First, as Adams recognized, 482 Mass. at 518-19, the criminal common law has force only where the legislature has not acted—and here, in contrast to the common law crime of interference with a police officer at issue in Adams, the Legislature has acted to prohibit not “interfering” with a police officer, but rather “hindering or delaying” an inspector. Second, the crime at issue in Adams was one in which the victim is necessarily a police officer and, “[i]n our society, police officers are expected to endure

¹⁵ Indeed, Courtney’s contact with Deputy Chief Donovan, although apparently not harmful, nonetheless was probably sufficient to support a charge for “offensive touching” battery on a public employee. See G.L. c. 265, § 13D; see also Commonwealth v. Hartnett, 72 Mass. App. Ct. 467, 477 (2008) (“What makes the touching offensive is . . . only that the victim did not consent to it. Nothing more is required.”).

¹⁶ Moreover, because the legality of enforcement actions are often “close questions,” the issue of whether an enforcement action is illegal is “more properly decided by a detached magistrate” to avoid “trial by battle in the streets.” Commonwealth v. Moreira, 388 Mass. 596, 600 (1983) (individual cannot forcibly resist even an unlawful arrest, as long as officer is not using excessive force); Commonwealth v. Lender, 66 Mass. App. Ct. 303, 305 (2006) (“Even were a court to determine later that the . . . arrest lacked reasonable suspicion or probable cause, the absence of either does not provide a defense to the charge of resisting arrest.”).

significant burdens” in a way not expected of other public employees such as firefighters or code inspectors. Project Veritas Action Fund v. Rollins, 982 F.3d 813, 843 (1st Cir. 2020) (after concluding that First Amendment guarantees right to surreptitiously record police officers in public, rejecting contention that same right extends to all public employees because the “analysis might be appreciably affected by the type of government official who would be recorded”).

Perhaps most importantly, Courtney was not a mere private citizen: She was the license manager of an establishment that sold alcoholic beverages. Such a license is “a special privilege subject to public regulation and control, for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution.” Hastings Assocs., Inc. v. Local 369 Bldg. Fund, Inc., 42 Mass. App. Ct. 162, 173-74 (1997). To be sure, the Twenty-First Amendment does not “trump” a licensee’s freedom of speech, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514-16 (1996), but speech that forms an integral part of conduct in violation of § 63A is not protected by the First Amendment in any event. See pp. 14-16 below. Under these circumstances, Courtney’s status as a licensee, obligated by law to cooperate with public safety inspections and beholden to the Commission’s “general supervision of [her] business,” G.L. c. 10, § 71, stands her on a very different footing than a private citizen who seeks to interfere with a police officer.

B. The First Amendment Did Not Immunize Courtney’s Actions.

The plaintiff argues (pp. 12-15) that the Commission’s decision is contrary to the Constitution and must be reversed, on the theory that Courtney’s statements to the inspectors were protected by the First Amendment.

The First Amendment provides that Congress—and, by incorporation, the states—“shall make no law . . . abridging the freedom of speech” But, notwithstanding its unqualified language, the First Amendment has long “permitted restrictions upon the content of speech in a

few limited areas . . . which have never been thought to raise any constitutional problems”
Commonwealth v. Carter, 481 Mass. 352, 367 (2019), cert. denied sub nom. Carter v. Massachusetts, 140 S. Ct. 910 (2020), quoting United States v. Stevens, 559 U.S. 460, 468-469 (2010). One such area is “speech or writing used as an integral part of conduct in violation of a valid criminal statute.”¹⁷ Id. at 366, quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949). “[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” Commonwealth v. Johnson, 470 Mass. 300, 309 (2014), indirectly quoting Giboney, 336 U.S. at 490.

Here, neither § 63A nor Rule 13.5 punishes speech; rather, each punishes hindering, delaying, or failing to cooperate with inspectors. Courtney cannot “escape liability” for violating those provisions just because her violation took the form, in part, of speech. Carter, 481 Mass. at 366-68 (affirming conviction for involuntary manslaughter where defendant used speech and text messages to procure victim’s suicide); accord Johnson, 470 Mass. at 309-10 (affirming conviction for criminal harassment where defendants used internet postings to harass victims); United States v. Sayer, 748 F.3d 425, 433-34 (1st Cir. 2014) (affirming conviction for cyberstalking where defendant used Facebook and other internet postings to cause substantial emotional distress to victim); Giboney, 336 U.S. at 501-02 (injunction barring otherwise lawful picketing does not violate First Amendment where sole purpose of picketing is to force company to enter unlawful agreement in violation of state criminal statute); Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 62 (2006) (that anti-discrimination law will require employer to take down “White Applicants Only” sign “hardly means that the law should

¹⁷ This principle applies equally to violations of valid civil and regulatory provisions. See, e.g., Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978).

be analyzed as one regulating the employer’s speech rather than conduct”). Thus the plaintiff was properly punished not for Courtney’s speech, but rather for her conduct (of which her speech was a part) of hindering, delaying, and failing to cooperate with the inspectors.

The plaintiff cites (pp. 13-14) a number of out-of-state cases that, it says, stand for the proposition that verbal refusals to cooperate with, and criticisms of, the police cannot form the basis for a criminal charge. Several of these cases are unhelpful to the plaintiff, because they are fully consistent with law in the Commonwealth, described above, that the First Amendment is not violated when a crime punishes something other than speech itself. See People v. Baskerville, 963 N.E.2d 898, 903-06 (Ill. 2012) (statute prohibiting obstruction of police officer may, consistent with First Amendment, be violated by speech that has effect of impeding or hindering officer); State v. Williams, 205 Conn. 456, 472 (1986) (statute prohibiting interference with police officer may, consistent with First Amendment, be violated by “verbal conduct intended to interfere with a police officer”). Other of the plaintiff’s cases—including the only two that are binding on this Court—are inapposite because they addressed ordinances that, unlike § 63A and Rule 13.5, expressly punished speech rather than conduct. See Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974) (municipal ordinance that penalizes “curs[ing] or revil[ing]” police officer “punishes only spoken words”); City of Houston v. Hill, 482 U.S. 451, 460-61 (1987) (municipal ordinance, pertinent portion of which “prohibits verbal interruptions of police officers,” “deals not with core criminal conduct, but with speech”). To the extent the plaintiff’s remaining out-of-state cases suggest that the use of speech as part of a course of conduct immunizes the speaker from prosecution, those cases are incompatible with Carter, Johnson, and other binding Massachusetts law.

II. The Commission Correctly Found that Courtney’s Actions Constituted Intimidation of a Witness Under G.L. c. 268, § 13B, and Thereby Violated Board Rule 5.1.

The Commission found that Courtney’s actions constituted intimidation of a witness under G.L. c. 268, § 13B, and thereby violated Board Rule 5.1. As it did with respect to Count Two, the plaintiff challenges this finding on two grounds, but neither is availing. First, contrary to the plaintiff’s contention, the Commission’s decision correctly applied the elements of § 13B. See pp. 17-18 below. Second, and also contrary to the plaintiff’s contention, the First Amendment did not immunize Courtney’s actions. See pp. 18-19 below.

A. The Commission’s Decision Correctly Applied the Elements of § 13B.

Section 13B of chapter 268 provides, as pertinent to this Count, that any person who “willfully, either directly or indirectly threatens . . . physical, emotional or economic injury or property damage to . . . another person who is a witness or potential witness . . . with the intent to or with reckless disregard for the fact that it may impede, obstruct, delay, prevent or otherwise interfere with . . . an administrative hearing . . . or any other civil proceeding of any type . . . shall be punished” The Commission found that Courtney’s statement to the inspectors “you will live to regret this” constituted a threat of economic or professional injury related to their prospective participation in administrative proceedings concerning the violations they had observed that night. ABCC Dec. at 11-13. The plaintiff challenges this finding on two grounds.

First, the plaintiff argues (pp. 15,17) that no such administrative proceedings were pending at the time Courtney made her statement. But § 13B’s use of the phrase “potential witness” signifies that “the [proceeding] need not have already begun when the intimidation occurred.” Commonwealth v. Fragata, 480 Mass. 121, 125, (2018) (a “potential witness” is “a person who might . . . testify at a future proceeding”).

The plaintiff also argues (pp. 17-18) that Courtney’s statement “you will live to regret this” was insufficient to constitute a “threat.” But an action or statement that is not “overtly threatening” may nonetheless violate § 13B, Commonwealth v. Ruano, 87 Mass. App. Ct. 98, 101 (2015), even if it does not actually place the victim in fear. Commonwealth v. Rivera, 76 Mass. App. Ct. 530, 535 (2010). Significantly, here, both Deputy Chief Donovan and Capt. Arsenault understood Courtney’s statement to comprise a threat to their jobs. AR VI:1687, VII:2176-77; cf. Commonwealth v. Carvalho, 88 Mass. App. Ct. 840, 845-46 (2016) (affirming conviction where “the victim testified that she understood the defendant’s statements to be a threat,” notwithstanding the defendant’s more benign interpretation of those statements). Under the circumstances, there was substantial evidence to find that the statement was such a threat.

B. Courtney’s Actions Were Not Immunized by the First Amendment.

The plaintiff argues (pp. 18-19) that the only statements capable of violating § 13B consistent with the First Amendment are “true threats,” and that “true threats” do not exist where, as here, only non-physical harm is threatened.

The plaintiff’s argument fails on its premise because, like the comparable argument directed at § 63A and Rule 13.5, it fails to account for the fact that speech used as a vehicle for violating a criminal statute is not entitled to constitutional protection. See Carter, 481 Mass. at 366 (“Although numerous crimes can be committed verbally, they are intuitively and correctly understood not to raise First Amendment concerns.”) (citations omitted). At least one United States Court of Appeals has rejected a First Amendment challenge to the federal witness intimidation statute on this very basis. White v. United States, 670 F.3d 498, 514-15 (4th Cir. 2012) (Speech constituting witness intimidation in violation of 18 U.S.C. § 1512 “is not protected by the First Amendment when it is the very vehicle of the crime itself.”), abrogated on other grounds by Elonis v. United States, 575 U.S. ---, 135 S. Ct. 2001 (2015). As such, the

plaintiff's argument that the only speech capable of violating § 13B is "true threats" fails to the reasons discussed at pages 14-16 above.

In disputing this conclusion, the plaintiff relies (pp. 18-19) on cases interpreting the civil and criminal harassment statutes. See O'Brien v. Borowski, 461 Mass. 415 (2012); Commonwealth v. Bigelow, 475 Mass. 554 (2016). But a required element of those statutes, in contrast to § 13B, is to put the victim in actual fear or alarm, thereby revealing their object to protect persons from speech that threatens a particular type of harm.¹⁸ See G.L. c. 258E, § 1 (civil harassment), G.L. c. 265, § 43A (criminal harassment). In contrast, as the Fourth Circuit observed in White, the object of a witness intimidation statute is "to protect testimony in an official proceeding by prohibiting intimidation," regardless of the nature of the threat. White v. United States, 670 F.3d 498, 514-15 (4th Cir. 2012) (emphasis in original).

III. The Commission Correctly Found that Courtney's Actions Constituted a Threat to Commit a Crime Under G.L. c. 275, § 2, and Thereby Violated Board Rule 5.1.

Sections 2-4 of chapter 275 prohibit threatening to commit a crime. The plaintiff argues (pp. 19-20) that the Commission's finding that Courtney had done so was erroneous because "[t]he crime she allegedly threatened to commit was exactly the same one covered by Count 3, namely, intimidation of a witness" But the plaintiff ignores the fact that the witness intimidation statute prohibits not only threatening damage or injury to certain potential witnesses, but also actually causing damage or injury to such a witness. See G.L. c. 268, § 13B. As such, Courtney's actions constituted both intimidation and a threat to engage in further acts of intimidation in the future, and the Commission did not misapply the law by concluding as much.

¹⁸ The SJC has also observed, with respect to both the civil and criminal harassment statutes, that "the Legislature crafted [those laws] . . . with the intent that the definition of harassment exclude constitutionally protected speech," and it has interpreted those laws narrowly "to effectuate that legislative intent." O'Brien, 461 Mass. at 425 (citing Commonwealth v. Welch, 444 Mass. 80, 99 (2005)).

The plaintiff complains (p. 20) that “convicting someone of two crimes for exactly the same conduct” offends the Double Jeopardy Clause of the Fifth Amendment. But the Double Jeopardy Clause, as pertinent here, prohibits only “multiple punishments for the same offense.” Mahoney v. Commonwealth, 415 Mass. 278, 283 (1993) (emphasis added). It has no application when a sanction is “nonpunitive [and] noncriminal,” but rather is “remedial.” Id. Consistent with the Supreme Court’s admonition that a “revocation of a privilege voluntarily granted” is a “[r]emedial sanction[] . . . characteristically free of the punitive criminal element,” Helvering v. Mitchell, 303 U.S. 391, 398-399 (1938), Massachusetts courts have routinely held that revocation or suspension of a license is remedial, and thus does not implicate the Double Jeopardy Clause. See, e.g., Luk v. Commonwealth, 421 Mass. 415 (1995) (driver’s license); Silva v. Dir. of Div. of Marine Fisheries, 46 Mass. App. Ct. 608 (1999) (lobstering permit). It is for this reason that the analysis prescribed by Blockburger v. United States, 284 U.S. 299 (1932), has no application here. See, e.g., Bott v. Comm’r of Revenue, 90 Mass. App. Ct. 1121, 2016 WL 7381727, at *2 n.3 (2016) (unpublished; copy attached at Tab B) (court’s conclusions that: (1) tax is non-punitive; and (2) assessment of tax and conviction of crime require proof of different facts under Blockburger; form independent bases for rejecting double jeopardy claim).

CONCLUSION

For the foregoing reasons, the plaintiff’s motion for judgment on the pleadings should be denied, the Commission’s cross-motion for judgment on the pleadings should be allowed, and judgment should enter affirming the Commission’s decision.

Respectfully submitted,

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ATTORNEY GENERAL

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January 15, 2021

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Judicial Court’s “Order Concerning Email Service In Cases Under Rule 5(b) of Mass. Rules of Civil Procedure” (dated Mar. 30, 2020), I certify that I caused the foregoing document to be served by e-mail on the counsel for the plaintiff and the co-defendant as follows:

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January 15, 2021

Eric A. Haskell
Assistant Attorney General

A



*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 Licensec (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, 2018 (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 Dincen'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 threatened 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.

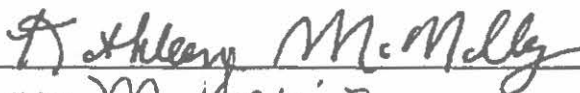
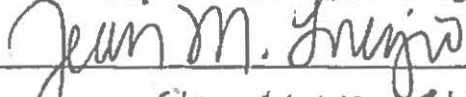

The Commission finds there was substantial evidence that the Licensee violated M.G.L. c. 275, § 2 and because the Licensee permitted this illegality, also a violation of Local Board Rule 5.1.⁸

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 
Jean M. Lorizio, Chairman 
Elizabeth A. Lashway, Commissioner 

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.

B

90 Mass.App.Ct. 1121
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

[Anthony R. BOTT](#)

v.

COMMISSIONER OF REVENUE.

No. 16–P–90.

|

December 19, 2016.

By the Court (CYPHER, MASSING & [HENRY](#), JJ. ¹).

¹ The panelists are listed in order of seniority.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

*1 Plaintiff Anthony R. Bott appeals from a decision of the Appellate Tax Board denying his petition for relief from an assessment of additional personal income taxes by defendant Commissioner of Revenue. Bott argues that the additional assessment under [G.L. c. 62C, § 28](#), for filing false or fraudulent tax returns, violates his protection against double jeopardy because he was previously convicted of crimes ² stemming from the same conduct. We affirm.

² Forgery of documents in violation of [G.L. c. 267, § 1](#); larceny in violation of [G.L. c. 266, § 30\(1\)](#); and larceny from a person sixty years or older in violation of [G.L. c. 266, § 30\(5\)](#).

Discussion. The double jeopardy clause of the Fifth Amendment to the United States Constitution states, “No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” That guarantee provides three separate protections: protection against a second prosecution for the same offense after acquittal, protection against a second prosecution for the same offense after conviction, and protection against multiple punishments for the same offense. [North Carolina v. Pearce](#), 395 U.S. 711, 717 (1969). Those protections extend to both Federal and State prosecutions. See [Benton v. Maryland](#), 395 U.S. 784, 787 (1969) (holding

that double jeopardy clause is applicable to States through Fourteenth Amendment).

The protection against multiple punishments for the same offense is at issue here. To establish a double jeopardy violation, Bott must show, first, that the assessment of additional taxes results from the “same offense” for which he was previously convicted, [Luk v. Commonwealth](#), 421 Mass. 415, 420 (1995), and, second, that the assessment of additional taxes amounts to “punishment” under the common law. [Kuklis v. Commonwealth](#), 361 Mass. 302, 306 (1972).

To determine whether Bott’s convictions for forgery and larceny and the assessment of additional taxes under [G.L. c. 62C, § 28](#), constitute punishment for the same offense, we compare the elements of the offenses. “This elements-based approach remains the standard for determining whether multiple convictions stemming from one criminal transaction are duplicative.” [Commonwealth v. Vick](#), 454 Mass. 418, 431 (2009). “The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” [Blockburger v. United States](#), 284 U.S. 299, 304 (1932). The elements-based approach does not require that the two offenses have no mutual facts. Even if proof of one particular fact is necessary to convict under two different statutory provisions, “if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.” [Morey v. Commonwealth](#), 108 Mass. 433, 434 (1871). Indeed, a single incident or course of conduct can result in distinct offenses. See [Luk](#), *supra* at 430–431 (holding that administrative license suspension for refusal to submit to breathe or blood test and prosecution for operating under the influence of liquor resulting from a single drunk driving incident did not violate double jeopardy clause).

*2 Applying that test, the defendant has not been exposed to double jeopardy because forgery, larceny, and the filing of a false or fraudulent tax return are distinct offenses, requiring proof of different elements. Conviction of forgery requires that the defendant (1) with intent to injure or defraud (2) falsely makes, alters, forges or counterfeits (3) any of the several enumerated writings. [G.L. c. 267, § 1](#). A larceny conviction requires that the defendant (1) steals, or with intent to defraud obtains by a false pretense, or with intent to steal or embezzle converts (2) the property of another. [G.L. c. 266,](#)

§ 30(1). See [G.L. c. 266, § 30\(5\)](#) (also requiring that victim be sixty years of age or older). By contrast, Bott was assessed additional taxes for (1) filing a false or fraudulent tax return or (2) filing a return in a wilful attempt to defeat or evade a tax. See [G.L. c. 62C, § 28](#).

Although those offenses stem from the same conduct—the misappropriation of client funds—the only element they have in common is the intent to defraud. Each requires proof of elements that the others do not. See [Commonwealth v. Bogannam, 50 Mass.App.Ct. 913, 914–915 \(2001\)](#) (finding no double jeopardy violation where defendant was assessed and paid additional tax penalties for failure to report income derived from illegal activity to which defendant subsequently pleaded guilty). Consequently, the additional assessment of taxes and the criminal prosecutions do not amount to the “same offense” for purposes of double jeopardy. Bott’s challenge to the assessment of additional taxes is without merit.³

³ The second part of the inquiry, whether the assessment of additional taxes constitutes criminal punishment, involves a two-part test: (1) “whether

[the Legislature], in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label [civil or criminal] or the other”; and (2) “where [the Legislature] has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.” [United States v. Ward, 448 U.S. 242, 248–249 \(1980\)](#). Nothing in [G.L. c. 62C, § 28](#), indicates that the Legislature meant the provision to be construed as a criminal penalty, and neither the purpose nor effect of the provision negates its intent to civilly punish its violators. Consequently, the additional assessment of taxes should not be considered criminal punishment under the double jeopardy clause.

Decision of Appellate Tax Board affirmed.

All Citations

90 Mass.App.Ct. 1121, 65 N.E.3d 670 (Table), 2016 WL 7381727