

March 26, 2021

VIA EFILING ONLY

John Harrington
Commissioner
Minnesota Department of Public Safety
445 Minnesota St Ste 1000
Saint Paul, MN 55101
john.m.harrington@state.mn.us

Re: *In the Matter of the Enforcement Action Against Liquor License No. 67512, Issued to Lionheart, LLC d/b/a Alibi Drinkery*
OAH 8-2400-37256

Dear Commissioner Harrington:

Enclosed and served upon you is the Administrative Law Judge's **RECOMMENDATION ON CROSS MOTIONS FOR SUMMARY DISPOSITION** in the above-entitled matter. The official record, along with a copy of the recording of the hearing, is also enclosed. The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact me at (651) 361-7874, michelle.severson@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,



MICHELLE SEVERSON
Legal Assistant

Enclosure

cc: Docket Coordinator
Joseph G. Marek
Jeffrey S. Thompson
William Young
Michael Padden

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF PUBLIC SAFETY

In the Matter of the Enforcement Action
Against Liquor License No. 67512, Issued
to Lionheart, LLC d/b/a Alibi Drinkery

**RECOMMENDATION
ON CROSS-MOTIONS
FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Eric L. Lipman for an oral argument on cross motions for summary disposition on February 3, 2021. The hearing record on the motions closed on that day at the conclusion of the oral argument.

Joseph G. Marek and Jeffery S. Thompson, Assistant Attorneys General, appeared on behalf of the Minnesota Department of Public Safety (Department).

Michael B. Padden, Padden Law Firm, PLLC, appeared on behalf of Lionheart, LLC, d/b/a Alibi Drinkery (Respondent or Alibi).

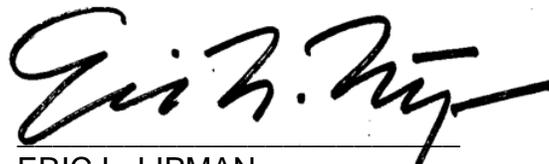
Based upon the submissions of counsel and the hearing record,

Based on the submissions of the parties and the oral argument, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION:

1. The Department's Motion for Summary Disposition should be **GRANTED**.
2. Alibi's Motion for Summary Disposition should be **DENIED**.
3. Alibi's appeal of the suspension order should be **DISMISSED**.

Dated: March 26, 2021


ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Department of Public Safety (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact John M. Harrington, Commissioner, Department of Public Safety, 445 Minnesota Street, Suite 1000, St. Paul, MN 55101, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2020). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2020), the Commissioner is required to serve her final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Factual Background

The Alcohol and Gambling Enforcement Division (AGED) is a division of the Minnesota Department of Public Safety (DPS), a cabinet-level department of state government.¹ AGED administers and enforces laws relating to the sale of alcohol in Minnesota. Among AGED's duties is the issuance and regulation of alcohol licenses under Chapter 340A of Minnesota Statutes.²

Alibi is a bar and restaurant in Lakeville, Minnesota. It holds a retail liquor license (Number 67512) and as part of its regular business serves alcoholic beverages to members of the public.³

The City of Lakeville conditions its liquor licenses upon law-abiding conduct by its licensees. Its Municipal Code of Ordinances states in part:

Every license shall be granted subject to the conditions of this chapter and of any other applicable ordinance of the city and/or state law.

....

¹ See Minn. Stat. §§ 15.01, 299A.02 (2020).

² Minn. Stat. §§ 340A.201, subd. 2, 340A.304 (2020).

³ Declaration of Carla Cincotta, at ¶ 12 (January 13, 2021) (Cincotta Decl.).

The council may suspend or revoke any license for the sale of intoxicating or 3.2 percent malt liquor for any of the following reasons:

....

C. Violation of any state or federal law regulating the sale of intoxicating liquor, 3.2 percent malt liquor, or controlled substance.

....

E. That the licensee suffered or permitted illegal acts upon the licensed premises or on property owned or controlled by the licensee adjacent to the licensed premises, unrelated to the sale of intoxicating liquor or 3.2 percent malt liquor.

F. That the licensee had knowledge of illegal acts upon or attributable to the licensed premises, but failed to report the same to the police.⁴

In response to the COVID-19 pandemic, on March 13, 2020, Governor Tim Walz declared a peacetime emergency.⁵ Moreover, at an emergency meeting of Minnesota's Executive Council,⁶ held on March 16, 2020, the Council approved the peacetime emergency.⁷

On November 18, 2020, Governor Walz issued Executive Order 20-99, which, in relevant part, orders that "restaurants, . . . bars, . . . and other Places of Public Accommodation offering food, beverages (including alcoholic beverages) . . . for on-premises consumption are closed to ingress, egress, use, and occupancy by member of the public," except as was specified in the same order.⁸ The Order goes on to specify that restaurants and bars may "permit up to five members of the public at one time . . . for the purpose of picking up their food or beverage orders."⁹

When announced on November 18, these restrictions were scheduled to last until December 18, 2020, at 11:59 p.m.¹⁰ The duration of those restrictions, however, was thereafter extended through January 13, 2021.¹¹

On December 13, 2020, the local CBS News affiliate reported that Alibi was "part of a coalition of roughly 150 bars, restaurants, gyms and other businesses that plan to open their doors this week, even if the governor extends his latest orders."¹² As part of its reporting, CBS interviewed Alibi's owner Lisa Zarza. During this interview, Ms. Zarza

⁴ Lakeville Municipal Code of Ordinances §§ 3-1-8-1A, 3-1-14-1 (2020).

⁵ See Executive Order 20-99 at 2 (available at <https://www.leg.mn.gov/archive/execorders/20-99.pdf>).

⁶ Minn. Stat. § 9.011 (2020).

⁷ See Executive Order 20-01 at 4 (available at <https://www.leg.mn.gov/archive/execorders/20-01.pdf>).

⁸ Executive Order 20-99 at ¶ 7(c)(iii)(A).

⁹ *Id.* at ¶ 7(c)(iii)(A)(1).

¹⁰ *Id.* at ¶ 2.

¹¹ See Executive Order 20-100 (available at <https://www.leg.mn.gov/archive/execorders/20-100.pdf>).

¹² Cincotta Decl., at ¶ 14, Exhibit (Ex.) 5.

stated, “[W]e’re prepared; we’re ready. We’re prepared to go to jail. We’re prepared to pay fines.”¹³

On December 15, 2020, Alibi posted to its Facebook page, viewable to the public, that it would be opening at 11:00 a.m. on December 16, 2020.¹⁴

On Wednesday, December 16, 2020, Alibi opened its business to the public for on-premises consumption of food and beverages, including alcoholic beverages. Throughout the day, Alibi’s opening for on-premises eating and drinking garnered significant media attention, from both traditional and social media sources. Ms. Zarza provided multiple interviews discussing Alibi’s unlawful operations. AGED documented these sources as part of its investigation into Alibi’s compliance with Executive Order 20-99’s temporary prohibition on on-premises consumption of alcoholic beverages.¹⁵

On December 16, 2020, Ms. Zarza gave an interview, live-streamed on Facebook, to an organization called “Action 4 Liberty” regarding Alibi’s opening for on-premises consumption. Zarza stated that Alibi was “fully open, 11am to 2am” with a “line out the door.”¹⁶

On December 16, 2020, the *Minneapolis Star Tribune* reported on the “crazy, bustling, nonstop full tables” at Alibi, and published multiple photographs of Alibi’s patrons many of whom were not wearing masks. “It’s insane,” the *Tribune* quoted Ms. Zarza as saying of the “overflow crowd.”¹⁷

On December 16, 2020, KSTP News reported on-scene that “almost every seat was taken, with a line forming at the front . . .” shortly after Alibi’s opening at 11:00 a.m.¹⁸ KSTP published video recorded from inside Alibi showing closely congregated, mask-less patrons eating and drinking. When interviewed by KSTP, Ms. Zarza stated she “expected” a visit from the government.¹⁹

On December 16, 2020, based upon the media reporting from Alibi’s location and the statements on Alibi’s social media account, AGED determined that Alibi was operating in violation of Executive Order 20-99.²⁰

As a sanction for this violation, AGED notified Alibi that AGED would impose a 60-day suspension of Alibi’s liquor license, pending a hearing on the issue before the Office of Administrative Hearings. AGED promptly sent Alibi a Notice of Agency Action (Notice) setting forth the sanction and its underlying basis. On December 16, 2020, this

¹³ *Id.* at Ex. 5-2 (at 1:30 minute mark).

¹⁴ *Id.* at ¶ 15, Ex. 6.

¹⁵ *Id.* at ¶ 16.

¹⁶ *Id.*, Exs. 7, 7-2 (at 0:26—0:52 minute mark).

¹⁷ *Id.* at ¶ 18, Ex. 8.

¹⁸ *Id.* at ¶ 19, Ex. 9.

¹⁹ *Id.* at ¶ 19, Ex. 9-2 (at 1:06—1:15 minute mark).

²⁰ *Id.* at ¶ 20.

Notice was also sent by certified mail, and to Alibi's publicly available electronic mail address.²¹

On the next day, December 17, 2020, a posting to Alibi's Facebook page read: "OPEN TODAY. COME IN FOR FOOD AND DRINKS!"²²

Later that same day, KARE-11 News was on-site at Alibi's location. KARE-11 reported that, while Ms. Zarza acknowledged "the consequences from reopening her doors, she plans to continue allowing customers inside for indoor dining."²³ The video footage obtained by KARE-11 inside Alibi shows numerous patrons eating food and drinking alcohol inside the establishment, many without face coverings or practicing social distancing. KARE-11 credited the video footage as having been obtained from Alibi's owner, Ms. Zarza.²⁴

Additionally, Ms. Zarza gave a lengthy radio interview on KYMN Radio. During the interview, Zarza admitted that on the previous day, Alibi had a "line out the door until eleven o'clock [p.m.]."²⁵

On December 18, 2020, Alibi again opened to on-premises consumption and in-person dining. An inspector from the Minnesota Department of Health (MDH) visited Alibi's location and noted, "[c]ustomers were entering and exiting the building and people were seated at inside tables and consuming drink."²⁶

On December 18, 2020, the Dakota County District Court issued a Temporary Restraining Order (TRO) enjoining Alibi from continuing operations in violation of Executive Order 20-99. In its Order, the district court specifically found, "[Alibi] has violated and indicates that it will continue to violate Executive Order 20-99, by remaining open to the public for on-premises dining."²⁷

On December 18, 2020, Governor Walz's issued Executive Order 20-103. This Order extended the prohibitions on indoor, on-premises consumption of alcohol through January 10, 2021.²⁸ Alibi, however, continued offering indoor, on-premises consumption of food and alcohol through at least December 20, 2020.²⁹

During a Prehearing Status and Scheduling Conference on December 21, 2020, Alibi's counsel represented that Alibi was in compliance with, and would continue to comply, with the TRO and Executive Order 20-99 through the pendency of this action. On December 22, 2020, Ms. Zarza signed an affidavit under penalty of perjury stating that Alibi was "closed." This affidavit was submitted to the district court by Alibi in

²¹ *Id.* at ¶ 20, Ex. 10.

²² *Id.* at ¶¶ 23, 26, Exs. 12, 15.

²³ *Id.* at ¶ 24, Ex. 13.

²⁴ *Id.* at ¶ 24, Ex. 13-2 (at minute mark 0:01—0:10).

²⁵ *Id.* at ¶ 25, Ex. 14.

²⁶ *Id.* at ¶ 27, Ex. 16.

²⁷ *Id.* at ¶ 28, Ex. 17.

²⁸ *Id.* at ¶ 21, Ex. 11.

²⁹ *Id.* at ¶ 29, Ex. 18.

response to a pending hearing that same day regarding whether the TRO should be converted to a temporary injunction.³⁰

On December 30, 2020, Alibi posted to its Facebook page that it planned to re-open for indoor, on-premises consumption. The post is captioned in part, “We will be reopening tomorrow at 11am”, and includes a video of approximately 20 mask-less people, congregated closely in Alibi’s doorway, consuming what appear to be alcoholic beverages.³¹

On the morning of December 31, 2020, the district court issued an order converting the then-existing TRO into a temporary injunction, further enjoining Alibi from operating in violation of applicable Executive Orders for the pendency of the civil enforcement action.³²

On December 31, 2020, despite the temporary injunction, Alibi re-opened for indoor, on-premises consumption of alcohol. Alibi’s activities were documented by an investigator from the Attorney General’s office. The Investigator visited Alibi and took photographs of multiple patrons crowded inside the building, consuming food and alcohol.³³

Again, Alibi’s New Year’s Eve operations drew significant media attention. For example, the *Minneapolis Star Tribune* reported:

Patrons packed the Alibi after it announced on Facebook that it would open Thursday morning. Co-owner Lisa Monet Zarza, wearing white fur boots and no face mask, happily greeted customers with an occasional hug as her staff delivered drinks and wings.³⁴

FOX 9 News, filming live on-scene, reported a “line of people waiting to get inside.”³⁵

On December 31, 2020, based on the report of the AGO investigator, the ongoing media coverage of Alibi’s renewed operations, and the other evidence gathered by AGED, AGED concluded that Alibi was again in violation of Executive Order 20-99.³⁶ AGED notified Alibi that it was rescinding its previous Notice and would instead seek revocation of Alibi’s liquor license. AGED promptly sent Alibi an Amended Notice of Agency Action setting forth the escalated sanction and its underlying basis.³⁷

The Department makes four key claims in this matter:

³⁰ *Id.* at ¶ 30, Ex. 19.

³¹ *Id.* at ¶ 31, Exs. 20, 20-2.

³² Marek Dec., Exhibit 1.

³³ Cincotta Dec. at ¶ 32, Ex. 21.

³⁴ *Id.* at ¶ 34, Ex. 23.

³⁵ *Id.* at ¶ 33, Exs. 22, 22-2 (at minute mark 0:31).

³⁶ *Id.* at ¶ 35.

³⁷ *Id.* at ¶ 35, Ex. 24.

- (1) the pandemic-related restrictions in Executive Order 20-99 were duly authorized by law;³⁸
- (2) Alibi violated those restrictions, by serving customers food and alcohol for consumption in the licensed premises;³⁹
- (3) the violations are punishable by regulatory discipline upon the liquor license held by Alibi;⁴⁰ and,
- (4) a revocation is a reasonable response to Alibi's serial violations.⁴¹

Alibi disagrees with the Department's claims. It maintains, among other arguments, that the suspensions and revocations are beyond the authority of the Commissioner of Public Safety to issue; the underlying Executive Order is arbitrary and unenforceable; and that the Commissioner's actions violate rights that are guaranteed to Alibi's owners by the state and federal constitutions.⁴²

On January 22, 2021, Alibi's counsel submitted correspondence to the tribunal, regarding its motion for summary disposition. Counsel stated:

I would like to rely on the filings of Boardwalk Bar & Grill submitted by their counsel on January 13, 2021. We have identical arguments.⁴³

Moreover, Alibi reprised this approach with respect to opposing AGED's motion for summary disposition. Counsel maintained:

Marshall Tanick and Michael Vanselow, attorneys for Boardwalk Bar and Grill, are filing a brief today opposing the State's claim for summary deposition. Rather than filing a separate brief, we wish to join with those arguments since ours are identical.⁴⁴

Both the Department's claims and Alibi's defenses are addressed below.

II. Legal Standards for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.⁴⁵ A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of

³⁸ Second Amended Notice and Order for Prehearing Conference and Hearing, OAH 8-2400-37256 at 4 (January 4, 2020).

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 4-5.

⁴¹ *Id.*

⁴² Digital Recording, OAH Docket No. 8-2400-37252 (Dec. 22, 2020).

⁴³ Letter from Counsel (January 22, 2021).

⁴⁴ Letter from Counsel (January 28, 2021).

⁴⁵ *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500(K) (2015).

law.⁴⁶ The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine factual issues exist.⁴⁷ In other words, the Administrative Law Judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.⁴⁸

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.⁴⁹ A fact is material if its resolution will affect the outcome of the case.⁵⁰ If the moving party meets this initial burden, the non-moving party must show the existence of a genuine issue of material fact.⁵¹ A genuine issue is not a "sham or frivolous" one and it cannot rest upon mere allegations or denials.⁵²

A genuine issue requires identification of specific facts that require a hearing to resolve.⁵³ As the Minnesota Supreme Court has explained:

[The] Rules of Civil Procedure ... expressly provides that when a motion for summary judgment is made and supported by affidavits, 'an adverse party may not rest upon the mere averments or denials of his pleading but must present specific facts showing that here is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.' Defendant has presented no affidavits, depositions, or other documents controverting plaintiff's affidavits.... We have consistently held that this is not enough.⁵⁴

Summary disposition is only proper when there are no fact issues which require a hearing to resolve.⁵⁵

III. Legal Analysis

AGED maintains that it may suspend Alibi's liquor license because Alibi: (a) "failed to comply with an applicable statute, rule, or ordinance relating to alcoholic beverages or the operation of the licensed establishment;" and (b) "failed to comply with a lawful license condition duly imposed by the authority issuing the license" –

⁴⁶ See *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).

⁴⁷ See e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

⁴⁸ See *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁴⁹ See *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁵⁰ See *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).

⁵¹ See *Thiele*, 425 N.W.2d at 583.

⁵² See *Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).

⁵³ See Minn. R. Civ. P. 56.05.

⁵⁴ *Minnesota Hous. Fin. Agency v. Hatfield*, 210 N.W.2d 298, 308 (Minn. 1973) (quoting Minn. Civ. P. 56.05).

⁵⁵ See *Sauter*, 70 N.W.2d at 353.

specifically sections 3-1-8-1A, 3-1-14-1 of the Lakeville Municipal Code of Ordinances.⁵⁶ As AGED reasons, violation of the terms of Executive Order 20-99 is itself a violation of Chapter 12, making the revocation of Alibi's license appropriate. Further, failure to adhere to the terms of Executive Order 20-99, violates the conditions on Alibi's license.

A. The Governor's Emergency Management Powers

Minn. Stat. § 12.21, subd. 3 (2020), authorizes the Governor to "make, amend, and rescind the necessary orders and rules to carry out the provisions" of Chapter 12.⁵⁷ Moreover, in "matters pertaining to the emergency management of the state and nation," the Governor may issue orders regulating "the direction or control of . . . the conduct of persons in the state, *including entrance or exit from any stricken or threatened public place, occupancy of facilities, and . . . public meetings or gatherings.*"⁵⁸

When approved by the Executive Council, and filed in the Office of the Secretary of State, these Executive Orders have the force and effect of law during the peacetime emergency.⁵⁹

B. The Authority to Sanction Liquor Licenses Under Chapter 340A

The Commissioner of Public Safety has the authority to sanction a liquor license upon a finding that the licensee has violated an applicable statute, rule, ordinance or license condition. Minn. Stat. § 340A.415(5) (2020) describes these categories of misconduct in this way:

On a finding that the license or permit holder has ... **[1] failed to comply with an applicable statute, rule, or ordinance relating to alcoholic beverages . . . , or [2] failed to comply with a lawful license condition duly imposed by the authority issuing the license . . . ,** the commissioner or the authority issuing a retail license or permit under this chapter may revoke the license or permit, suspend the license or permit for up to 60 days, impose a civil penalty of up to \$2,000 for each violation, or impose any combination of these sanctions.⁶⁰

Each of these categories of misconduct are further discussed in turn below.

C. Giving Statutes their Plain, Ordinary Meaning

When interpreting statutes, tribunals in Minnesota give the words and phrases of a statute their plain and ordinary meaning.⁶¹ When "the words of a law in their

⁵⁶ Department's Memorandum of Law in Support of its Motion for Summary Disposition, at 16-17.

⁵⁷ *Id.* at 13-15.

⁵⁸ Minn. Stat. § 12.21, subd. 3(7)(iv)(2020) (emphasis added).

⁵⁹ Minn. Stat. § 12.32 (2020).

⁶⁰ Minn. Stat. § 340A.415(5) (emphasis added).

⁶¹ *Emerson v. Sch. Bd. of Indep. Sch. Dist.* 199, 809 N.W.2d 679, 682 (Minn. 2012); *Lucas v. Am. Family Mut. Ins. Co.*, 403 N.W.2d 646, 650-51 (Minn. 1987); *Comm'r of Revenue v. Richardson*, 302 N.W.2d 23, 26 (Minn. 1981).

application to an existing situation are clear and free from all ambiguity,” the letter of the law is not “disregarded under the pretext of pursuing the spirit.”⁶² Moreover, Minnesota tribunals do not “add words to the statute that the Legislature did not supply.”⁶³ Instead the courts rely upon the Legislature to revise statutes as changes in policy and circumstances require.⁶⁴

In this particular case, Executive Order 20-99 regulates the “occupancy of facilities,”⁶⁵ and its terms are liquor-related, to the extent that they restrict the places where alcoholic beverages may be purchased and consumed during the peacetime emergency.

Yet, it is also clear that an Executive Order is not a “statute, rule, or ordinance,” as those terms are used in Minn. Stat. § 340A.415(5). Executive Orders are distinct from these other types of decrees. For example, Minn. Stat. § 4.035 (2020) defines an Executive Order as a “written statement or order executed by the governor pursuant to constitutional or statutory authority and denominated as an executive order”⁶⁶ Executive Order 20-99 reflects all of these requirements.

A “statute,” by contrast, is a bill with an enacting clause, that has been approved by a majority of both houses of the legislature, with recording of that approval in the journal of each house of the legislature, and is either approved by the Governor or enacted following the procedures of Article IV, section 23 of the Minnesota Constitution.⁶⁷ Executive Order 20-99 is not a “statute” because it did not follow from any of these procedures.

Similarly, Executive Order 20-99 does not qualify as a “rule.” A rule is an agency’s statement of general applicability and future effect, “adopted to implement ... the law enforced or administered by that agency,” pursuant to either the procedures in the Minnesota’s Administrative Procedure Act (MAPA) or some other law.⁶⁸ In this case, the in-person dining restrictions were not promulgated by the Governor under the

⁶² Minn. Stat. § 645.16 (2020).

⁶³ *Halva v. Minnesota State Colleges & Universities*, 953 N.W.2d 496, 504 (Minn. 2021); *In re Welfare of Children of J.D.T.*, 946 N.W.2d 321, 328 (Minn. 2020); see also *Webber v. St. Paul City Ry. Co.*, 97 F.140, 144-45 (8th Cir. 1899) (“There is no safer or better canon of interpretation than that, when the terms of a statute are plain and its meaning is clear, the legislature must be presumed to have meant what it expressed, and there is no room for construction”).

⁶⁴ *Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206, 212–13 (Minn. 2014); *In re Estate of Karger*, 93 N.W.2d 137, 142 (Minn. 1958) (“What the law ought to be is for the legislature; what the law is, rests with the courts.”).

⁶⁵ See e.g., Executive Order 20-99, at 11-12 (“Because indoor dine-in service is prohibited at restaurants, for the purposes of Minnesota Laws 2020, Chapter 75, Limited Off-Sale for Restaurants Closed by Executive Order, nothing in this Executive Order constitutes, prescribes, or should be deemed as, the expiration, termination, or rescission of the closure of restaurants as set forth in Executive Order 20-04, as modified and extended by Executive Orders 20-18 and 20-33, or any subsequent order. As set forth in Minnesota Laws 2020, Chapter 75, limited off-sale of alcoholic beverages is authorized only for take-out service with a prepared take-out food order, and delivery is not authorized”).

⁶⁶ Minn. Stat. § 4.035.

⁶⁷ Minn. Const. Art. IV, §§ 22, 23; *Sjoberg v. Sec. Sav. & Loan Ass’n*, 75 N.W. 1116, 1116 (Minn. 1898) (“Be it enacted by the legislature of the state of Minnesota, is mandatory, and a statute without any enacting clause is void.”).

⁶⁸ Minn. Stat. §§ 14.02, subd. 4; 14.05, subd. 1 (2020).

ordinary rulemaking process in Chapter 14 and the text of Executive Order 20-99 itself does not purport to create new rules. It stands to reason that if the Governor and the Executive Council had intended to promulgate a rule on in-person dining in restaurants (that would last throughout the emergency, instead of an easily-revisable order), the text of the document would have reflected this point.

In fact, the distinction between matters that are addressed by Gubernatorial orders, and those topics that are addressed by rulemaking, during an emergency, follows from the text of Chapter 12. The rulemaking anticipated by that chapter relates to a particular set of subjects, and neither of these relate to safety directives a Governor might make for the public during an emergency. Among the subjects Minn. Stat. § 12.22 (2020) identifies as appropriate for rulemaking, are: “administration of the emergency management program[,] including methods relating to the establishment and maintenance of personnel standards on a merit basis” and qualifying for federal disaster aid.⁶⁹ While the delegation of rulemaking authority is broad enough to include other topics, the statutory text focuses on a particular need: Having sturdy protocols for liaising with federal agencies and local units of government.

The in-person dining restrictions at issue in this case are far afield from the operational details of the emergency management program or protocols for receiving federal aid. The restrictions in-person dining followed from a temporary order that the Governor issued; not a rule that he and the Executive Council promulgated.

Lastly, Executive Order 20-99 is not an “ordinance.” This term is reserved for municipal regulations promulgated by a city or township.⁷⁰

For all of these reasons, the first clause of Minn. Stat. § 340A.415(5) is not broad enough to reach Alibi’s misconduct in this case. It is undisputed that Alibi disobeyed the restrictions on in-person service, but because Executive Order 20-99 is not a statute, rule or ordinance, that misconduct is not punishable under the first clause of Minn. Stat. § 340A.415.

Under the second clause of Minn. Stat. § 340A.415(5), however, AGED may punish violations of local licensing conditions. Thus, we must also look to the provisions of Lakeville’s Municipal Code of Ordinances.

Lakeville prohibits local license holders from violating “any state or federal law regulating the sale of intoxicating liquor.”⁷¹ While Executive Order 20-99 is not a “statute, rule, or ordinance,” as soon as this Order was approved by the Executive Council and filed with the Secretary of State, its prohibitions were “State laws that are applicable to liquor violations.”⁷² The reach of the local ordinance is wider than the first

⁶⁹ See Ordinance, Black’s Law Dictionary (11th ed. 2019); see also Minn. Stat. § 415.021 (2020).

⁷⁰ Minn. Stat. § 12.22, subd. 3 (a), (b) (2020).

⁷¹ Lakeville Municipal Code of Ordinances § 3-1-14-1(C) (2020).

⁷² Compare *id.*, with Minn. Stat. § 12.32 (2020) (“Orders and rules promulgated by the governor under authority of section 12.21, subdivision 3, clause (1), when approved by the Executive Council and filed in the Office of the Secretary of State, have, during a ... peacetime emergency ... the full force and effect of law”).

clause of Minn. Stat. § 340A.415(5); and it is broad enough to include Alibi's misconduct in this case.

Alibi's refusal to abide by Executive Order 20-99's restrictions on occupancy and in-person service of alcohol, were violations of Lakeville's requirements that local bar owners follow all state liquor laws and not to acquiesce to "illegal acts" occurring upon the licensed premises. Accordingly, where authorized by a local ordinance, AGED is entitled to impose sanctions on licensees who violated Executive Order 20-99.

To the extent that Alibi argues the same constitutional claims as advanced by Boardwalk Bar & Grill's arguments *In the Matter of the Enforcement Action Against Liquor License No. 26788, Issued to Boardwalk Bar & Grill, LLC, OAH 8-2400-37252*, those claims were resolved against Boardwalk in a parallel Order issued today. The same peroration will not be reprinted here.

Alibi did not submit its own affidavits, depositions, or other documents controverting AGED's submissions. Beyond the legal arguments advanced by its fellow respondent Boardwalk, it has rested on mere averments. It is not enough to win Alibi an evidentiary hearing.

IV. Conclusion

To say that Alibi does not have a legal basis for avoiding summary disposition on AGED's licensing claim is not to discount, or minimize, the very real tragedy that has befallen Ms. Zarza and her employees. The COVID-19 pandemic has damaged lives and livelihoods every bit as much as a tornado, or a flood, or an earthquake. Such calamities can quickly destroy years' worth of effort spent building a business, a brand and a clientele. Alibi's misfortunes are very real.

Likewise, clear is the legal authority of the Governor to issue Executive Orders regulating the occupancy of structures during an emergency and for AGED to punish licensees who violate local liquor licensing restrictions. For all of these reasons, AGED is entitled to summary disposition on its claim and authorized to revoke Alibi's license for its misconduct.

E. L. L.