



Joseph M. Centorino, Inspector General

TO: File
FROM: Joseph M. Centorino, Inspector General
DATE: March 4, 2021
RE: Complaint of Unequal Enforcement of Noise Regulations by Code Compliance Officer
OIG No. 21-14

Complaint

Mr. Gerald Bouhana, a Miami Beach resident and business owner, filed a complaint with the OIG alleging that a city Code Compliance Officer was selectively enforcing code provisions in an effort to close Bouhana's business. Mr. Bouhana stated in his written complaint that the Code Compliance Officer came to his business multiple times on November 19, 2020 to investigate noise complaints and was trying to find a reason to "shut us down." Bouhana was not present at the business on November 19th, did not personally observe the events and did not interact with the Code Compliance Officer.

Investigation

Bouhana's business, The Upper Deck, LLC, is a roof top event space located at 605 Lincoln Road, Suite 800. The space provides food, drinks, hookahs and music. There are couches for seating. The entrance is blocked and monitored by staff members who provide access for guests. The guests are escorted to the rooftop in an elevator that only operates with a security key fob. On November 19th, there was an event with a DJ and, possibly, an enhanced sound machine called a subwoofer. During the evening, four noise complaints were called into the City regarding loud music coming from the rooftop. CCO Randy Russell was dispatched to three of the complaints with his partner, CCO Rene Santana. In all instances, both Officers wore body cameras that were activated at all times.

Special Agent Singer interviewed Mr. Bouhana the same day that he made the complaint and sent him a draft copy of this report to which he responded. His comments, to the extent they are relevant, have been incorporated into the final report. According to Bouhana, the music at the November 19 event was played at an ambient level, but the sound traveled because it was a windy night. He denied that there was a subwoofer on the premises and stated that the only sound equipment present at any time is that which is approved by the City. Moreover, Bouhana

explained that he “can only play music at an ambient level due to the fact that the processor on site limits the sound level at which the music can be played and the processor is password protected.” According to Bouhana, neither he nor any members of the management team have access to the password for the processor.

Bouhana further alleged that, “we did not violate any emergency order (music above level of conversation) but still were ordered to cease operations under an arbitrary criteria of music heard a block away... due to the heavy wind, the music could be heard a block away and (Russell) took advantage of this to shut us down per Covid ordinance violation.” Bouhana stated that the entire incident was recorded on a body camera and that Russell acknowledged on camera that the music was at a level that was in compliance with the City’s emergency order. Nevertheless, according to Bouhana, Russell ordered him to cease operations immediately and called law enforcement to close the business when Bouhana did not comply.

Bouhana alleged that CCO Russell has repeatedly come to his business and it seemed to him that Russell was looking for a reason to close his business. Special Agent Singer reviewed all code compliance incident reports where CCO Russell responded to 605 Lincoln Road, Suite 800. Between February and November 19th, 2020, CCO Russell investigated four noise complaints. Those complaint numbers are:

- NC2020-13901(February 8, 2020)
- NC2020-16749(October 22, 2020)
- NC2020-17027(November 14, 2020)
- NC2020-17076(November 19, 2020)

No violations were issued for the first three complaints that Russell handled. However, on November 19, under case NC2020-17076, Bouhana was issued a Written Warning Notice and Notice of Violation (CC2020-09805). The Notice of Violation was not issued until it was approved by Russell’s supervisor, CCA Griselda Contreras, and Tom Curitore, the Assistant Code Compliance Director. Curitore had previously detailed the permitted noise levels to Bouhana. It should be noted that Bouhana has another business on Lincoln Road called “Mr. Jones”. On one prior occasion Russell was dispatched after code compliance received a social distancing complaint. Neither a warning nor a violation was issued.

It is also noteworthy that Code Compliance Officers other than Russell have responded to 605 Lincoln Road, Suite 800 on the following dates:

- NC2020-090611(September 25, 2020)
Ensuring ambient music being played
- NC2020-090616(September 25, 2020)
Curfew check
- NC2020-091437(September 30, 2020)
Curfew check
- NC2020-091639(October 1, 2020)
Curfew check
- NC2020-096341(October 31, 2020)

Curfew check

On November 19, there were actually four loud music complaints called into Code Compliance against 605 Lincoln Road. The first one was investigated by CCO McClean. He arrived at the business at 7:45 PM. After waiting to be escorted to the rooftop by one of the event managers, McClean observed a live DJ, but made the determination that the music was not loud or excessive. The live DJ was permitted under (RL-10005119). No violation was issued.

The next three complaints that evening regarding loud music from the rooftop were investigated by CCO Randy Russell, working in tandem with CCO Rene Santana. Two of the complaints were from anonymous sources and one was from a resident who lives in an apartment complex approximately one block away from Bouhana's event. The first two complaints did not result in a violation, although the Officers did respond to the business. Because those complainants were anonymous, or otherwise unavailable, it was not possible for the Officers to determine whether the City's noise ordinance had been violated.

After receiving the third complaint, CCOs Russell and Santana responded to the complainant's apartment complex, met with the resident, and confirmed that music could be heard inside with the windows closed. The Officers decided to separate in an effort to determine whether the sound in the apartment was coming from Bouhana's event. CCO Rene Santana stayed in the complainant's apartment while CCO Russell went to the rooftop at 605 Lincoln Road. They were able to confirm with each other, via cell phone, that the music playing on the rooftop was the same music that was heard in the complainant's apartment.

Once they had the confirmation, and after consulting with supervisors, both Officers returned to the business and advised that it was in violation of the noise ordinance and had to cease operations. A gentleman, who may be a co-owner or a manager, refused to close the establishment, insisting that they were playing music at an ambient level. CCO Russell called for police assistance. Minutes later, CCA Contreras, Russell's supervisor, and the police arrived. Contreras made contact with the manager. She inquired whether they were still operating their business, and the manager advised that they were. CCA Contreras informed them that they had to cease activity immediately. She asked if she could conduct an inspection at the rooftop. Once upstairs she observed that there were several people drinking and eating on the couches in violation of the rules regarding social distancing. Staff was cleaning the event space. Photographs were taken on the rooftop.

Mr. Bouhana, in his response to the OIG draft report, disputed Contreras' observations. In spite of the fact that he was not present on the 19th, he stated that Contreras actually observed people leaving the rooftop. Bouhana said that it was impossible to maintain social distance when being ordered to quickly exit. Moreover, he stated, the patrons were forced to exit via the emergency stairs which made it impossible to maintain distance. Finally, Bouhana noted that most of the female patrons were in high heels and their being forced to quickly leave down the emergency stairs placed them in a dangerous situation. The OIG cannot resolve this factual dispute and believes the body camera footage and still photos speak for themselves.

Special Agent Singer interviewed CCA Contreras. She stated that as she approached the business that night, she could hear the music from the street level; however, she was unable to

determine whether the music was coming from the rooftop. Contreras explained that there are only five Officers for the entire city on the night shift and there is no time for spot checking. All Officers respond to actual complaints after being dispatched. Additionally, she stated that a violation, as in this case, can only be proven with a complaining witness who does not remain anonymous. The decisions to issue emergency order violations are controlled by Code Compliance management and are not discretionary with the individual Officer.

Special Agent Singer interviewed CCO Russell. Mr. Russell has been employed with Code Compliance for approximately two and a half years. Mr. Russell stated that he has responded to 605 Lincoln Road for noise-related complaints four times, all of them during 2020. Russell also stated that he responded one time to 350 Lincoln Road, which is another business owned or operated by Bouhana. On that one occasion, Russell was investigating a social distancing complaint. 350 Lincoln Road is a bar called "Mr. Jones" and is an enclosed establishment. Russell did not issue a warning or a violation. He talked to the manager to explain the rules about social distancing. Russell stated that his goal is not to issue a violation but to bring businesses into compliance.

On the 19th, Russell stated that he was dispatched three times to noise complaints involving 605 Lincoln Road. Two of the complaints came from residents who lived a block away from Bouhana's business. Only one of the complainants cooperated. Russell explained that the only way to confirm the noise complaint was to verify that what was being heard in the resident's unit was the same noise coming from the location generating the sound. To make this determination, Russell's partner, CCO Santana, stayed with the resident in her apartment with the windows closed while Russell returned to 605 Lincoln. They communicated with each other and confirmed that the music heard in the apartment was the same music coming from Bouhana's business.

Additionally, CCOs Russell and Santana went to the 17th street garage and walked to the 5th floor to see whether they could hear the music. The garage is located directly behind 605 Lincoln Road. The music was easily heard from that vantage point and was captured on the body camera footage. Before acting, Russell called his supervisor who instructed him to have the business cease operations. He and Santana returned to shut down the event for the night. The manager or employee refused. Russell explained that their protocol dictates that when a business refuses to close, police are to be called. Russell called the police and an Officer responded, as well as Russell's supervisor.

Special Agent Singer met with the Assistant Director of Code Compliance, Thomas Curitore. Mr. Curitore stated that the Department has a zero-tolerance policy on noise violations. The individual code compliance officers both patrol and respond after being dispatched. All code compliance vehicles have tracking devices that enable management to monitor their locations. The officers have little or no discretion when confronting violators and all decisions regarding business closures are made by Code Compliance management. The Department's standard operating procedures require the officers to turn on their cameras immediately after being dispatched for safety reasons. Officer Russell complied with all required procedures on this occasion and has never been sanctioned for previously violating standard operating procedures.

Mr. Curitore also explained that in instances such as this one, the officers are playing a "cat and mouse game" with the businesses. While the emergency order is in effect, commercial properties

are required to provide immediate access to code compliance officers when they respond to noise complaints. However, many utilize delay tactics which prevent officers from determining whether music is being played above ambient levels. As stated above, Russell and Santana could not enter 605 Lincoln Road until an employee allowed them into the building and escorted them up to the rooftop by which time the music was being played at an ambient level. It was because of this "cat and mouse" dynamic that they went to the garage across from 605 Lincoln Road and the apartment a block away to investigate the noise level.

Finally, Special Agent Singer discussed with Curitore the perception by some that certain businesses are given preferential treatment and allowed to remain open in spite of the violations. Or, as is sometimes the case, businesses are required to cease operations for 24 hours but allowed to re-open before the 24-hour period expires. In this case, one of Bouhana's employees was heard on the body camera footage stating that he was going to call Curitore to ask for leniency after he was ordered to cease and desist. An appearance of unequal enforcement of Code Compliance regulations has been discussed during public hearings and, according to Curitore, is currently being addressed by the Commission and City Attorney's Office. Curitore stated that he has no discretion to allow a business to re-open prior to the expiration of the 24- hour period. Additionally, the current noise ordinance is under review, and the City is considering a number of remedies which may include more special masters and enhanced fines against businesses.

Special Agent Singer reviewed all the body camera footage and still photographs from November 19. One employee can be heard telling CCOs Russell and Santana that they had turned off the subwoofer (a sound enhancement device). Another employee or manager is heard complaining that Russell had been to the business 15 times. The footage also shows a significant delay by the business in allowing the code compliance officers access to the roof. The footage shows a front door employee notifying a manager that compliance officers wanted to enter. The Officers had to wait until the manager allowed them entry and escorted them to the rooftop. Both Russell and Contreras believe this time lapse gave the business the opportunity to turn down the music before they accessed the rooftop.

Conclusion

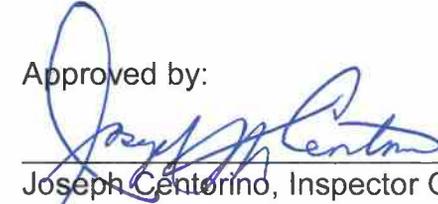
Nothing in the footage shows that Russell acted in a manner that was unprofessional or that he harassed Bouhana. At all times Russell was patient, professional and thorough in his responses to Bouhana. Special Agent Singer also reviewed body camera footage from November 14 when CCO Russell responded to a noise complaint at Bouhana's business to determine whether any of the allegations against him could be sustained. Once again, CCO Russell acted with professionalism. There is no evidence on either date that Russell acted with a personal vendetta or otherwise abused his power as alleged by Bouhana. His conduct was consistent with protocols and all decisions relating to Bouhana's business were made with the knowledge and advice of his chain of command.

Mr. Bouhana called Special Agent Singer on February 12, 2021 and stated that he had decided to withdraw his complaint against CCO Russell. Bouhana explained that he recently had the opportunity to speak at length with CCO Russell and he now understands that he was not trying to harass him. Bouhana maintains that the music was at an ambient level and that the music

system is programmed to keep it within ambient range. He had the opportunity to show this to CCO Russell and to discuss the challenges he has as a business owner. Mr. Bouhana is working on improvements to his business that will prevent sound from traveling from the rooftop. Additionally, he contacted Mr. Curitore for guidance on how to remedy his situation. Mr. Curitore and Mr. Bouhana met with Special Agent Singer at the Office of the Inspector General and discussed the options available to him.

This investigation will be closed without further action.

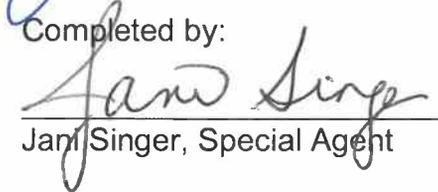
Approved by:



Joseph Centorino, Inspector General

03/04/2021
Date

Completed by:



Jani Singer, Special Agent

03/04/2021
Date