

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF BUSINESS REGULATION  
PASTORE COMPLEX  
1511 PONTIAC AVENUE  
CRANSTON, RHODE ISLAND

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ABK, LLC d/b/a Boneyard BBQ and Saloon	:	
Appellant,	:	
	:	DBR No. 19LQ031
v.	:	
	:	
Town of Hopkinton Town Council sitting as the	:	
Board of Licenses,	:	
Appellee.	:	

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ORDER RE: MOTION FOR STAY

**I. INTRODUCTION**

This matter arose from a motion for stay filed on October 1, 2019 by ABK, LLC d/b/a Boneyard BBQ and Saloon (“Appellant”) with the Department of Business Regulation (“Department”) pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on September 30, 2019 by the Town of Hopkinton Town Council sitting as the Board of Licenses (“Board”) to revoke the Appellant’s Class BV liquor license (“License”).<sup>1</sup> A hearing on the motion to stay was heard on October 3, 2019 before the undersigned who was delegated to hear this matter by the Director of the Department.

**II. JURISDICTION**

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

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<sup>1</sup> Appeals to the Department can only relate to the liquor license held by an appellant. See *El Nido v. Goldstein*, 626 A.2d 239 (R.I. 1993). The Board did not take action on any other licenses held by this Appellant. The Appellant holds a Class BV liquor license. It does not have an extended hours license.

A liquor appeal to the Department pursuant to R.I. Gen. Laws § 3-7-21 is considered a *de novo* hearing. The Department's jurisdiction is *de novo* and the Department independently exercises the licensing function. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964); and *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964). Because the Department's has such broad and comprehensive control over traffic in intoxicating liquor, its power has been referred to as a "super-licensing board." *Baginski v. Alcoholic Beverage Comm.*, 4 A.2d 265, 267 (R.I. 1939). See also *Board of Police Com'rs v. Reynolds*, 133 A.2d 737 (R.I. 1957). The purpose of this authority is to ensure the uniform and consistent regulation of liquor statewide. *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964).

### **III. THE BASIS FOR SUSPENSION AND REVOCATION**

R.I. Gen. Laws § 3-5-23 states in part as follows:

(b) If any licensed person permits the house or place where he or she is licensed to sell beverages under the provisions of this title to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood, or permits any gambling or unlawful gaming to be carried on in the neighborhood, or permits any of the laws of this state to be violated in the neighborhood, in addition to any punishment or penalties that may be prescribed by statute for that offense, he or she may be summoned before the board, body, or official which issued his or her license and before the department, when he or she and the witnesses for and against him or her may be heard. If it appears to the satisfaction of the board, body, or official hearing the charges that the licensee has violated any of the provisions of this title or has permitted any of the things listed in this section, then the board, body, or official may suspend or revoke the license or enter another order.

R.I. Gen. Laws § 3-5-21 states in part as follows:

Revocation or suspension of licenses – Fines for violating conditions of license.  
– (a) Every license is subject to revocation or suspension and a licensee is subject to fine by the board, body or official issuing the license, or by the department or by the division of taxation, on its own motion, for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.

In revoking or suspending a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. See *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964). The same statute also forbids a licensee from permitting any laws of Rhode Island from being violated. A liquor licensee has the “responsibility to control the conduct of its patrons both within and without the premises in a manner so that the laws and regulations to which the license is subject will not be violated.” *Schillers, Inc. v. Pastore*, 419 A. 2d 859 (R.I. 1980). Under *Cesaroni* and *A.J.C. Enterprises*, the Appellant is directly or indirectly responsible for the actions of its patrons and for the actions arising inside or emanating from inside a liquor licensee.

A liquor licensee is accountable for violations of law that occur on its premises and outside. *Vitali v. Smith*, 254 A.2d 766 (R.I. 1969). It is not a defense that a licensee is not aware of the violations or provided supervision to try to prevent a violation. While such a responsibility may be onerous, a licensee is subject to such a burden by the legislature and accepted such conditions by becoming licensed. *Therault v. O'Dowd*, 223 A.2d 841, 842-3 (R.I. 1966). See also *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965).

The Department reviews sanctions to ensure statewide consistency and appropriateness in the situation. It also supports progressive discipline barring the rare and extreme event where revocation may be warranted without prior discipline. It also accepts the principles of comity and deference to the local authorities and their desire to have control over their own town or city. At the same time, pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21, the Department ensures that tensions between local boards and licensees are settled in a consistent manner. Nonetheless, there is not a mechanical application of sanctions as each matter has its own sets of circumstances. See *C&L Lounge, Inc. d/b/a Gabby's Bar and Grille; Gabriel L. Lopes v. Town of North Providence*, LCA – NP-98-17 (4/30/99). At the same time, a sanction cannot be arbitrary

and capricious. The unevenness of the application of a sanction does not render its application unwarranted in law but excessive variance would be evidence that an action was arbitrary and capricious. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). See *Jake and Ella's v. Department of Business Regulation*, 2002 WL 977812 (R.I. Super.) (R.I. Super.) (overturning a revocation of a liquor license as arbitrary and capricious).

The revocation of a liquor license is a relatively rare event and is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety. See *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.) (disturbances and a shooting on one night justified revocation) and *Pakse* (upholding revocation when had four (4) incidents of underage sales within three (3) years). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside with licensee failing to call the police justified revocation); *PAP Restaurant, Inc. v. d/b/a Tailgate's Grill and Bar v. Town of Smithfield, Board of License Commissioners*, DBR No.: 03-L-0019 (5/8/03) (series of infractions justified revocation).

Thus, the Department will uphold a revocation where an incident is so egregious as to justify revocation without progressive discipline. However, the Department will decline to uphold a revocation where the violation is not so egregious or extreme and the local authority has not engaged in progressive discipline. *Infra*.

#### **IV. STANDARD FOR ISSUANCE OF A STAY**

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (R.I. 1976), a stay will not be issued unless the party seeking the stay makes a “strong showing”

that “(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest.” Despite the ruling in *Harsch*, the Supreme Court in *Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995) found that *Harsch* was not necessarily applicable in all agency actions and the Court could maintain the *status quo* in its discretion when reviewing an administrative decision pursuant to R.I. Gen. Laws § 42-35-15(c). The issue before the undersigned is a motion to stay a Decision which is subject to a *de novo* appeal and does not fall under R.I. Gen. Laws § 42-35-15(c). Nonetheless, it is instructive to note that the *Department of Corrections* found it a matter of discretion to hold matters in *status quo* pending review of an agency decision on its merits.

#### V. PRIOR DISCIPLINE

The parties agreed that the Appellant was issued its liquor license in February, 2018 and has not had any formal discipline.

#### VI. THE BOARD HEARING

The information received by the undersigned is based on representations of the parties. The undersigned did not have a transcript of the Board hearing; however, a video of the Board’s hearing for September 30, 2019 was available online and the undersigned watched the video.<sup>2</sup>

At the Board hearing, it was ascertained that the Appellant is owned by a three (3) member LLC, one member of which is being bought out and the other two (2) members are Patrick Kane (“Kane”) and William Beggs (“Beggs”). Beggs testified at the Board hearing that he is only at the Appellant’s location two (2) or three (3) times a week and rarely at closing since he has another restaurant in Seekonk. He testified that he spoke to the police in December, 2018 about issues at

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<sup>2</sup> <https://www.youtube.com/user/HopkintonRI/videos>.

the Appellant and told them that he would take care of the issues so began to stop serving at 12:45 a.m. rather than 1:00 a.m. He testified that he was called by the police one night in May, 2019 when Kane had passed out drunk so that he, Beggs, came to the Appellant to close.

Kane was called to testify but asserted his 5<sup>th</sup> amendment rights. At the stay hearing, it was agreed that Kane is currently being charged with obstruction of justice (in relation to a car accident of August 16, 2019).

Various police officers testified to various incidents in 2018 regarding the Appellant that culminated in the meeting by the police captain and police chief with Beggs on December 7, 2018. It was agreed at the stay hearing that the meeting took place after the License was renewed and that at least six (6) of the incidents detailed by the police at the Board hearing that occurred in 2018 occurred prior to the 2018 renewal of License. The testimony was that the police concerns conveyed to Beggs in December, 2018 were about drugs, overserving, and after hours.

For the 2018 and 2019 incidences, the testimony indicated that some incidences did not result in police reports. Some of the testimony regarded DWI's where the driver indicated he or she had been at the Appellant but no independent verification was established. There was testimony that the owners were spoken to in the Spring of 2019 and again after Kane was found passed out in May, 2019. There was evidence that Kane allowed a friend ("Friend") to pour his own drinks and pour drinks for others and he was not an employee.

On August 16, 2019 in the afternoon, a man was found dead in Kane's jeep that had rolled over. The testimony was that the night before (August 15 to 16), Kane, his mother, the decedent, and the Friend had stayed in the Appellant after closing drinking. The bartender on duty testified she left about 1:15 a.m. and the group were still there drinking and dancing on top of the bar (at the Board hearing, a photograph was introduced showing them dancing on the bar). The bartender

who then opened up the next morning testified that she found broken glass all over the place, two (2) racks of dirty shot glasses, and broken lamps. She testified that at 7:41 a.m., she texted the bartender who closed about the mess and the broken glass all over the place. That bartender who closed testified that it was not messy like that when she left at 1:15 a.m. and that is what she had texted back when asked. The police testimony was that the alarm was set that morning at about 4:13 a.m. The testimony was that the bartender who opened up the next day shut off the alarm about 7:30 a.m. There was testimony that it was Kane who knew how to set the alarm and was the one who set the alarm. The police testimony was that there has been three (3) other passengers in Kane's jeep that night but when it was found 12 hours later that there was just the decedent in the jeep. There was testimony that when the police served a search warrant on the establishment that Kane orally told the police that the video surveillance had reached the end of its life so there was no video. There was testimony by employees that the video had been working the day before the accident. There was testimony that the video recorded and could be rewound.

## VII. ARGUMENTS

The Appellant argued that there has been no progressive discipline imposed and there is no nexus between the fatal accident and the Appellant. The Appellant argued that the other member is already being bought out of the LLC and it is now in process of taking Kane off the LLC. The Appellant represented that Beggs has identified a manager with 20 years of experience who is currently managing a tavern in Rhode Island to manage the Appellant. The Appellant argued that the Department should follow the *Department of Corrections* and maintain the *status quo* pending a full hearing and decision. The Appellant argued that the 2019 DWI's cannot be linked to the Appellant and the License was renewed in 2018 so the 2018 incidences cannot be brought up now as the Appellant has no opportunity to defend itself against old charges.

The Board argued that there was a nexus between the Appellant and the accident because it was drinking related. The Board argued that the police spoke many times to the owners about problems and tried to work with the Appellant to fix the problems and that Beggs did not fix the problems as promised but rather left it to Kane who did not manage the establishment well. The Board argued the video surveillance was working on August 14, 2019 but then Kane claimed it was not working the next day. The Board argued that Beggs and Kane are the principals, not just a manager, who have been communication with the police and have not done anything to fix any problems. The Board argued that at the Board hearing, Beggs was not knowledgeable about Rhode Island liquor law and after Kane was found drunk and passed out in May, 2019, no changes were made even after Kane was spoken to by the police. The Board argued that the Town reasonably tried to work with the licensee so that the Appellant was on notice regarding various issues. The Board argued that the owners have been shown to be incapable of following the requirements to hold a liquor license. The Board believes that Kane interfered with the video surveillance and did not testify at hearing so an inference can be taken against his failure to testify. The Board argued that the accident supports revocation even if the 2018 incidences are too remote.

## **VIII. DISCUSSION**

The Board included in its notice of hearing to the Appellant a list of incidences from 2018 and 2019 against the Appellant. None of the 2018 incidences resulted in any formal sanction. None of the 2019 incidences had resulted in a formal sanction until the accident when the Town initiated this action. In *DL Enterprises d/b/a East Bay Tavern v. East Providence City Council*, DBR No.14LQ009 (4/28/19), the Department noted in its decision that the local police chief had testified anecdotally to other incidences on the premises where no formal discipline against the licensee had been rendered so they could not be considered in any decision. Here, there were



apparently police reports entered at the Board hearing but not all incidences had police reports and no formal allegations had been made regarding any of the incidences prior to this hearing.

There really are two (2) issues in this matter. One is whether the prior incidences from 2018 and some from 2019 are relevant and/or provable. The second issue is the accident and its relation to the Appellant and could it by itself justify revocation or could it in conjunction with some incidences - depending on what is proved - be enough to justify revocation. Certainly, the issue of Kane passing out in May, 2019 with apparently no improvement in management after that is also a factor in any decision.

It was uncontradicted at the Board hearing that there were violations of Section 1.4.18 of 230-RICR-30-10-1 *Liquor Control Administration* Regulation which provides as follows:

1.4.18 Hours of Business - Retail

A. All patrons shall leave the licensed premises not later than 1:20 a.m. where the licensee is permitted to remain open until 1:00 a.m. Last call shall be at 12:45 a.m. Where licensee is permitted by local ordinance or permit to remain open until 2:00 a.m. all patrons must leave the licensed establishment by 2:00 am. All employees shall leave the licensed premises within one-half hour after the required closing time; provided the owner or employees may enter or be in a licensed establishment at any time for a legitimate business purpose with approval from the local police department. This paragraph shall not apply to a Class B-C license.

B. The owner or employees may not consume alcoholic beverages on the premises after the legal closing time or before the legal opening time.

C. No employee shall be allowed on the premises for maintenance purposes earlier than two hours before the legal opening time. The local licensing authority may authorize additional hours for maintenance purposes upon written application and after hearing by the local licensing authority. In the event of emergency, the licensee may request an extension of time for cleaning and/or maintenance purposes from the local police department. Such extension, if granted, shall be for a specific time. This paragraph shall not apply to a Class B-C license.

D. No one, other than the owner, employees, or law enforcement personnel, shall be admitted to the premises after the required closing time or before legal opening time.

On the evening of August 15 to August 16, 2019, the evidence was that Kane and his friends were on the premises after 1:20 a.m. The friends should have left by 1:20 a.m. and Kane should have left by 1:30 a.m. The evidence was that after the bartender left at 1:15 a.m., the alarm was set at 4:13 a.m. and the place trashed since broken glass (including lamps) was all over the place the next morning but had not been there when the bartender left. It is clear that the Board has a substantially likelihood of success on the merits in terms of proving some violations related to August 15 and 16, 2019. E.g. hours of operation.

The issue will be whether this matter is more like *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) or *Davinci Lounge and Restaurant Inc. and Davinci Cigar Bar, Inc. City of Providence, Board of Licenses*, DBR No. 19LQ004 (4/3/19). Revocation has been imposed for a solitary severe act.

In *Cardio*, an incident started inside and escalated outside and led to the killing of a patron with the licensee failing to call the police which justified revocation. Here, the owner/manager was drinking after hours and the police believed he was somehow involved in the accident that killed the decedent so that Kane has been charged with obstruction of justice. The police believe he did something to the video surveillance system so it could not be accessed. Without Kane's testimony,<sup>3</sup> the Board could infer that he had been involved somehow in the accident and did somehow interfere in the police investigation. Furthermore, a licensee has the obligation to conduct its business to comply with the law and is responsible for violations of the law even if it

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<sup>3</sup> A negative inference may be drawn from Kane's refusal to testify. The drawing of a negative inference Kane's failure to testify is also supported by the "Empty Chair Doctrine" which can be invoked in a civil matter but not in a criminal proceeding. *State v. Taylor*, 581 A.2d 1037 (R.I. 1990). It is a rule of jurisprudence that states that if a party in a contested legal proceeding fails to call a readily available witness who would normally be expected to testify to a material issue, the fact-finder may presume that if the witness did testify, the evidence would have been prejudicial to the party's cause. *Belanger v. Cross*, 488 A.2d 410 (R.I. 1985); and *Retirement Board of Employees' Retirement System v. DiPrete*, 845 A.2d 270 (R.I. 2004). See also *Benevides v. Canario*, 301 A.2d 75 (R.I. 1973) (doctrine is to be applied with caution so that as a condition precedent to its invocation there must be a showing of the missing witness's availability to the person who would be expected to produce the witness).

had no knowledge of such violations. *Scialo v. Smith*, 210 A.2d 595 (R.I. 1965). While Kane has the right not to testify, there is a question of his honesty with the police during the investigation of the fatal accident that occurred after he and his friends left the Appellant and his friend was found dead in Kane's jeep. As found in *The Vault, LLC v. City of Providence, Board of Licenses*, DBR No.: 16LQ008 (9/14/16), a lie to the police by a licensee or staff violates R.I. Gen. Laws § 3-5-21(b) since it is axiomatic that a condition of licensing would include being honest when questioned by the police during an investigation of a shooting or in this case during this type of investigation into a death. *The Vault* resulted in various suspensions, but *Cardio* resulted in a revocation.

At the same time, after a full hearing on appeal, it could be that the actions by Kane would justify a long suspension as well as barring him from working and/or managing the Appellant as in *Davinci Lounge and Restaurant Inc.* In that matter, one of the licensee's co-owners was accused of trying to bribe a police officer to look the other way over an entertainment without a license violation. The co-owner did not testify at the local licensing hearing. Due to his actions, that licensee's late night license was revoked and the BV license suspended for 100 days<sup>4</sup> and the co-owner was barred from working/managing that licensee.

The Board is rightfully concerned with the Appellant's management. Kane certainly does not appear qualified to manage an establishment based on the testimony before the Board. The Appellant argued that the Department should maintain the *status quo* pending the appeal. The Board argued that there was a danger to the public if the Appellant remained open. However, without a stay, the Appellant will not be able to have a meaningful appeal of the revocation. Finally, case law allows a stay to be issued as a matter of discretion in order to maintain the *status quo* pending the full hearing. At the Board hearing, there was testimony that this establishment

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<sup>4</sup> The decision found that while the co-owner's actions did not constitute disorderly conduct, his actions represent a danger to the public by undermining regulatory enforcement.

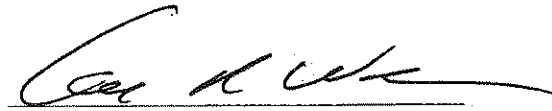
was only place in town with a liquor license that opened to 1:00 a.m. In this situation, the *status quo* can be maintained and public safety issues can be addressed by the following:

1. Kane is not to work or manage the Appellant.
2. The Appellant can only open each night as late as 11:00 p.m.
3. The Appellant and its proposed new manager will meet with the Board so that the proposed new manager can explain his experience and plans for operating the Appellant and the Appellant will provide the Board with said manager's resume prior to re-opening.
4. The Appellant cannot re-open without a working surveillance system that records video and must provide proof to the Board that said surveillance system is working prior to re-opening.
5. The Appellant must provide the Board with a security plan prior to re-opening that addresses the operation of the Appellant including the hours of operation and security and present it at a Board meeting. The Board may decide at the meeting, if the plan should include weekend security or a police detail (if not provided for already).
6. The Appellant must provide proof to the Board that as represented at the stay hearing, it is working on or has removed Kane from the LLC prior to re-opening.

**IX. RECOMMENDATION**

Based on the foregoing, the undersigned recommends that a stay be granted for revocation of the Class BV provided the conditions of the stay are met by the Appellant.

Dated: 10/7/19

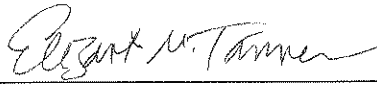
  
Catherine R. Warren  
Hearing Officer

**INTERIM ORDER**

I have read the Hearing Officer's Recommended Order in this matter, and I hereby take the following action with regard to the Recommendation:

  X   ADOPT (see attached Supplement)  
       REJECT  
       MODIFY

Dated: 10/09/2019

  
\_\_\_\_\_  
Elizabeth Tanner, Director  
Director


A hearing will be scheduled on a mutually convenient date to be determined by the parties.<sup>5</sup>

**NOTICE OF APPELLATE RIGHTS**

**THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.**

**CERTIFICATION**

I hereby certify on this 9<sup>th</sup> day of October, 2019 that a copy of the within Order was sent by first class mail, postage prepaid and by electronic delivery to the following: Kevin J. McAllister, Esquire, Hopkinton Town Solicitor, 362 Broadway, Providence, R.I. 02909, Michael P. Lynch, Esquire, 117 High Street, P.O. Box 761, Westerly, R.I. 02891, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, and Christopher Masselli, Esquire, Law Office of Thomas E. Badway & Associates, 1052 North Main Street, North Providence, R.I. 02904 and by hand-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

  
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<sup>5</sup> Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant is responsible for the stenographer.

**DIRECTOR'S SUPPLEMENT TO ORDER**

The following condition is added to the order:

7. The Appellant will also provide the Board with an alcohol service compliance plan prior to re-opening.