STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND 02920

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

DECISION

I. INTRODUCTION

On or about September 30, 2019, the Town of Hopkinton ("Town") Town Council sitting as the Board of Licenses ("Board") revoked ABK, LLC d/b/a Boneyard BBQ and Saloon's ("Appellant") Class BV liquor license ("License"). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board's decision to the Director of the Department of Business Regulation ("Department"). The undersigned was designated by the Director of the Department to hear the appeal. The Appellant filed two (2) motions to stay to which the Board objected and conditional orders to stay were issued by the Department on October 9 and November 19, 2019. The appeal hearing was held on November 7, 2019. The parties were represented by counsel. The parties timely filed briefs by December 16, 2019.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R. I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, and 230-RICR-30-10-1 *Liquor Control Administration* regulation ("LCA Regulation").

III. ISSUE

Whether the Appellant engaged in the violations as found by the Board, and if so, what is the appropriate penalty.

IV. MATERIAL FACTS AND TESTIMONY

At the Board hearing, William Beggs ("Beggs") was called to testify by the Town. He testified there are three (3) members of the Appellant LLC including him and Patrick Kane ("Kane"). He testified that the License was issued in February, 2018, and he was there for its renewal in November, 2018, but Kane was not. He testified he has owned a "Boneyard" restaurant for 12 years in Seekonk, Massachusetts but goes two (2) or three (3) times a week to the Appellant. He testified he spoke with the police chief and captain in December, 2018 about the Appellant and told them he would take care of potential drug activity and overservice of liquor problems. He testified that he started closing the Appellant 15 minutes earlier so everyone would be out on time, but he was not aware of the time that a 1:00 a.m. licensee has to have its patrons exit by. He testified he spoke to Kane about the police chief's concerns, but Kane never told him about Kane's other conversations with the police. He testified when he, Beggs, goes to the Appellant it is usually dinner time, and has only been there until 1:00 a.m. about three (3) or four (4) times since February, 2018. He testified that managers are not supposed to drink on the job but can accept drinks and he has an employee handbook but did not know what was in it. He testified he was aware of the May, 2019 incidence when Kane was working but passed out drunk, so he, Beggs, went to the Appellant that night and closed up but he did not take any other steps after that incident. He testified he was aware that Kane's jeep was involved in an accident when Derrick Payne ("Payne") died, but he did not do any investigation on behalf of the Appellant into that incident. On cross-examination, he testified he has never had any disciplinary issues with his Seekonk liquor license.

Kane was called as a witness for the Town; however, his attorney asserted that he would not testify and would invoke his right against self-incrimination, and that absent the Hopkinton police dismissing the charge against him, Kane would not answer any questions.

Christopher Scheib testified on behalf of the Town. He testified that he is the Information Technology director for the Town, and he went to the Appellant on August 16, 2019. He testified that he observed a set-up for video surveillance and it had all the pieces except the one piece that processes and records the video was missing. There was no cross-examination.

Patrol Officer Alexander Villanis testified on behalf of the Town. He testified in June, 2018, he responded to a one (1) car accident near the Appellant at about 4:00 p.m., and the operator was stumbling and mumbling and it was about 100 yards from the Appellant. He testified that the operator was charged with DUI and refusal to submit to a chemical test, and the operator said he had been at the Appellant. He testified that on April 20, 2019, he was working the third shift and at about 3:00 a.m., he observed someone in the Appellant's parking lot passed out and the driver refused to get out of the car after he identified himself as a police officer and he ended up arresting the operator who was convicted of assaulting a police officer. On cross-examination, he testified that for the June, 2018 DUI, he did not go to the Appellant after that person was charged so the only evidence that the operator had been drinking at the Appellant was the operator's own statement. He testified that he was not aware of the Appellant being notified of this DUI arrest.

Patrol Officer Albert Gaccione ("Gaccione") testified on behalf of the Town. He testified that since February 2018, he has been inside the Appellant about 30 times. He testified that he has seen patrons with drinks at 1:00 a.m. or at 1:30 a.m. He testified that he spoke to Kane in April, 2018 about the rules for when alcohol can be served and when the patrons have to leave. He testified that many times when he spoke to Kane, Kane had been drinking. He testified he was

able to get inside after 1:30 a.m. because the doors would be unlocked. He testified that in December, 2018, he went to the Appellant for a domestic assault which raised concerns about drug activity. He testified that he was aware that his superiors spoke to Kane in December, 2018. He testified he responded to a call in March, 2019 for an intoxicated patron. He testified that things improved a bit after December, 2018. He testified that in April, 2019, he responded to the home of a man who had fallen off his porch and said that he had been at the Appellant's earlier. He testified that he responded to a call in May, 2019 when Kane had passed out mumbling on the floor covered in vomit and had defecated. He testified that Kane spoke to him later and apologized. He testified that he was involved in a DUI arrest in May, 2019 when a driver said he had been coming from the Appellant. He testified that on August 23, 2019, he pulled over a car who he had seen leave the Appellant's parking lot and the driver was unresponsive with bloodshot eyes and failed the field sobriety test. He testified that at the request of the police chief, he compiled a list of various incidences that totaled about 20 that were connected to the Appellant. See "Exhibit B" attached to the Notice of Hearing issued by the Town to the Appellant in the certified record.

On cross-examination, Gaccione testified he never before prepared a list like Exhibit B. He testified that in the list he wrote that he saw patrons approximately ten (10) times at the Appellant past 1:20 a.m. but he did not make any reports at the time. He testified that the list says he saw Kane intoxicated about 20 times at the Appellant, but he did not make any reports at the time. He testified that he spoke to the bartender about the man who fell off his porch and the bartender said the man had two (2) beers and two (2) shots.

Sargent Jason Eastwood testified on behalf of the Town. He testified that in April 2018, he got a 9-1-1 hang-up call from the Appellant and when he went there, he spoke to Kane and did not find anyone but later he identified the caller who said there had been an assault but she did not

want to be identified. He testified in May, 2018, he spoke to Kane about service after hours. He testified in September, 2018, he responded to a highly intoxicated female outside Appellant who had been consuming alcohol there. He testified that in March, 2019, he responded to the Appellant for an intoxicated patron who refused to leave. He testified that in May, 2019, he pulled over a driver who almost ran into him and was intoxicated and apparently coming from the Appellant and he then spoke to Kane about two (2) days later about overserving and other issues. On cross-examination, he testified that when he spoke to Kane in May, 2019, he did not make a report and did not ask him if that operator had been at the Appellant.

Detective John Forbes ("Forbes") testified on behalf of the Town. He testified that he investigated the death of Payne and the call had come in as a rollover motor vehicle accident. [It was uncontradicted that the vehicle was on the Appellant's premises; Forbes testified to that on cross-examination]. He testified that as he approached the vehicle, he saw a lone occupant who was deceased, and he detected the odor of alcohol from the victim. He testified that Payne was pinned beneath a jeep that he learned later was Kane's jeep. He testified he met with Kane within an hour. He testified that he learned that forensic biology supervisor at the Department of Health that Payne's blood alcohol was .104. He testified that he learned Payne had been at the Appellant and had been seen drinking. He testified that he spoke with a patron and she had taken pictures with her iPhone of several people standing on the bar that night. He testified that he saw the picture and in the picture is Stephanie Kane (Kane's mother), Kane, Zachary Pion ("Pion"), Payne, and Yvette Johnson ("Johnson"). He testified that the picture was taken on August 16, 2019 at approximately 12:24 a.m. See certified record. He testified that he heard that Kane managed the Appellant that night. He testified that he saw video surveillance cameras so they returned at 9:00 p.m. on August 16 with search warrants and spoke with Kane and Kane was unable to provide any

video surveillance and Kane said the system was at the end of its life and did not work so he had sent it out three (3) months ago to be serviced and then later said the system had been removed two (2) months ago. He testified that his partner spoke with Pion who said they had been there with Payne that night and they all left at the same time, but he did not say the time. He testified that the coroner was there at 2:00 p.m. and thought death had occurred approximately 12 hours earlier. He testified that the Appellant's building alarm had been set at 4:13 a.m. on August 16, 2019 and only Kane can lock up. He testified that Pion said that Payne had gone to his own vehicle and Kane and Kane's mother were too drunk to drive so he drove them back to Kane's condominium in Westerly. He testified that Pion's statement was that Kane could not drive himself. He testified that he asked Kane and Kane said he had no knowledge of the incident and he, Kane, was advised by his attorney not speak with him.

On cross-examination, Forbes testified that the call came in as a rollover motor vehicle accident and he was dispatched to the Appellant's. He testified he took measurements and photographs of the scene with another detective and they both were trained in accident reconstruction. He testified that when they examined the jeep and accident scene, there was an abundance of physical and trace evidence indicating that there were three (3) passengers and the driver in the jeep at the time of the accident. He testified that the evidence showed that four (4) seatbelts had been activated and that there were fingerprints on the vehicle indicating that someone had tried to wipe the jeep down. He testified that the fingerprint and blood tests were not yet back from the Department of Health laboratory. He testified that the search warrant for the video surveillance was based on duty to render aid and failure to report a death. He testified that there was a camera in the front parking lot and a camera in the rear where the accident occurred but they did not obtain any video. He testified that he had not told Kane that a warrant would be issued.

Melvin Caplinger testified on behalf of the Town. He testified he worked at the Appellant as a dishwasher. He testified that he worked on August 14, 2019 and from the kitchen, he could see the video of the restaurant. There was no cross-examination.

Jennifer Bedard ("Bedard") testified on behalf of the Town. She testified that she had previously worked at the Appellant as a janitor/bartender/server. She testified that on August 15, 2019, she started work at 5:00 p.m. and would have usually left about 1:15 a.m. but that night, she left at 11:00 p.m. because Kane relieved her of duties. She testified she came in the next morning about 7:30 a.m. and turned the alarm off and found a lot of broken glass. She testified that there was a pile of broken glass, broken glass on top of the bar, behind the bar, under the bar, and in the ice bowl area, as well as two (2) racks of dirty shot glasses. She testified that the bar is not usually left that way when someone leaves at 1:15 a.m. She testified that usually there would be maybe a half a rack of dirty dishes and there would not be broken glass all over the place and certainly not in the ice wells. She testified that the bartender was Malorie Carpenter ("Carpenter") that night and she, Bedard, had previously opened up after Carpenter had worked so she texted Carpenter that morning around 7:41 a.m. and asked her what happened last night. She testified that Carpenter replied that "they" were drinking, and being "assholes" and were still there when she left at 1:15 a.m. She testified that the video surveillance was working prior to August 15, 2019 because Kane would text her things like to put on the patio lights because he could access the video through his cell phone, and Kane never told her the cameras were not working.

On cross-examination, Bedard testified she did not know if the video actually recorded, or if Kane was just texting about observations he could see. She testified she once looked at a video with Kane because someone had stolen a sweatshirt and she looked at the video another time about a car being hit and went through the videotape. She testified when she was cleaning up the next

morning, she found Payne's car keys in his work shirt so how could he have gotten to his car when his keys were in his work shirt in the bar locked in the building.[1]

Carpenter testified on behalf of the Town. She testified she worked at the Appellant on August 15, 2019 and was the only bartender with Bedard leaving at 11:00 p.m. so she was there with Kane. She testified that Kane served drinks to himself, Pion, Johnson, and Payne and those were the only ones he was serving. She testified that when she left, Kane, Stephanie Kane, Pion, Johnson, Johnson's boyfriend Brian, and Payne were there. She testified that Bedard texted her in the morning, "WTF happened here" and she replied, "Jenny, I can't even." She testified when she left at 1:15 a.m., there was no broken glass. She testified that she told Bedard that Kane and Pion were dancing on the bar and that they took off their shirts and danced on the bar while Stephanie Kane and Johnson recorded it. She testified that Pion does not work there but poured his own drinks and she did not know if Pion was "TIPS" certified. She testified that Kane allowed Pion to pour his own drinks and put them on Pion's tab from November, 2018 to August, 2019 and that Pion would come in about every other week. There was no cross-examination.

Captain Mark Carrier testified on behalf of the Board. He testified that he met with Beggs and the police chief on December 7, 2018 about overserving. He testified that at that time, they did not know there were other owners besides Beggs. On cross-examination, he testified that he had never sought any type of discipline against the Appellant until this hearing.

The Appellant called Officer Gaccione to testify. He testified about the timeline he prepared. He testified he used the chief's list of incidences (Exhibit A) to help him compile his list. He testified that he used Exhibit A for dates and times. There was no cross-examination.

[1] She texted Carpenter that morning she had found the shirt and keys and also texted that two (2) lamps were broken in response to Carpenter texting there was no broken glass when she left. Certified record (Exhibit Seven (7)).

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. The Appeal before the Department

After the end of prohibition of liquor within the United States, Rhode Island implemented a new system of statewide control of liquor coupled with local authority to grant certain licenses. See P.L. 1933 ch. 2013. The intent of the new system was to eliminate the old unsupervised system of local regulation that resulted in a lack of uniformity and grave abuses that seriously affected the public welfare and instead vested broad powers of control and supervision in a state system. *Baginski v. Alcoholic Beverage Commission*, 4 A.2d 265 (R.I. 1939).

In keeping with the Department's statewide oversight and mandate to "establish a uniformity of administration of the law for purpose of promoting temperance throughout the state,"

the Department has broad statutory authority to review liquor appeals. *Baginski,* at 268. See also *Tedford et al. v. Reynolds*, 141 A.2d 264 (R.I. 1958). *Baginski* held that since the Department[2] is a "superlicensing board," it has the discretion to hear cases "*de novo* either in whole or in part." *Baginski*, at 268. Thus, an appeal may hear new testimony in part and/or may rely on the hearing before the local licensing authority. However, as the review is *de novo* the parties start afresh during the appeal but the Department has the discretion to review the local authority partially *de novo* and partially appellate as seen fit. *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964). Since the Department is charged with ensuring statewide uniformity, it follows that the statutory scheme grants the Department the authority to revise or alter decisions of local boards. *Id.* Further, since the liquor appeal hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence. *Id.* See also *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (Department's jurisdiction is *de novo* and the Department independently exercises the licensing function).

The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision. Thus, this appeal is not bound by the Board's reasons for revocation but whether the Board presented its case for revocation before the undersigned. The undersigned will make her findings on the basis of the evidence before her and determine whether that evidence justifies said revocation.

As the Department has statewide authority and indeed the statutory intent is to ensure statewide consistency, 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

[2] At that time the alcoholic beverage commission.

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). Thus, the unevenness in the application of a sanction does not make it unwarranted in law. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). However, a sanction must be proportional to the violation and if there is an excessive variance in a sanction than it will be found to be arbitrary and capricious. *Jake and Ella's* 2002 WL 977812 (R.I. Super.). In reviewing local authorities' decisions, the Department ensures that local authorities' sanctions are not arbitrary and capricious and that statewide such sanctions are consistent and appropriate (otherwise sanctions would be arbitrary).

In order to suspend or revoke a liquor license, there must be a showing that the holder breached an applicable rule or regulation. In order to impose discipline, cause must be found. *Chernov Enterprises, Inc. v. Sarkas*, 109 R.I. 283, 287 (1971) found that cause shall mean, "we have said that a *cause*, to justify action, must be *legally sufficient*, that is to say, it must be bottomed upon substantial grounds and be established by legally competent evidence." (italics in original).

An appeal proceeding held pursuant to R.I. Gen. Laws § 3-7-21 is considered a civil proceeding. See *Board of License Commissioners of Tiverton v. Pastore*, 463 A.2d 161 (R.I. 1983). In civil proceedings, unless otherwise specified, the burden of proof generally needed for moving parties to prevail is a fair preponderance of the evidence. *Jackson Furniture Co. v Lieberman*, 14 A.2d 27 (R.I. 1940). See also *Parenti v. McConaghy*, 2006 WL 1314255

(R.I.Super.); and *Manny's Café, Inc. v. Tiverton Board of Commissioners*, LCA TI-97-16 (11/10/97) (Department decision discusses burden of proof for proceedings held pursuant to R.I. Gen. Laws § 3-7-21). Thus, in order to sanction a liquor license, there must be substantial grounds established by the preponderance of legally competent evidence.

C. Relevant Statutes

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 . . . 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 provides 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:
>
> (1) Breach by the holder of the license of the conditions on which it was issued; or
>
> (2) Violation by the holder of the license of any rule or regulation applicable; or
>
> ***
>
> (4) Breach of any provisions of this chapter.

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
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> 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.

R.I. Gen. Laws § 3-7-6.1. requires all people who sell or serve alcohol to be TIPS certified.

D. Arguments

The Board argued that the issue is not about an employee, but two (2) owners and holders of the License. The Board argued that Begg's own testimony showed he did not know statutory requirements for liquor licensees, and he did nothing after Kane passed out drunk while managing the Appellant. The Board argued that a negative inference can be made regarding Kane's refusal to testify. The Board argued that neither Beggs nor Kane made changes after many conversations with the police. The Board argued that while the renewal was granted in November, 2018, the police had been trying to work with a new licensee and the Appellant never addressed those issues. The Board argued that on August 15, 2019, Kane served himself and his friends alcohol, and allowed a friend to serve himself and they stayed after hours. The Board argued that it was Kane's jeep involved in the accident causing the death of someone Kane had just been with. The Appellant argued that the security video which was working had been removed with the claim it had been sent away months ago. The Board argued that the evidence was uncontradicted by the Appellant.

The Appellant argued that the incidents used by the Board were inappropriate because it was not given proper notice of the violations since they went back to prior to the 2018 renewal and

were not shown to be related to Appellant. E.g. the DUIs, the man who fell off his porch. The Appellant argued that the 2018 incidences could have been used at renewal time but were not. The Appellant argued there was no toxicology report introduced regarding Payne and there was no evidence that the surveillance recorded anything, and it was clear it was a live feed system. The Appellant argued there was no competent evidence that 1) Payne's death was alcohol related; 2) that Kane was actually working on August 15, 2019; and 3) anyone lied about the video system.

E. Whether the Appellant Violated the Liquor Statute and/or Regulation

i. August 15-16, 2019

The uncontradicted evidence was that night Kane relieved Bedard as the bartender and he and his friends were drinking together and dancing on the bar prior to closing time. (12:24 a.m. photograph). Kane allowed someone who did not work there, Zion, to pour drinks for himself and friends and had done so previously. The Appellant argued that there was no evidence that Kane was working at the Appellant that night. Carpenter testified she was the only bartender after Kane relieved Bedard of her duties. Whether Kane was officially working as the bartender or not, Kane was the owner and was there that night certainly in a management position as he relieved Bedard of her duties and was allowing Pion to pour drinks. The evidence was that when Carpenter left at 1:15 a.m., there was no broken glass and Kane and Pion were pouring drinks. The next morning, there were dirty glasses and broken glass everywhere including in the ice well. The evidence was that the Appellant's alarm was set at 4:13 a.m. and could only be set by Kane. The inference is that after Carpenter left, Kane and his friends kept drinking and smashed glasses either because they were fighting or because they thought it fun to break glass and either way they were drunk.

The evidence was that Payne was found in the afternoon of August 16, 2019 dead in Kane's jeep on the Appellant's property and Payne's car keys were found in his work shirt inside the

Appellant. The evidence (testified to by a police officer) was that Payne's blood level alcohol was .104. The evidence was that along with Payne, there were three (3) other individuals in the jeep and it looked like someone had tried to wipe away fingerprints. There was testimony that the video surveillance had been working the night before. There was evidence that Kane could see the video via his cell phone and there was evidence that the video could be rewound while searching for something that happened (testimony about looking for a previous car accident).

Kane has been charged obstruction.[3] The Board's administrative proceeding on whether these licenses should be suspended or revoked is a separate and distinct proceeding from any potential criminal proceeding even if the former is based on parallel facts from the latter. Both types of proceedings have separate and distinct purposes. The purpose of any potential criminal proceeding is the punishment of the wrongdoer whereas the purpose of the appeal to the Department arises out of the local licensing authority and the Department's authority to protect the public by regulating liquor licensees.

Even if Kane is never charged or if he charged and acquitted of the criminal charges, the Board could nevertheless seek revocation of the License, even if based on similar facts because there is no *res judicata* on the basis of the outcome of the criminal charges. Parallel proceedings are proper and constitutional. See *United States v. Kordel*, 397 U.S. 1 (1970).

The United States Constitution's Fifth Amendment privilege against self-incrimination may be properly invoked in a civil proceeding regardless of whether there is a pending criminal matter arising out of the same set of factual circumstances. *Tona v. Evans*, 590 A.2d 873 (R.I. 1991), citing *Kordel*, at 7-8. See also *Simeone v. Charron*, 762 A.2d 442 (R.I. 2000); and *Pulaski v. Pulaski,* 463 A.2d 151 (R.I. 1983). However, a negative inference may be drawn against a party

[3] See Department's transcript of November 7, 2019 hearing, p. 20.

who refuses to testify. *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Furthermore, "an inference may be drawn against a party in a civil case who declines to answer questions or to testify in a civil case." *Pulawski v. Pulawski*, 463 A.2d 151, 156 (R.I. 1983). See also *Flint v. Mullen*, 499 F.2d 100 (1st Cir. 1974), *cert. den.* 419 U.S. 1026 (1974); and *Rhode Island v. Cardillo*, 592 F. Supp. 655 (R.I. 1984).

Here, Kane did not testify at the Board hearing. His counsel asserted his fifth amendment rights. Thus, a negative inference may be drawn from Kane's refusal to testify.[4] Kane also appeared at the Department hearing which is a *de novo* hearing and did not testify.

The Appellant argued that the video surveillance system was just a live feed system but did not offer any evidence to support that claim. Instead, there was uncontradicted evidence that the video system worked on August 14, 2019 (as opposed to the testimony regarding Kane telling the police he sent the system away in prior months) and that it did record (could be rewound). The police were unable to obtain the surveillance video when the police executed a search warrant. The inference can be drawn from the evidence presented as well as separately from Kane's failure to testify that the video system was working and Kane removed the video recording system.

It can be inferred that Kane's friends stayed past 1:20 a.m. as Carpenter left at 1:15 a.m. and Kane and his friends remained drinking and smashing glass. It can be inferred that they stayed later than 1:30 a.m. as well as such a mess would longer than 15 minutes to create. The alarm was set at 4:13 a.m. either when they left or if Kane went back after they left and set it.

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[4] The drawing of a negative inference from 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).

In terms of disorderly conduct, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. Rather, the Rhode Island Supreme Court held in *Cesaroni v. Smith*, 202 A.2d 292, 295-6 (R.I. 1964) as follows:

> [T]he legislature, in enacting the pertinent provision of the statute, intended to impose upon such licensee the obligation to maintain an efficient and affirmative supervision over the conduct of his patrons in his place to such an extent as is necessary to maintain order therein. It is our opinion that as a practical matter a licensee assumes an obligation to affirmatively supervise the conduct of his patrons so as to preclude the generation therefrom of conditions in the neighborhood of like character to conditions that would result from maintenance of a nuisance therein.
>
> It is to be conceded that this imposes upon a licensee an onerous burden in the management of the licensed premises. It is, however, within the authority of the legislature, the liquor traffic being peculiarly within the police power of the state.

Furthermore, the Court found that "disorderly" as contemplated in the statute meant as follows:

> The word "disorderly" as used here contemplates conduct within premises where liquor is dispensed under a license that causes either directly or indirectly conditions in the neighborhood in annoyance of or disturbing to the residents thereof. *Id.* at 296.

Thus, 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, 859 (R.I. 1980). 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 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 (R.I. 1966). See also *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965). See also *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d 269 (R.I. 1984); and *Furtado v. Sarkas*, 118 R.I. 218 (1977).

In this matter, Kane and his friends engaged in disorderly conduct inside the premises. This conduct arose from their drinking, allowing Zion to pour drinks when he was not employed (and not TIPS certified), and after hours breaking of glasses and lamps. In this situation, it was not just patrons involved in disorderly conduct but the conduct was allowed for by the owner and manager. Not only does this conduct arise to disorderly conduct, there is the issue of did that conduct directly or indirectly cause the accident. There was no direct testimony from anyone about what happened after Kane and his friends left. The police testified as to a statement from Pion but that statement is contradicted by the evidence of the police that four (4) people were in Kane's jeep and Payne's car keys were in the bar. The undersigned will not make an inference that the late night carousing caused the death of Payne, but an inference can be made that the disorderly conduct inside the bar spilled outside so that there was disorderly conduct outside.

In addition, the Appellant violated conditions of licensing by not cooperating with a police investigation. The Appellant further violated conditions of licensing by after hours service, staying past the exit time, and allowing a nonemployee to pour drinks for himself and friends. Separate and apart from his refusal to cooperate with the police, Kane's approach to management appears to be nonexistent on August 15-16, 2019. Based on the testimony of the bartenders and the police, it would appear on that night and others, Kane approached his job not as a job but as his own place to throw a party.

Based on the foregoing, on August 15-16, 2019, the Appellant violated R.I. Gen. Laws § 3-5-23 (disorderly conduct), R.I. Gen. Laws § 3-5-21 (conditions of licensing: refusal to cooperate with police, removing evidence, allowing non-employees to serve self and others, failure to comply with regulations and statute), and Section 1.4.18 of the LCA (patrons not exit by 1:20 a.m., staff not exit by 1:30 a.m., drinking by owner and patrons past closing time).

ii. **May 19, 2019**

It was uncontradicted that Kane was the on duty manager that night and passed out drunk that night and an ambulance was called.

iii. **Other Incidences**

There was testimony regarding DUI stops and other police calls to the Appellant going back to 2018 with many having occurred prior to the 2018 renewal. The evidence was that at renewal time, the police chief and captain spoke to Beggs. None of these prior incidences resulted in formal discipline so no findings of fact on these allegations were made by the Board following a hearing. In terms of progressive discipline, the Department relies on past formal discipline.

The man falling off his porch may have been at the Appellant but also may have continued to drink when he got home. The DUI operators may have been at the Appellant's but there was no further investigation after the initial stop. There was someone passed on in the car in the Appellant's parking lot so presumably was drinking there but his altercation with the police was not related to disorderly conduct inside the premises.[5] Without more evidence to prove these other alleged violations in 2018 and 2019, the Department cannot make independent findings of fact to find violations. *DL Enterprises d/b/a East Bay Tavern v. East Providence City Council*, DBR No. 14LQ009 (4/28/14).

However, multiple police officers testified and Beggs testified as well that the police had ongoing conversations with Beggs and Kane regarding the Appellant's operations. In *DL Enterprises*, the licensee had an informal agreement with the police to call the police immediately if another disturbance occurred in the future and that licensee failed to do so. While there is no evidence of any such informal agreement here, the evidence is that for a few months the Appellant

[5] The Appellant raised issues of due process violations by the Town. However, as the Department's hearing is *de novo*, any alleged error of law or fact committed by the municipal agency is of no consequence. *Supra.*

improved its operation and then returned to its old ways. While there is no formal discipline charting that improvement, there is evidence that the police apparently tried to impress upon Beggs and Kane how to operate appropriately and were ignored.

iv. Investigation

Beggs took no steps after Kane passed out drunk in May, 2019. Beggs testified that he did not inquire into what happened on the night of August 15, 2019. In *DL Enterprises*, the licensee knew of a serious beating of a patron at his establishment and failed to call the police and did not inquire further into the injury. That case found the licensee violated its duty to inquire into happenings at its establishment. Here, neither Beggs nor Kane took any steps after May, 2019 to ensure Kane was fit to manage and work at the Appellant. Beggs then took no action to inquire as to what happened the night of August 15-16, 2019 when separate and apart from the death of Payne, Kane engaged in numerous statutory and regulatory violations. Indeed, a week after Payne's death, the police stopped a drunk driver seen leaving Appellant's parking lot. The Appellant violated R.I. Gen. Laws § 3-5-21 twice by failing to investigate the incidences of May, 2019 and August, 2019 regarding the actions of its own co-owner and manager.

F. When a Suspension or Revocation of License is Justified

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 shooting on one night justified revocation) and *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upheld 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 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). The Department has a long line of cases regarding progressive discipline and upholding the same. The progressive discipline imposed on a licensee depends on the violations and the circumstances of a licensee's violation(s) and must not be arbitrary or capricious.

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.*

G. Prior Sanctions

The Appellant has no prior discipline.

H. What Sanctions are Justified

In *Pakse*, the Court found that the local authority was authorized to impose a reasonable sanction that would deter the licensee from repeatedly violating the law. In contrast to *Pakse*, the Superior Court overturned the Department in *Jake and Ella*'s finding that a license revocation was arbitrary and extreme.[6] The Court found the Department ignored the concept of proportionality that was expected to be applied so that there was an abuse of discretion. The Court found that sanctions need to be reasonably related to the severity of the conduct and in considering the type of sanction to be imposed, factors such as real/potential danger to the public, the nature of any previous violations sanction, the type of violations, and other relevant facts should be considered.

[6] In that matter, the licensee had two (2) after-hour violations with the first violation receiving a monetary sanction and the second violation receiving a revocation.

In *Cardio*, the facts surrounding the fight within that bar and killing included that the patrons in the bar argued shortly before closing time and there was a physical altercation inside the bar. A stabbing occurred because of the altercation within the bar and the situation escalated in the bar so that a bouncer sprayed pepper spray or mace. In *Cardio*, the owner called 9-1-1 because a patron asked him to do so, but then he left the scene and did not return and gave inconsistent reasons for his departure. The owner testified that he did not know what was happening, but he left anyway. The egregious events in *Cardio* justified revocation of license.

The Vault, LLC v. City of Providence, Board of Licenses, DBR No.: 16LQ008 (9/14/16) found that lying to police 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." In *Davinci Lounge and Restaurant Inc. and Davinci Cigar Bar, Inc. v. City of Providence, Board of Licenses,* DBR No. 19LQ004 (4/3/20), the manager and co-owner of both licenses tried to give money to the police to ignore the appellants' violations. *Davinci* found that not only is it axiomatic that being honest when questioned by the police is a condition of licensing, it is even more obvious that not giving money – especially by a manager and an owner - to the police to overlook violations is a condition of licensing. *Davinci* found that such actions are tantamount to lying to the police and being uncooperative with the police could serve to undermine the public trust in and integrity of the licensing statutory requirements. In *DaVinci*, the licensee's late night license was revoked because of the co-owner's attempt to bribe the police officer to overlook entertainment without a license violations. The BV licenses were suspended for 100 days for the attempted bribery. The co-owner was barred from working or managing the licensee.

Here, the manager and co-owner refused to speak with the police which may be his right criminally, but this is a licensing issue with a different standard of proof as compared to a criminal

matter. Kane removed video. Kane did not cooperate with the police and refused to explain what happened after he and his friends left the Appellant. Thus, his actions represent a danger to the public by undermining regulatory enforcement. Beggs did not investigate the May and August, 2019 incidences and does not to know the statutory and regulatory requirements of liquor licenses in Rhode Island.

In terms of determining a sanction, the question is whether the events of August 15-16, 2019 are so egregious as to warrant revocation or after a finding of a violation of May 19, 2019, are those violations enough to warrant revocation following an earlier discipline.

This is not a matter where patrons fight and the fight may spill outside and the police are called. Case law mandates that a liquor licensee is responsible for any disorderly conduct inside the premises whether the licensee made a good effort or a bad effort to mitigate such behavior. Here, the activity was that the owner and manager was involved in the disorderly conduct and a number of other violations inside and outside the premises. Furthermore, there was a fatal accident on the Appellant's premises involving a drunk patron who the manager and co-owner had been drinking with that night in violation of liquor licensing laws, and the co-owner and manager refused to cooperate with and took active steps to hinder a police investigation about the fatal accident. Beggs, another co-owner, did not investigate the accident.

In May, 2019, Kane passed out drunk while managing the bar and Beggs did not take any steps to investigate the incidence or to implement steps to prevent such incidences occurring in the future. Beggs failed to any steps after May, 2019 to correct Kane's mismanagement.

Thus, the Appellant failed to investigate the May, 2019 incidence. In August, 2019, the Appellant's co-owner and manager engaged in disorderly conduct, failed to comply with rules of

operation, failed to cooperate with the police, and took steps to hide evidence from the police. The Appellant failed to investigate its own actions after the events of August 15-16, 2019.

The Appellant's violations on August 15-16, 2019 in conjunction with May, 2019 violation justify revocation. Its violations on August 15-16, 2019 also justify revocation separate and apart from the May, 2019 violation. The seriousness of the August, 2019 disorderly conduct in conjunction not only with the failure to cooperate with the police investigation but the proactive step of removing evidence rises to an egregious event to justify revocation.[7] Revocation is consistent with past Department cases and proportionate in light of the number of serious violations on August 15-16, 2019 that represent a danger to the public and serve to undermine regulatory enforcement. See *Jake and Ella's*.

Under *Thompson v. East Greenwich*, 512 A.2d 837 (R.I. 1986), a town may grant a liquor license upon conditions that promote the reasonable control of alcoholic beverages. The actions here do not justify imposing conditions such as removing Kane from day-to-day management. The Appellant's violations are more than just Kane's failures to be a responsible manager, but as detailed above show an egregious collective failure by the Appellant resulting in these serious violations for which revocation is appropriate.

VI. FINDINGS OF FACT

1. On September 30, 2019, the Board revoked the Appellant's License.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board's decision to the Director of the Department.

[7] Because of Kane's involvement as an owner and a manager and his actions, this is not a matter analogous to *Tel Aviv, LLC d/b/a Tel Aviv v. City of Providence, Board of Licenses*, DBR No. 16LQ015 (12/8/16) where a manager engaged in illegal activity by selling drugs which resulted in a suspension of the Class BVX license.

3. Conditional stays of said revocation were issued by the Department on October 9 and November 19, 2019.

4. A *de novo* hearing was held on November 7, 2019 before the undersigned sitting as a designee of the Director. The parties were represented by counsel who timely filed briefs by December 16, 2019.

5. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-1 *et seq.*, 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.*

2. The Appellant violated R.I. Gen. Laws § 3-5-21 on May 19, 2019 (condition of licensing by failing to investigate).

3. The Appellant violated R.I. Gen. Laws § 3-5-23 (disorderly conduct by owner and manager and patrons that spilled outside); R.I. Gen. Laws § 3-5-21 (five (5) violations: failure to cooperate with police, removing evidence, allowing non-employees to serve, failure to investigate, failure to comply with statute and regulation); and Section 1.4.18 of the LCA (three (3) violations: patrons not exit by 1:20 a.m., staff not exit by 1:30 a.m., after hours drinking by owner and patron) on August 15-16, 2019.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Appellant's License be revoked.

Dated: January 9, 2020

Catherine R. Warren
Hearing Officer

ORDER

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

✓ ADOPT
____ REJECT
____ MODIFY

Dated: 1/14/2020

Elizabeth M. Tanner, Esquire
Director

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 14th day of January, 2020 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.