



*Commonwealth of Massachusetts  
Department of the State Treasurer  
Alcoholic Beverages Control Commission  
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**Jean M. Lorizio, Esq.**  
*Chairman*

**AMENDED  
DECISION**

**MICHAEL'S OF STOCKBRIDGE, INC. D/B/A MICHAEL'S  
5 ELM ST.  
STOCKBRIDGE, MA 01262  
LICENSE#: 124000002  
HEARD: 09/27/2016**

This is an appeal of the action of the Town of Stockbridge Board of Selectmen (the "Local Board" or "Stockbridge") for suspending the M.G.L. c. 138, § 12 all alcoholic beverages license of Michael's of Stockbridge, Inc. d/b/a Michael's ("Licensee" or "Michael's") located at 5 Elm St., Stockbridge, Massachusetts for fifty (50) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Tuesday, September 27, 2016.

The Commission left the record open until November 16, 2016 to enable the parties to submit additional evidence and set a deadline of December 7, 2016 for the parties to submit written closing briefs. On or about November 15, 2016, the Local Board submitted to the Commission the Affidavit of Officer Samuel Stolar. There was no objection filed by the Licensee. The Commission has accepted the affidavit in evidence and marked it as Exhibit 21, per the Local Board's request. Both parties submitted closing briefs on December 6, 2016. The record is now closed.

The following documents are in evidence as exhibits:

1. Local Board Decision 4/29/2016;
2. DVD Recording #1;
3. DVD Recording #2;
4. DVD Recording #3;
5. DVD Recording #4;
6. Local Board's Liquor Violation Guidelines;
7. Local Board's Notice of Hearing 4/15/2016;
8. Local Board's Notice of Hearing 4/19/2016;
9. Certified Mail Receipt signed by J. Abdalla, 4/21/2016;
10. Great Barrington Police Department Summons Report #15-154-AR;
11. Great Barrington Police Department Arrest Report #15-62-AR;
12. Plea Hearing Decision 3/31/2016;

13. Transcript of 3/31/2016 Plea Hearing;
14. Transcript of Local Board's Hearing, 4/27/2016;
15. TIPS Certification for D. Andre;
16. TIPS Training Manual;
17. Affidavit of Kevin Norton;
18. Affidavit of Matthew M.;
19. Licensee's Motion to Quash Non-Party Witnesses;
20. Local Board's Opposition to Licensee's Motion; and
21. Affidavit of Great Barrington Police Officer Samuel Stolzar.

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

The Commission took Administrative Notice of the Licensee's Commission File.

### FINDINGS OF FACT

The Commission makes the following findings based on the evidence presented at the hearing:

1. Michael's of Stockbridge, Inc. d/b/a Michael's ("Licensee" or "Michael's") located at 5 Elm Street, Stockbridge, Massachusetts, holds a § 12 all alcoholic beverages license. (Commission File)
2. Michael's has had its license since 1986, and its owner and licensed manager is Michael Abdalla. (Commission File)
3. On the night of April 3, 2015, brothers Garrett and Kevin Norton had friends to their home. Kyle Bailey arrived at about 7:45 p.m., Matthew M.<sup>1</sup> arrived around 8:00 p.m., and Anthony Pultorak arrived at about 8:10 p.m. (Exhibits 17, 18)<sup>2</sup>

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<sup>1</sup> The Commission does not identify minors.

<sup>2</sup> The Commission accepted in evidence the affidavits of Kevin Norton and Matthew M., who were subpoenaed to testify at the September 27, 2016 hearing but refused to appear. (Exhibits 17, 18) The Local Board served the subpoenas on Kevin Norton and Matthew M. a few days before the Commission hearing date. (Exhibit 19) On September 26, 2016 at 4:28 p.m. (the evening before the hearing), counsel for Norton and Matthew M. objected to the subpoenas and requested that affidavits they prepared be accepted in lieu of their testimony. (Exhibit 19) The affidavits are signed under the penalties of perjury. (Exhibits 17, 18) The objection was premised on the distance between Boston and Berkshire County (the witnesses' residences) and the failure to give adequate notice. (Exhibit 19) At 5:55 p.m. that evening, counsel for the Local Board filed a limited opposition to the witnesses' objections to the subpoenas asserting that the Local Board would be prejudiced if the witnesses were excused from the hearing and if their affidavits were not accepted in evidence. (Exhibit 20) The parties addressed the issue at the September 27, 2016 hearing at which time the Licensee objected to submission of the affidavits. The Commission admitted them in evidence as Exhibits 17 and 18 but gave the Licensee the opportunity to inform the Commission within two weeks of the hearing as to whether it would seek to schedule the taking of testimony from the two subject witnesses. By email dated October 5, 2016, counsel for the Licensee informed counsel for the Local Board and the Commission that it would not call any additional witnesses. (Commission File) From the affidavits, the Commission accepts certain facts, as identified below and cited as Exhibits 17 and 18.

4. Kyle Bailey, who brought his own beer to the Nortons' house, consumed about five beers at the house. (Exhibits 17, 18)
5. At approximately 9:30 p.m., Bailey drove all of the men to the Brick House Pub in Housatonic, Massachusetts. (Exhibits 17, 18)
6. At the Brick House Pub, Bailey consumed one or two beers. (Exhibits 17, 18)
7. At about 11:00 p.m., Bailey drove the same group to Michael's. (Exhibits 17, 18)
8. Bailey drove fast and close to the curb and guardrails. (Exhibits 17, 18)
9. When the group of men arrived at Michael's after 11:00 p.m., and there were approximately fifteen to thirty people at Michael's at the time. Only one bartender and one bar-back were working. The group of men was socializing at the bar and at a table where women were sitting. (Testimony)
10. There was no table service at the time, and so patrons had to order alcoholic beverages at the bar. (Testimony)
11. Matthew M. went to the bar at Michael's and ordered a beer. He was not asked for identification, and he paid cash for the beer. Matthew M.'s actual date of birth was 02/02/1995 (age 20). (Exhibits 11, 18)
12. At Michael's, Bailey ordered and consumed approximately three beers, and he also ordered several shots of liquor (Fireball), one of which he consumed himself. (Testimony; Exhibits 5, 11, 17, 18)
13. After Bailey consumed the first two beers and the shot at Michael's, Bailey and Garrett Norton exited Michael's, walked across the parking lot, and returned approximately four minutes later. (Exhibit 5)
14. About fifteen minutes later, Bailey ordered his final beer. (Exhibits 2, 5)
15. The bartender working at Michael's that night, Denise Andre, spoke with Bailey and did not observe him showing any signs of intoxication. (Testimony)
16. After being at Michael's for about an hour and twenty minutes, Bailey, Matthew M., and Garrett Norton drove away from Michael's with Bailey as the driver. It was approximately 12:30 a.m. on April 4, 2015. (Testimony; Exhibits 11, 17, 18)
17. At approximately 12:45 a.m., the Great Barrington Police Department received a 911 call reporting a car accident on East Street in Great Barrington. East Street is approximately seven miles from Michael's. (Testimony; Exhibit 11)
18. Bailey had crashed the vehicle into a utility pole. Norton died en route to the hospital. Bailey and Michael were both injured. (Testimony; Exhibit 11)
19. Inside Bailey's vehicle and on the ground outside of the vehicle were opened and unopened beer cans/bottles. Additionally, a small amount of marijuana in a glass jar, empty baggies, and a pipe were found in the car. (Exhibit 11)
20. Bailey's blood alcohol content ("BAC") was measured twice. When his blood was drawn at 1:33 a.m., his BAC was .176%. When his blood was drawn at 3:20 a.m., his BAC was .152%. (Exhibit 11)

21. Bailey also tested positive for marijuana after the motor vehicle accident. (Exhibit 11)
22. In the afternoon of April 4, 2015, Abdulla received a call from an employee at Michael's informing him of the motor vehicle accident and that a police officer had called and wanted to speak with him about securing video footage from the prior night. (Testimony)
23. After receiving the message, Abdalla deliberately erased the video surveillance pertaining to the night in question. (Testimony)
24. Abdulla spoke by telephone with police officers from the Great Barrington Police Department about the video surveillance. Abdulla informed the officers that the footage had been inadvertently erased. (Testimony; Exhibit 10)
25. On April 7, 2015, Great Barrington Police Officers Tim Ullrich and Samuel Stolzar visited Abdulla at Michael's. Abdulla informed them that while he was checking the camera system, he noticed the system's clocks were off. Abdulla explained to them that in an attempt to correct the time, he had inadvertently erased the previously recorded video. (Testimony; Exhibit 10)
26. Officer Stolzar reviewed the camera system log which tracks everything done in the system. Officer Stolzar determined that Abdalla likely erased the data intentionally to mislead police in its criminal investigation of the vehicle crash on April 4, 2015. (Testimony; Exhibit 10)
27. Prior to the issuance of a search warrant, Abdulla turned over the video system to the police. The police obtained a search warrant nonetheless. (Testimony)
28. The police were able to recover data from one of the two video surveillance drives. (Testimony)
29. On October 2, 2015, Police charged Abdalla with M.G.L. c. 268, § 13B(1)(c)(iii) willfully misleading a police officer in order to interfere with a criminal investigation. (Testimony; Exhibit 10)
30. On March 31, 2016, at the criminal hearing Abdalla admitted to the charge and accepted a continuance without a finding. (Testimony; Exhibit 10)
31. On April 15, 2016, the Local Board sent Abdalla via certified mail, a notice of hearing on alleged violations of M.G.L. c. 138, §§ 34, 69 and M.G.L. c. 268, § 13B(1)(c)(iii). On April 19, 2016, the Licensee notified the Local Board regarding a misidentification, and the Local Board issued a corrected notice of hearing. (Exhibits 7, 8)
32. On April 27, 2016, the Local Board held a hearing, which Abdalla attended with counsel. (Exhibit 14)
33. By decision dated April 29, 2016, the Local Board found the Licensee in violation of all three charges and imposed a 10-day suspension for each of G.L. c. 138, §§ 34, 69. (Exhibit 1) The Licensee served the 20-day suspension. (Testimony)

34. On the final charge, M.G.L. c. 268, § 13B(1)(c)(iii), Stockbridge imposed a 30-day suspension to be served immediately upon completion of the two 10-day suspensions or if its decision was appealed to the ABCC, upon the issuance of any further order from the Local Board. (Exhibit 1) The Local Board also imposed a condition of “the Stockbridge Police Department’s having the right, during operating hours of the restaurant, to conduct unannounced inspections of the restaurant’s surveillance system, cameras and recordings, and to retain any such recordings that it deems to be necessary or appropriate to determine compliance with applicable laws and regulations governing the service of alcohol.” (Exhibit 1)
35. On May 4, 2016, the Licensee appealed the Local Board’s decision to the ABCC. (Commission Files)
36. In the approximate 30 years of business, Michael’s has had two prior violations:
- a. October 1989: M.G.L. c. 138, § 2 (unlawful storage) and M.G.L. c. 138, § 23 (sale of alcoholic beverages other than those purchased from a licensee under § 18 or § 19 or from a holder of a special permit under § 22A), for which the Commission suspended the Licensee for four days; and
  - b. June 2009: 204 CMR 2.05(2)- Permitting an illegality on the licensed premises, to wit: M.G.L. c. 138, § 34 (sale or delivery of an alcoholic beverage to a person under twenty-one years of age), for which the Commission suspended the license for three days of which three days were held in abeyance for two years.

### DISCUSSION

Pursuant to M.G.L. C. 138, § 67, “[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed.” Dolphino Corp. v. Alcoholic Beverages Control Comm’n, 29 Mass. App. Ct. 954, 955 (1990) citing United Food Corp v. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978). The findings of a local licensing board are “viewed as hearsay evidence, [and] they are second-level, or totem pole hearsay, analogous to the non-eyewitness police reports in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 – 476 (1989).” Dolphino, 29 Mass. App. Ct. at 955.

Both the Local Board and the Commission have the authority to grant, revoke, and suspend licenses. Their powers were authorized “to serve the public need and . . . to protect the common good.” M.G.L. c. 138, § 23, as amended through St. 1977, c. 929, § 7. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given “comprehensive powers of supervision over licensees,” Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Comm’n, 11 Mass. App. Ct. 785, 788 (1981).

These “comprehensive powers” are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, § 64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§ 23, 64.

The Commission’s decision must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 528 (1988). “Substantial evidence” is “such evidence as a reasonable mind might accept as adequate to support a conclusion.” Id. Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc. v. Comm’r of Ins., 420 Mass. 707 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

Here, the Licensee stipulated at the opening of the hearing that the Licensee had violated M.G.L. c. 138, § 34 and M.G.L. c. 268, § 13B(1)(c)(iii). The Commission concurs that the evidence supports those violations. However, the Licensee disputes the penalty assessed for those two violations and also disputes the finding of a violation of M.G.L. c. 138, § 69 and the penalty assessed for that violation. The Commission addresses each violation below.

Did The Licensee Violate M.G.L. c. 138, § 69, Sale Or Delivery To An Intoxicated Person, And If So, Was the Penalty Reasonable?

The Licensee is charged with service to an intoxicated person in violation of M.G.L. c. 138, § 69. “No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person.” M.G.L. c. 138, § 69. “[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated.” Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). “The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication.” Id. at 610; accord McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

In order to prove this violation, the Local Board must prove: (1) that an individual was intoxicated on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. Vickowski, 422 Mass. at 609. “The imposition of liability on a commercial establishment for the service of alcohol to an intoxicated person . . . , often has turned, in large part, on evidence of obvious intoxication at the time a patron was served.” Id. at 610; see Cimino, 385 Mass. at 325, 328 (patron was “totally drunk”; “loud and vulgar”); Gottlin v. Graves, 40 Mass. App. Ct. 155, 158 (1996) (acquaintance testified patron who had accident displayed obvious intoxication one hour and twenty minutes before leaving bar); Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121 (1994) (sufficient evidence for jury where acquaintance described patron who later had accident as appearing to feel “pretty good”). Contrast Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (commercial establishment could not be liable when there was no evidence of obvious intoxication while patron was at bar); Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (affirming summary judgment for defendant in absence

of any evidence of obvious intoxication); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816-817 (1979) (directed verdict in favor of commercial establishment affirmed when there was no evidence that patron was served alcohol after he began exhibiting obvious signs of intoxication).

The Local Board must produce some evidence that “the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink.” Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 20 (2010). “The [Local Board] may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two.” Vickowski, 422 Mass. at 611 (direct evidence of obvious intoxication not required). “[S]ervice [to a patron] of a large number of strong alcoholic drinks [would be] sufficient to put [a licensee] on notice that it was serving a [patron] who could potentially endanger others.” Cimino, 385 Mass. at 328. It is proper to infer from evidence a patron’s excessive consumption of alcohol, “on the basis of common sense and experience, that [a] patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee.” Vickowski, 422 Mass. at 611; accord P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

However, “[e]vidence of apparent intoxication, or of elevated blood alcohol levels, at some later point in time does not, by itself, suffice to show that the patron’s intoxication was evident at the time the last drink was served.” Douillard v. LMR, Inc., 433 Mass. 162, 165 (2001). Yet, such evidence may be used to bolster other evidence concerning a patron’s condition at the time alcohol was served. Id. at 166.

#### *Evidence of Outward Signs of Intoxication:*

The Local Board did not present the Commission with any live testimony from percipient eyewitnesses to support its assertion that Bailey was showing signs of intoxication at the time he was served his last alcoholic drink. The Local Board subpoenaed for the Commission hearing Kevin Norton and Matthew M., both of whom were with Bailey on the night in question. However, the men objected to appearing and instead presented affidavits sworn under the penalties of perjury. The Commission accepted the affidavits as exhibits. Other than the affidavit of Matthew M. and a suggestion in Kevin Norton’s affidavit,<sup>3</sup> there is nothing in the record to corroborate the allegation that Bailey was showing signs of intoxication prior to Michael’s serving Bailey his last alcoholic beverage.

Not only was there no direct evidence to support the position that Bailey was showing signs of intoxication before he was served his last alcoholic beverage, but the waitress who served Bailey did testify at the Commission hearing and denied the allegations. According to her, she spoke with Bailey, and he did not show any signs of intoxication. (Testimony)

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<sup>3</sup> Matthew M. stated in his affidavit that throughout the time Bailey was at Michael’s, including when Bailey was served alcoholic beverages, Bailey had slurred speech and glassy eyes and was acting overly friendly. (Exhibit 18) Matthew M. stated that he has seen Bailey intoxicated previously, and Bailey “typically gets glassy eyes, slurs his speech and gets overly friendly when he is intoxicated . . . and [on the night in question] Michael’s served him alcohol when he was showing these signs.” Id. Additionally, both Matthew M. and Norton stated in their affidavits that in the car on the way to Michael’s, Bailey was driving fast and close to the curb. (Exhibits 17, 18)

The Commission declines to accept as substantial evidence the statements of Norton and Matthew M. in their affidavits pertaining to Bailey exhibiting signs of intoxication, particularly where bartender Andre testified at the hearing and contradicted those statements. See Moran v. School Committee of Littleton, 317 Mass. 591, 597 (1945) (internal citations omitted) (stating “[t]he petitioner was entitled to have the charges dismissed unless they were substantiated by true and competent evidence, but he is not entitled to have the decision of the committee held invalid if apart from the affidavits there was evidence sufficient to substantiate the charges.”); Stroman v. State Board of Retirement, No. CR-02-115, 2005 WL 4541629, at \*3 (MA DALA December 29, 2005) (determining that where petitioner did not testify at hearing, “[h]is assertion in an affidavit that is not subject to cross-examination does not rise to the level of substantial evidence and is not sufficient to conclude” a major issue in the case); see also Med. Malpractice Joint Underwriting Assn of Massachusetts v. Comm’r of Ins., 395 Mass. 43, 55 (1985) (Commission’s “determination of the substantiality of the evidence must be made upon consideration of the entire record, including whatever in the record fairly detracts from its weight.”). Likewise, the Commission has reviewed the video surveillance from the premises taken that evening and did not see anything on the discs to contradict Andre’s testimony. The Commission concludes that the affidavits of Norton and Matthew M. do not constitute substantial evidence and therefore do not support a violation of M.G.L. c. 138, § 69.

*Evidence of Excessive Consumption:*

There was no evidence that Michael’s served Bailey a “large number of strong alcoholic drinks . . . sufficient to put [Michael’s] on notice that it was serving a [patron] who could potentially endanger others [or himself].” Cimino, 385 Mass. at 328 (where patron had been served six or more White Russians, an intoxicating beverage containing vodka and coffee-brandy liqueur); see O’Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64, 65 (1981) (inference of obvious intoxication could be drawn where patron consumed at least fifteen beers and six martinis). “When evidence of excessive consumption is lacking, as matter of common sense and experience, the inference may not be drawn.” Vickowski, 422 Mass. at 611.

The evidence in this case – that over the course of approximately one hour and twenty minutes, Michael’s served Bailey three beers and a shot of Fireball liquor -- would not be sufficient to support an inference of obvious intoxication based on excessive consumption. Id.; see Kirby, 34 Mass. App. Ct. at 632 (consumption of eight beers insufficient to support inference of obvious intoxication); Makynen, 39 Mass. App. Ct. at 312 (same, as to consumption of five to six cans of beer). Vickowski, 422 Mass. at 611 (insufficient proof where patron, “who was in the habit of drinking beer, ‘sipped’ four to five bottles over the course of approximately two hours”); compare Rivera, 77 Mass. App. Ct. at 21 (where patron was served fourteen drinks over a two-hour period and drank “most” of them, it was for jury to decide whether he likely appeared intoxicated before he was served his last drink).



Evidence of Later Intoxication:

“[P]roof of later intoxication or later elevated blood-alcohol concentration is not, taken alone, sufficient to establish the patron's apparent intoxication at the time alcohol was served.” Soucy v. Eugene M. Connors Post 193, Inc., 79 Mass. App. Ct. 1109, \*1 (2011) (memorandum and order pursuant to Rule 1:28); see Douillard v. LMR, Inc., 433 Mass. 162, 165-166 (2001) (providing that “[e]vidence of later intoxication has been admitted for purposes of bolstering other evidence”). In this matter, the police report references the breathalyzer results obtained from Bailey about an hour after he left the premises (BAC of .176%) and then about three hours after he left the premises (BAC of .152%).<sup>4</sup> (Exhibit 11) There was no evidence as to how many alcoholic beverages Bailey customarily would need to consume to exhibit signs of intoxication. There was also no expert testimony explaining the meaning of a BAC of .176%. As such, proof that Bailey’s blood alcohol content was over the legal limit after the motor vehicle accident was not by itself, sufficient to show that Bailey was or appeared to be intoxicated when Michael’s last served him. See Soucy, 79 Mass. App. Ct. at \*2; Douillard, 433 Mass. at 167-168.

The Commission concludes that the Licensee did not violate M.G.L. c. 138, § 69, sale or delivery to an intoxicated person, and therefore rejects the Local Board’s issuance of a penalty for that asserted violation.

Was The Penalty Assessed For A Violation Of M.G.L. c. 138, § 34 Reasonable?

The parties stipulated that the Local Board has a written policy of progressive discipline, which was applicable to the violation of § 34. With regard to serving and/or selling alcoholic beverages to minors, the policy provides: (1) show cause hearing with a three day suspension, (2) show cause hearing with a seven day suspension, and (3) show cause hearing with possible action that could include: reduction of hours or taking other appropriate action up to and including the cancellation, suspension, and/or revocation of license. (Exhibit 6) The Local Board did not inform the Commission as to whether it has rules and regulations concerning application of the progressive discipline policy. In particular, the Commission is not aware as to whether the Local Board considers suspensions issued by the Commission in determining a licensee’s number of past violations.

The Licensee was found by the Commission to have violated § 34 in 2009, which was less than ten years ago. (Commission Files) In consideration of the fact that the instant violation is Licensee’s second violation of § 34, the Commission finds that a seven day suspension for this violation is appropriate and warranted in the present case. Accordingly, following the Local Board’s own guidelines, the Commission recommends that the Licensee serve a seven day suspension for violating § 34.

Was The Penalty Assessed for Violation of M.G.L. c. 268, § 13B(1)(c)(iii) Reasonable?

The Local Board’s written policy of progressive discipline does not address violations such as M.G.L. c. 268, § 13B(1)(c)(iii) (willfully misleading a police officer). (Exhibit 6) With regard to a similar type of violation, M.G.L. c. 138, § 63A (hindering or delaying an investigator of the

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<sup>4</sup> The legal blood alcohol content in Massachusetts is .08% for a person 21 or older; and for a person under 21, the legal limit is .02%. M.G.L. c. 90, § 24.

Commission), the Commission has in the past issued penalties of a wide range depending on the circumstances of the particular case. See Shree Mahavir Corp. d/b/a Sweeney's Package Store (ABCC Decision 10/23/13) (nine day suspension issued after licensed owner lied to investigators and hid evidence); Boulevard Café Corporation d/b/a Club Cyclone (ABCC Decision 8/9/00) (thirty day suspension where additional violations included gambling and offering free drinks); JFD Enterprises, Inc. d/b/a Century Liquor Mart (ABCC Decision 12/28/92) (three day suspension where corporate licensee and employee denied that the underlying violation occurred); Bowser's, Inc. d/b/a Bowser's Seafood (ABCC Decision 5/23/01) (eighteen day suspension where owner refused investigators access to his office during an investigation); O'Toole's Pub, Inc. (ABCC Decision 7/29/08) (seven day suspension where owner refused investigators access to the kitchen, went into the kitchen himself alone, and then told the investigators that they could enter); JDTP, Inc. d/b/a Dineen's (ABCC Decision 11/13/95) (twelve day suspension where employee refused to cooperate during an investigation and interfered with investigators questioning a youthful looking patron). The cases cited differ from the instant case in that here the licensed owner deleted evidence that was critical to the police (and the Local Board's) investigation. Were it not for the Police Department's ability to recover the data on one of those discs, the surveillance video would be gone. The Commission considers the gravity of the offense, including Abdulla's deliberate and thought-out actions. The Commission also recognizes Abdulla's willingness to turn over his surveillance system to the police officers after he had deleted the disks but before a search warrant was issued as well as the Licensee's past record before the Local Board and the Commission. (Testimony; Exhibit 10). Balancing these factors, the Commission concludes that the thirty day suspension assessed by the Local Board was reasonable.

### CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding Michael's of Stockbridge, Inc. d/b/a Michael's in violation of M.G.L. c. 138, § 69. Consequently, the Commission also disapproves the action of the Local Board in imposing a ten day suspension for violating § 69.

With regard to the violation of M.G.L. c. 138, § 34, the Commission recommends that the Local Board follow its own progressive discipline policy and impose a seven day suspension, instead of the ten day suspension it originally imposed.

Lastly, with regard to the violation of M.G.L. c. 268, § 13B(1)(c)(iii), the Commission approves the Local Board's imposition of a thirty day suspension.

In total, the Commission recommends a total suspension of thirty-seven days. The Licensee has already served twenty days. The Commission recommends that the Local Board hold some of the remaining seventeen days in abeyance and require the Licensee to serve the balance.

The Commission **APPROVES** the condition that the Local Board placed on the license, consistent with this Decision.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Elizabeth A. Lashway, Commissioner



I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Kathleen McNally, Commissioner



Dated: February 28, 2017

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

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cc: Benjamin M. Coyle, Esq. via facsimile 413-739-7740  
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