

**STATE OF VERMONT
LIQUOR CONTROL BOARD**

IN RE: **ROUTE 7 RESTAURANT ASSOCIATES OF
NEW ENGLAND, INC. D/B/A
MULLIGAN'S PUB AND RESTAURANT
3912 MAIN STREET
MANCHESTER, VERMONT** **DOCKET NO. 2018-012**

BOARD DECISION AND ORDER

The Department of Liquor Control (“DLC”)¹ cited Route 7 Restaurant Associates of New England, Inc. d/b/a Mulligan’s Pub and Restaurant (“Licensee” or “Mulligan’s”) to appear for a June 13, 2018 contested case hearing. The Liquor Control Board (“Board”) considered potential sanctions against Mulligan’s First and Third Class Liquor Licenses for alleged violations of General Regulation Nos. 17 and 17(a). Jacob A. Humbert, Esq., Assistant Attorney General, represented the Department of Liquor Control (“DLC”). Joel P. Ianuzzi, Esq. appeared on behalf of Mulligan’s.

ALLEGED VIOLATIONS

DLC alleged that during the night of September 23-24, 2017, Mulligan’s: (1) allowed a patron, who was displaying outward and recognizable signs of intoxication, to remain in public areas of the licensed premises without direct personal supervision in violation of General Regulation No. 17; and (2) served the patron alcoholic beverages in an amount that would make a reasonable seller/server expect that such patron would be under the influence in violation of General Regulation No. 17(a).

¹ By an act of the Legislature, subsequent to the contested case hearing in this matter, DLC and this Board were renamed to reflect a merger between DLC and the Vermont Lottery Commission; this is the final hearing decision of the Liquor Control Board. Subsequent decisions shall be issued on behalf of the Board of Liquor and Lottery.

General Regulation No. 17 is as follows:

No licensee shall sell or furnish alcoholic beverages to any individual displaying signs of intoxication from alcoholic beverages or other drugs / substances. No licensee shall allow alcoholic beverages to be consumed on the licensed premises by any individual displaying such signs of intoxication. No licensee shall allow any individual displaying such signs of intoxication to stay on the licensed premises, except under direct personal supervision by a licensee or licensee employee in a segregated nonpublic area when the patron's immediate departure could be expected to pose a risk of bodily injury to the patron or any other individual.

General Regulation No. 17(a) is as follows:

Licensees or licensees' employees shall not serve alcoholic beverages to any individual whom it would be reasonable to expect would be under the influence as a result of the amount of alcohol served to that person. Under the influence, in this Regulation, shall mean that degree of intoxication that would render it unsafe or illegal for the patron to undertake normal and expected activities upon leaving the licensed premises.

EXHIBITS ADMITTED

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| DLC's Exhibit 1 – | Photographs of motor vehicle collision scene |
| DLC's Exhibit 2 – | Video of William Jeffrey Interview (Manchester Police Department) |
| DLC's Exhibit 3 – | Audio of Sanja Garic interview (Manchester Police Department) |
| DLC's Exhibit 4 – | Audio of April Serdena interview (Manchester Police Department) |
| DLC's Exhibit 5 – | Receipt from Licensee's Establishment |
| DLC's Exhibit 6 – | Resume of Jeffrey Dukette, Forensic Chemist |
| DLC's Exhibit 7 – | Vermont Forensic Laboratory Form |
| DLC's Exhibit 8 – | Blood Alcohol Report |
| DLC's Exhibit 9 – | Jeffrey Dukette Report / Summary and Calculations |
| DLC's Exhibit 10 – | Jeffrey Dukette notes prepared during contested case hearing |

Licensee's Exhibit 1 – "Camera 2" video

Licensee's Exhibit 2 – "Camera 1" video

Licensee's Exhibit 3 – "Hallway Camera" video

FINDINGS OF FACT

1. At all relevant times, Mulligan's held First and Third-Class Liquor Licenses for the premises located at 3912 Main Street, Manchester.
2. This matter is before the Board in the wake of a fatal motor vehicle collision that occurred at approximately 2:13 a.m. on Sunday, September 24, 2017 at or about 2353 Main Street (also known as Vermont State Route 7A), Manchester.
3. Manchester Police Officers Jason Thomas and Ryan Matteson testified to the details of their investigation of the fatal motor vehicle collision, specifically:
 - a. Christian James, while driving his motor vehicle, caused a two-vehicle collision that resulted in the death of the driver of the other vehicle, Jason Baumes;
 - b. Mr. James' vehicle crossed into the oncoming lane of traffic at a rate of speed substantially higher than the posted speed limit;
 - c. The collision occurred at a point south of both Mulligan's and Mr. James' residence:
 - i. Mr. James' residence is located approximately 0.8 miles south of Mulligan's; and
 - ii. The collision occurred approximately an additional 0.8 miles south of Mr. James' residence; and, therefore, approximately 1.6 miles south of Mulligan's;
 - d. Mr. James' vehicle was traveling north at the time of the collision, towards his home and also towards Mulligan's;

- e. Officer Matteson testified that Mr. James was travelling north from “some other place,” not Mulligan’s;
 - f. No alcoholic beverages were found in Mr. James’ vehicle; and
 - g. Mr. James was transported to Southwestern Vermont Medical Center in Bennington, where his blood alcohol content (“BAC”) was measured at approximately 0.239% g/100ml at 3:15 am.
4. It is undisputed that Christian James was a patron at Mulligan’s during the evening of September 23-24, 2017. It is also undisputed that, while there, he consumed alcoholic beverages and food.
5. DLC and Licensee agree that Mr. James arrived at Licensee at approximately 8:30 p.m. He left no later than approximately 1:50 a.m.²
6. When he arrived at Mulligan’s, Mr. James was not intoxicated, nor did he show any outward signs of intoxication.
7. Mr. James’ residence is within a short walking distance of Mulligan’s.
8. There was no evidence presented whether Mr. James drove or walked to or from Mulligan’s.
9. A woman identified as Jessika Bledsoe, referred to by witnesses as either Mr. James’ girlfriend or fiancée, was with Mr. James at Mulligan’s. According to Officer Matteson, she refused to speak with police during their investigation. It does not appear that she has been charged with any criminal offense relative to the collision. The Board is not aware whether DLC made efforts to interview her or subpoena her testimony.

² Video evidence shows a time stamp of 8:31:03 p.m. when Mr. James entered Licensee’s bar area and a time stamp of 1:49:50 a.m. when Mr. James is last seen at Mulligan’s.

10. Mulligan's cooperated with the Manchester Police Department's investigation. Officer Matteson spoke with Mulligan's manager, who provided a copy of Mr. James' bar receipt and also identified the bartender on duty that evening, William Jeffrey. Mulligan's also provided copies of its in-house surveillance video, admitted into evidence and referenced in this decision (the "video" is actually a string of still shots taken in quick succession throughout the evening).
11. Over the five-plus hours that Mr. James was at Mulligan's, DLC asserts that Mr. James consumed "at least seven alcoholic beverages." Mulligan's admits to serving Mr. James four "Tequila neats" at either 1.25 or 1.50 ounces each³ and one additional drink; the record is unclear if it was another tequila or beer. Mr. Jeffrey described "tequila neat" as a shot of tequila served in a "rocks glass," which is intended to be sipped, rather than consumed at once. By the end of the evening, Mr. Jeffrey rated Mr. James' intoxication at "3-4" on a scale of 1-10 and testified that Mr. James did not display any overt signs of intoxication.
12. Based on the Mulligan's receipt admitted into evidence, Mr. James closed out his bar tab at 12:33 a.m. The receipt contains charges for four tequila drinks, food and two beers. Ms. Bledsoe consumed the beers. No evidence was presented or admitted to refute these facts.
13. After closing his tab, and over approximately the next hour, Mr. James is observed on video with an additional drink.
14. There was no evidence presented that another patron purchased alcoholic beverages for Mr. James or that Mr. James consumed other patrons' alcoholic beverages.

³ Mulligan's serves alcohol in "measured pours" of either 1.25 ounces or 1.5 ounces of 80 proof Tequila. Although Mr. Jeffrey does not recall which measure was used in serving Mr. James' drinks, there is no evidence that each "Tequila neat" exceeded 1.5 ounces of 80 proof tequila.

15. Manchester Police Department personnel conducted interviews of people that were with Mr. James at Mulligan's during the evening of September 23, 2017. The Board reviewed audio of two such interviews: Sanja Garic and April Serdena, both of whom appear to be Mr. James' friends.
 - a. Ms. Garic indicated that Mr. James "always seemed happy;" she could not tell whether Mr. James was intoxicated that evening. Ms. Garic observed Mr. James consume only one alcoholic beverage. She also indicated that Mr. James said he planned to walk home, but it is ambiguous to the Board whether this was due to an intoxicated state, because he had not driven there, or because he and Ms. Bledsoe had apparently broken up that evening.
 - b. Ms. Serdena testified that she was concerned about Mr. James walking or driving that evening. She qualified that, however, by saying that she was concerned with Mr. James walking or driving *alone* rather than stating that her concern was with his ability to walk or drive *at all*.
 - c. It is unclear whether DLC made efforts to interview Ms. Garic or Ms. Serdena prior to Hearing or compel their live testimony at the contested case hearing.
16. The Board finds, on the evidence presented, that Mulligan's served Mr. James no more than five alcoholic beverages over the more than five hours he was there.
17. DLC relied on the reports and testimony of Jeffrey Dukette, a forensic chemist. He is employed by the Vermont Forensic Laboratory in Waterbury. He is qualified to offer expert testimony in this matter.
18. Mr. Dukette analyzed the sample of Mr. James' blood taken at the hospital. He was asked to relate Mr. James' Blood Alcohol Content ("BAC") back to the time of the collision and to the time that Mr. James left Mulligan's. Mr. Dukette concluded that Mr. James' BAC was

approximately 0.254% g/100ml at the time of the collision and approximately 0.265% g/100ml at the time that Mr. James left Mulligan's.

19. Mr. Dukette was asked by both parties to assume various scenarios involving consumption of various amounts of tequila over a period of five hours with consideration of "elimination rate" (the rate at which alcohol is eliminated from the body). There was no scenario consistent with the amount of alcohol served to Mr. James at Mulligan's that would support a BAC consistent with approximately 0.265% g/100ml at the time of leaving Mulligan's. In fact, the evidence supported a contention that Mr. James would not have had a BAC over the "legal limit" of 0.08% g/100ml given the drinks consumed over the five hours that he was at Mulligan's, let alone the BAC that Mr. Dukette relates back to the time Mr. James left Mulligan's. At the hearing, Mr. Dukette concluded that Estimated BAC for consumption of five 1.5-ounce drinks over five hours, including elimination, would be approximately 0.066% g/100ml.
20. Mr. Dukette confirms: "the drinking pattern presented in this case is not consistent with BAC results." (DLC's Exhibit 9) He agreed that a BAC of 0.265% g/100ml is substantial. While he could not offer opinions on Mr. James' level of intoxication based on the video evidence, he agreed that an average person with 0.265% g/100ml BAC would potentially demonstrate severe impairment, nausea, loss of balance, though outward signs might vary at these high levels. A person could "shut down" at that level of blood alcohol; though some could show minimal signs.
21. Officer Matteson testified that he was "surprised" by the high BAC at the time of the collision given that the evidence of alcohol Mr. James consumed at Mulligan's was inconsistent with such a number.
22. The parties advanced several theories (1) why Mr. James was where he was at the time of the collision and (2) what might have occurred during the twenty-plus minutes Mr. James is unaccounted for, including:

- a. Ryan Casey, identified as Mr. James' friend, lives near the site of the collision (2.5 miles south of Mulligan's and approximately 2.0 miles south of Mr. James' residence). Mulligan's advocates that Mr. James could have traveled to his friend's house and consumed alcohol there. Officer Matteson apparently ruled this out solely because Mr. Casey told him that Mr. James did not come there that night. Regarding Mr. Casey, Officer Matteson stated: "I don't think he would lie." There is no evidence that DLC interviewed or sought to compel Mr. Casey to testify;
- b. Mulligan's argues that Mr. James consumed a significant quantity of alcohol after leaving Mulligan's, perhaps due to the sequelae of breaking up with his girlfriend/fiancée, sufficient to account for the measured BAC;
- c. Officer Matteson offered that Mr. James might have been traveling back from a different friend's house in Arlington, looking for Ms. Bledsoe;
- d. DLC argues that Mr. James was of such a degree of intoxication at the time he left Mulligan's that he drove nearly one mile southbound past his street and turned around to head north and back towards his home; and
- e. DLC argues that there are no open establishments where Mr. James could have purchased or have been served alcoholic beverages between the time of his departure from Mulligan's and the time of the collision, making it less likely that he continued to consume alcohol after leaving Mulligan's.

As Officer Matteson testified, Mr. James' activity during this period is a "mystery."

23. DLC investigator Sgt. Tom Curran testified (he was called to testify during Mulligan's case-in-chief) that he took the Manchester Police Department's investigative reports and combined them, verbatim, into one report for DLC. There appears to have been no

significant independent investigation or interviews undertaken to investigate the alleged General Regulation violations.

24. Sgt. Curran agreed that there should be significant visible signs of intoxication when a person has a 0.239% g/100ml BAC and that he could not make out any signs of intoxication on the video. Sgt. Curran did not believe the video captured all relevant information regarding Mr. James' level of intoxication.
25. Sgt. Curran is aware of no documented enforcement history for this Licensee; he has covered the geographical territory in which Mulligan's is located since 1999.

CONCLUSIONS OF LAW

1. The Board is established as the paramount authority in the administration of Vermont's liquor statutes and regulations. *See Verrill, Jr. v. Daley, Jr.*, 126 Vt. 444, 446 (1967).
2. When passing upon the question whether a license shall be revoked or suspended for the violation of a liquor statute or regulation, the Board sits as a tribunal with a judicial function to perform and is authorized under Title 7 of the Vermont Statutes to suspend or revoke any license for violating the provisions of Title 7 or any regulation it duly promulgates. *See In Re: Wakefield*, 107 Vt. 180, 190 (1935).
3. Licensee held First and Third-Class Liquor Licenses at all relevant times to this matter and is, therefore, subject to this Board's jurisdiction.
4. Despite the tragic nature of the fatal motor vehicle collision, the Board's focus must be on what occurred at Mulligan's during the night of September 23-24, 2017.
5. DLC relied too heavily on the local police investigation, reports and interviews regarding the collision. Manchester Police personnel, however, were charged with investigating a motor

vehicle collision and DUI, not a violation of Title 7 or our General Regulations. The applicable DUI statute, 23 V.S.A §1201(a), reads: “[a] person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway: when the person’s alcohol concentration is 0.08 or more.” To violate that law, it is generally unimportant *how* or *where* the driver became intoxicated, but that the driver *was* intoxicated at the time he operated a motor vehicle.

6. Conversely, violations of General Regulation Nos. 17 and 17(a) require proof, by a preponderance of the evidence, that Mr. James was intoxicated, became intoxicated, displayed signs of intoxication and/or was overserved while at Mulligan’s. While there is certainly evidence of Mr. James’ intoxication at the time of the collision, the evidence of Mr. James’ level of intoxication from the time he arrived at Mulligan’s until he departed Mulligan’s was not sufficiently established.
7. Turning specifically to General Regulation No. 17, there is insufficient evidence before the Board that Mulligan’s sold or furnished alcoholic beverages to Mr. James while he displayed signs of intoxication from alcoholic beverages. Based on the video from Mulligan’s and witness testimony detailed above, there is insufficient evidence that Mr. James displayed any outward and recognizable signs of intoxication while at Mulligan’s. Consequently, there is insufficient evidence that Mulligan’s allowed Mr. James to consume alcoholic beverages on the licensed premises while displaying such signs of intoxication. Given the insufficient evidence that Mr. James displayed signs of intoxication, Mulligan’s had no obligation to remove Mr. James from the licensed premises or to keep him on the licensed premises under direct personal supervision in a segregated nonpublic area.
8. Turning specifically to General Regulation No. 17(a), there is insufficient evidence before the Board that Licensee served alcoholic beverages to Mr. James where it would have been reasonable to expect that he would be under the influence as a result of the amount of alcohol served to him.

9. Based on the testimony presented and video evidence reviewed, the Board can not conclude that Mr. James had a BAC of .265% g/100ml at the time he departed Mulligan's.

10. Furthermore, the alleged violations General Regulation Nos. 17 and 17(a) cannot succeed in the face of:

- a. Expert testimony that Mr. James' measured BAC is inconsistent with the number of alcoholic beverages served to him at Mulligan's;
- b. Manchester Police Officer testimony that the measured BAC "surprised" him given the amount of alcoholic beverages served to Mr. James at Mulligan's;
- c. The unexplained twenty-plus minute gap in time between Mr. James leaving Mulligan's and the collision;
- d. The direction that the Mr. James was traveling at the time of the collision, suggesting a different point of origin than Mulligan's; and
- e. The possibility, not satisfactorily ruled out on the record before the Board, that Mr. James consumed additional alcoholic beverages upon leaving Mulligan's.

11. DLC has not established that Mulligan's violated General Regulation Nos. 17 or 17(a).

12. Sadly, this is the *third* case before the Board in less than two years where a licensee's patrons were involved in a fatal motor vehicle accident during the same evening after leaving a licensed establishment. What differentiates this case from *In re: Edgewater, Inc.*⁴ and *In re: V-Twin, LLC d/b/a Corner Pocket*⁵ is that both involved (1) clearly established levels of its

⁴http://liquorcontrol.vermont.gov/sites/dlc/files/documents/LiquorControlBoard/Decisions/2016_12_01_Edgewater_Inc.pdf

⁵http://liquorcontrol.vermont.gov/sites/dlc/files/documents/LiquorControlBoard/Decisions/2017_05_23_VTWIN_LLC.pdf

patrons' intoxication at and upon leaving the licensed premises; and (2) significant evidence of overservice at the licensed premises. *See Edgewater* at Conclusions of Law, ¶28; *V-Twin* at Conclusions of Law, ¶14.

13. Unlike this matter, *Edgewater* also involved a clearly unbroken chain of events (overservice to a patron and that patron's subsequent departure from the licensed establishment) leading to a fatal motor vehicle crash. *See also In re M.S.D.D., Inc.*, 2009 VT 72 (evidence that patron was intoxicated upon arrival at licensee, which was not established here; patron later caused fatal collision driving wrong way on Interstate). It is important to emphasize that Mr. James' collision is not specifically relevant to whether violations occurred, but it could serve as an aggravating factor to be considered in conjunction with imposing an appropriate sanction. The violations that DLC charged could have been established, if the evidence supported it, even if Mr. James had gone directly to his home from Mulligan's for the night. Tragic events need not result for a licensee to violate our Regulations.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the alleged violations of General Regulation Nos. 17 and 17(a) are hereby **DISMISSED**.

DATED at Montpelier, Vermont this 8th day of August 2018.

VERMONT LIQUOR CONTROL BOARD



Liquor Control Board Chair

RIGHT TO APPEAL

Within 30 days after copies of this Order have been mailed, either party may appeal to the Vermont Supreme Court by filing a Notice of Appeal with the Department of Liquor Control and paying the requisite filing fee. *See 3 V.S.A. § 815(a); V.R.A.P. 4 and 13(a).*