

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX, BLDG 68-69
1511 PONTIAC AVENUE
CRANSTON, RI 02920

Gianco, Inc. d/b/a \$3 Bar,
Appellant,

v.

City of Providence, Board of Licenses,
Appellee.

DBR No.: 14LQ043

DECISION

I. INTRODUCTION

This matter arose from an appeal filed by Gianco, Inc. d/b/a \$3 Bar (“Appellant” or “\$3 Bar”) with the Department of Business Regulation (“Department”) regarding a decision taken by the City of Providence, Board of Licenses’ (“Board” or “City”) on August 7, 2014 to revoke its Class BX license (“License”). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision by the Board to Department. The hearing was held before the undersigned¹ on August 25, September 17, 19, and 23, 2014 with written closings timely filed by October 3, 2014.²

¹ The undersigned was delegated to hear this appeal and the Appellant’s stay requests by order of the Director of the Department.

² Prior to the Board’s revocation order, the Board issued an order on July 30, 2014 to indefinitely close the Appellant. The Appellant filed a stay request with the Department and a hearing was held on that request on August 4, 2014 and the next day, the matter was remanded to the Board for a further decision. On August 7, 2014, the Board held a hearing and revoked the License. The Board’s July 30, 2014 decision was based on the incidents on July 26, 2014. The Board’s August 7, 2014 decision was based on the incidents of July 23 and July 26, 2014. A hearing had been held previously (on July 30, 2014) before the Board on the July 26, 2014 incident. An emergency hearing was held before the Board on the July 27, 2014 regarding the July 23, 2014 incident. On the remand hearing on August 7, 2014, the Board heard testimony on the July 23, 2014 incident with notice to Appellant given one (1) hour before the meeting of its intention to hear testimony regarding July 23, 2014. The Board treated the August 7, 2014 hearing as an emergency hearing for the July 23, 2014 incident but made a final decision to revoke all licenses. The

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *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.*

III. ISSUES

Whether to uphold or overturn City's decision to revoke the Appellant's License.

IV. MATERIAL FACTS AND TESTIMONY

A. **July 26, 2014 Street Fight**

At the Board hearing on July 30, 2014, Detective David Schivulli testified on behalf of the City. He testified that there was a large disturbance outside the \$3 Bar at approximately 2:00 a.m. on July 26, 2014 with about 20 people involved in the disturbance and 75-100 people watching the disturbance. He testified that people surrounded him and the other officer and two (2) women fought and would not stop and were eventually arrested. He testified that the street was blocked. On cross-examination, he testified that it took about 10 minutes to disperse the crowd.

Officer William Hutchinson testified on behalf of the City. He testified that he was on detail at Venda restaurant on July 26, 2014 and testified to the disturbance outside of the \$3 Bar. He testified that there was a large crowd that was screaming and not moving and blocking traffic. On cross-examination, he testified that it took

Appellant requested a stay and a hearing was held on August 12, 2104. By order dated August 13, 2014, the Department denied the stay but found that the Board's power for emergency hearings is limited by Providence Charter section 1102 which provides that the City cannot revoke a license without three (3) days written notice given of its intended action. Thus, the Board's decision to revoke the License was in violation of the City's Ordinance. Nonetheless in light of the Department's appellate authority pursuant to R.I. Gen. Laws § 3-7-21, the Department declined to remand the matter but instead held a *de novo* hearing. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964); and *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964).

approximately three (3) to five (5) minutes to clear the fight but there were still people standing around and it took 10 to 15 minutes to clear the crowd of 75 to 100 people.

The Appellant played its security camera video of the July 26, 2014 disturbance at the Department hearing. The video showed a woman inside the Appellant's right before 2:00 a.m. throwing something on the ground and then someone taking her outside. While outside this woman pushed and shoved people. She was pushed away and came back and pushed people. Several people including men with "staff" written on the back of their t-shirts were outside. There were several people outside that were involved in shoving match with people falling to the ground. There are also a few people taking photographs or videos with cell phones. Two (2) police officers walked by and cleared people away. At 2:05 a.m., two (2) police officers walked by and nothing was happening and people were passing by the sidewalk. At 2:07 a.m., three (3) police officers were in front of the bar and by 2:11 a.m., the police cruisers had left. See Appellant's Exhibit I (video).

B. July 23, 2014 Fight

Detective Jonathan Primiano ("Primiano") testified on the City's behalf. He testified that he is a video extraction expert and reviewed the surveillance footage for the \$3 Bar for July 23, 2014 and was able to capture the incident from seven (7) camera angles. He testified that videos in evidence are from different cameras as well as a "compilation" video which is comprised of various camera shots in chronological order. See City's Exhibits One (1) (video) and Eight (8) (compilation video). He testified that the time of the Appellant's security video was one (1) minute fast.

Detective Casey Moffett testified on behalf of the City. He testified that he is the lead detective on the Jonathan Stack (“Victim”) homicide. He testified that the Victim died from blunt force trauma.

From the testimony and review of the various videos, the following timeline³ (based on the time on the video) can be established:

4:56:22 The suspect (“Suspect”) in the Victim’s killing and Suspect’s friend (“Tucker”) are in the \$3 Bar. Primiano testified and the parties agreed that for approximately the next 30-45 minutes, the Suspect walks in and out of the bar usually talking on his cell phone (the front door of bar was in an open position allowing for easy egress and exit).

5:36:00 Suspect sits by himself outside the bar while speaking on his cell phone.

5:39:46 Suspect stands up and walks around in front of the Bar talking on his cell phone.

5:45:00 Tucker comes outside and stands next to Suspect who is standing by the curb.

5:46:48 A red pick-up truck drives up the street next to the \$3 Bar.

5:46:52 Suspect points to truck and says something to Tucker and runs down street. Suspect is on his cell phone.

5:46:53 Suspect leaves the video frame. [Suspect never goes back inside the bar].

The truck parks a few spots up the street from \$3 Bar. Victim gets out of truck and runs down street toward the bar.

5:47:02 Tucker goes into bar.

5:47:04 Victim goes into bar. [This is the first time the Victim is in the bar].

³ All times are in the afternoon so are “p.m.”

5:47:06 Nassi, Victim's friend, (who came from truck) walks into bar. [This is the first time Nassi is in the bar].

Meanwhile:

5:48:24 Suspect climbs fence into the parking lot behind the \$3 Bar.

5:49:37 Suspect in parking lot; walks around parking lot.

5:49:39 Suspect walks out of parking lot toward the street.

5:47:13 Victim yelling at Tucker inside the front of bar. Nassi takes Victim's arm but Victim shakes him off.

5:47:18 Nassi touches Victim again; Victim holds up cell phone as if to take a photograph.

5:47:23 Victim's cell phone apparently knocked out of hand.

5:47:40 Victim on his telephone.

5:47:58 Victim, Nassi, and Tucker are outside in front of bar.

5:48:00 Tucker comes back inside.

5:48:06 Victim comes back inside.

5:48:16 Victim on cell phone.

Victim and Tucker are arguing. A third man (apparently bar staff) is talking to them and standing between them. Nassi is still outside.

5:48:52 Tucker goes down to the back hall; the third man walks with him; Victim follows. They walk to the back of bar.

5:49:13 Waitress gets a bartender in back to come out from behind his bar to come to the back of the \$3 Bar where the argument is ongoing.

5:49:16 Another male staff member joins them in back.

5:49:16 Nassi comes back in the front door.

5:49:19 Nassi walk down the side of bar to the back of \$3 Bar.

5:49:21 Tucker and Victim arguing in back and waitress is in between them; Victim is on telephone. Male staff member next to them.

5:49:23 Tucker, Victim, waitress, male staff member are near back door; Nassi and two (2) male bar staff are in back but hanging back so are not next to Tucker and Victim. Tucker and Victim are arguing.

5:49:35 Tucker, Victim in back with male staff member, waitress, and the unidentified man in testimony assumed to be staff.

5:49:52 Tucker and Victim and waitress exit bar by back door.

5:49:55 Male staff member exits bar by back door.

5:49:58 Nassi exits bar by back door; two (2) staff members are following him.

5:50:02 The staff member (male) exits to the parking lot.

5:50:03 The staff member (waitress) exits to the parking lot.

5:50:14 p.m. One (1) patron outside can be seen.⁴

5:50:18 Tucker, Victim, Nassi are between two (2) vehicles and an employee of the establishment is standing there.

5:50:22 Employee leaves the camera field of view.

5:50:22 Tucker, Nassi, Victim are wrestling.

5:40:23 Male staff member exits to the parking lot.⁵

5:50:25 Two patrons on ground.

⁴ The front of the back door into the parking lot is not picked up by the security camera. See Primiano's testimony. 9/19/14 transcript. See City's Exhibit 15 (15) (Primiano's hand drawn map of \$3 Bar).

⁵ This is the unidentified man assumed to be staff. See Primiano's testimony. 9/19/14 transcript p. 96.

5:50:27 Staff members start coming back inside bar.

5:50:29 Three staff members are inside bar.

5:50:33 All five (5) staff members (including unidentified man as staff) are inside and walking quickly in the back of bar.

5:50:50 Three (3) staff members seen in front of bar (two behind front bar, one goes outside in front).

5:50:32 In the parking lot, one of the patrons is punching a man on the ground and carries on punching.

5:50:46 Suspect is first seen running – from the street⁶ - up the parking lot carrying the two-by-four.

5:50:52 to :57 Suspect strikes with the two-by-four.

5:50:57 to :14 Suspect, Nassi, Tucker all move away and Suspect and a man (presumably Tucker) leave toward the street that Suspect came up.

Victim is lying on the ground.

5:50:22 to :50 See person's arm in lower right hand corner of video on other side of fence for a few seconds, then disappears; then whole person can be seen on other side of fence, watching or trying to watch.

5:51:17 Staff member in kitchen goes to back door (different from the one the patrons and staff exited). Shadow of door opening and closing.

5:51:21 to :23 Back door opens and closes (not the back door the staff and patrons had exited from but the other back door).⁷

⁶ Primiano testified that the Suspect came from the street with the two-by-four. 9/19/14 transcript. p. 117.

⁷ The outside camera shows the back door opening and closing. The camera in the kitchen shows the staff member walking to the door and the shadow of the door.

5:51:27 Staff member who apparently opened door rushes back inside.

5:51:44 Red truck appears in parking lot; a man [presumably Nassi] gets out.

5:51:55 Staff member goes outside.

5:52:03 Staff member runs back inside.

5:52:18 Staff member comes back outside.

5:52:32 Staff member goes back inside.

5:52:43 Kelly Jackson (“Jackson”)⁸ drives in and parks her car. At same time, staff member is back outside.

5:53:08 Jackson gets out of her car and is on her cell phone.

5:55:52 Police patrol car arrives in parking plot.

On direct examination, Primiano testified that the staff never closed the front door to separate the patrons when they were arguing in front of the bar. On cross-examination, he testified that there was no physical altercation in the bar. He testified that right before the Victim and Tucker exit, a female employee gets in the middle of the two (2) men and the Victim has his cell phone to his ear but the two (2) men are still talking to each other and Victim still has the cell phone to his ear as he exits. He testified that the Victim is seen on the video making a telephone call on his way to the back exit and the telephone records show that the Victim called the police for one (1) minute and 35 seconds but had also called for 31 seconds earlier. He testified that in his opinion staff but should not get in the way of a physical altercation. On redirect, he testified that in his opinion, the staff should have called the police. He also testified that after the Suspect walked around the

⁸ The identification of who is in the car is based on her testimony discussed later in this decision.

parking lot, he went around a corner (leaving parking lot) and into a yard between two (2) brick buildings and retrieved the two-by-four from there.

Officer Michael Troia testified on behalf of the City. He testified that he is a traffic officer and was working the 3:00 p.m. to 11:00 p.m. shift on July 23, 2104 and was flagged down by the valet from Sienna restaurant (“Sienna”) and was told that a man was badly beaten at the back of \$3 Bar. He testified that he found the Victim face down and with him was a man he later identified as Nassi who told him that he was friends with the Victim. He testified that Kaitlyn Henriques (“Henriques”), a bartender from \$3 Bar, told him the license plate of the red pickup truck that possibly was fleeing the scene. He testified that another \$3 Bar bartender, Cassandra Martinelli (“Martinelli”), told him that there was a verbal altercation inside and since there were no bouncers working at that time, she went to the back and got the cooks to push the men outside and they closed the door. He testified that he spoke to both Henriques and Martinelli next to the Victim who was lying bleeding on the ground. He testified that another male employee of the \$3 Bar gave him a piece of paper with the registration of the red vehicle. On cross-examination, he testified two (2) employees of the \$3 Bar gave him the red pickup truck license plate.

Officer Stephen Shea testified on behalf of the City. He testified that he is the communications liaison and he provided the telephone call sheets and daily call for service logs. See City’s Exhibits Two (2) to Seven (7).

Moffett testified that the Suspect never left the vicinity of the \$3 Bar. He testified that the Victim, Tucker, and Nassi were kicked out of the bar. He testified that in the parking lot, Nassi was hitting Tucker who was hitting the Victim and the Suspect came and hit Nassi and then hit the Victim twice. On cross-examination, he testified that when

the Suspect was outside the bar and saw the red truck, the Suspect ran off down the street and never re-entered the bar. He testified that Tucker's wife took money from Nassi.

Detective Theodore Michael testified on behalf of the City. He testified that there were five (5) calls received about the incident. He testified there were three (3) calls to 911 and two (2) calls to the police department. He testified that two (2) Sienna employees and an Opra restaurant employee called 911. He testified that the Victim and the Suspect both called the police. He testified that the time on the logs in one (1) hour early because of a wrong entry of "UTC" (coordinated universal entry). He testified that Jackson and Pedro Silva called at 5:52 p.m. and Josh Sousa at 5:54 p.m. He testified the Victim called at 5:47 p.m. which was consistent with the video. He testified that the Suspect called at 5:52 p.m. to say that his friend was injured and where he could be found (not at \$3 Bar). On cross-examination, he testified that he did not identify the female heard on the telephone call from the Victim.

The call from the Victim to the police is as follows:

Victim: Hi. I got a gentleman right here who just assaulted me and he stole my money.

(background talking)

Police: Where are you?

Victim: What is the name of this place?

Female voice: \$3 Bar.

Victim: \$3 Bar on Federal Hill.

*** [police take his name, telephone number].

Victim: He just robbed us.

Police: What's the guy look like?

Victim: He's a white guy. His name is Chris Tucker. He's right here, right now.

Police: Alright. We'll send an officer.

Victim: Alright. Thank you.

See City's Exhibit Nine (9) (audio of call).

Jackson testified on behalf of the City. She testified that she was working at Sienna on July 23, 2014 and ran an errand by car at 5:30 p.m. and returned to the parking lot at about 5:50 p.m. She testified that she saw a man lying in the ground beaten and there was a man with a \$3 Bar shirt next to him. She testified that she spoke to the \$3 Bar man through her car window and asked him if he called 911 and he said no but did not say why. She testified that while she spoke to him, she was calling 911 on her phone and she was still in her car. On cross-examination, she testified that she could not tell if the employee had a cell phone or not.

Henriques testified on behalf of the Appellant. She testified that on July 23, 2014, there were two (2) men in the bar and one man (Victim) came in and said to a man, "you stole my F** \$400." She testified that she and the bartender told them to take it outside and the men went out the back door. She testified the Victim was on his cell phone to the police when in the bar and the Victim asked her where he was when he was speaking to the police and she told him that he was at the \$3 Bar. She testified that she knew he was speaking to the police because he was screaming that he was calling the "cops." After listening to the Victim's telephone call to the police, she testified that it was her on the recording saying he was at the \$3 Bar. She testified that the men went outside and she saw the fight but it was scary to see three (3) men fight like that so the staff did not get involved. She testified that it happened very quickly. She testified that the neighbors were outside and they said they would call the police. She testified that she was able to get the license plate from the pickup truck and gave it to the officers.

On cross-examination, Henriques testified that as the patrons exited, the Victim was on his cell phone with the police. She testified that they tried to get the men to go

out front but the men were arguing, yelling, and walking to the back. She testified that the manager, two (2) bartenders, and she went with them outside. She testified that she did not see the whole fight but it was very scary. She testified that she and the other bartender could see the fight from the door and the neighbors who were outside were on the phone calling the police. She testified that she relied on the fact that the Victim called the police. She testified she had not seen the security video. She testified that she did not have her cell phone on her but keeps it in the drawer at the bar. On re-direct examination, she testified that she did not know if the other employees had their cell phones.

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. Arguments

The City argued that a liquor licensee is strictly liable for disorderly conditions and violations of state law occurring on or emanating from the licensed premises. *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964). The City argued that case law requires that a licensee affirmatively supervises its business so as to preclude any disorderly conduct and that a licensee is absolutely accountable for what happens on its premises and lack of awareness is not a defense. *Vitali v. Smith*, 254 A.2d 766 (R.I. 1969). The City argued that the failure to supervise is established if the licensing authority finds evidence to support a reasonable inference that the prohibited conduct occurred on or emanated from the licensed premises.

The City argued that there was a disturbance that started on the Appellant's on July 26, 2014 that spilled out onto the sidewalk. The City argued that the Appellant's video only confirmed the testimony at the Board hearing regarding the disturbance which then moved out of camera range down the street to which police responded as seen on the video.

For the July 23, 2014, the City concedes that two (2) of the four (4) individuals involved were not patrons of the Appellant's but argued that the Appellant allowed them to enter the bar. The City argued that at no time did any staff try to prevent the re-entry of Tucker, Nassi, or Victim and instead they walked around the bar arguing until the staff exited with them and even though the staff saw the fight, they did not call the police nor did they call 911 immediately upon seeing the Victim on the ground. The City argued that Henriques' testimony should be discounted as her testimony was at odds with the video.⁹ The City argued that revocation is justified because of the Appellant's failure to maintain and affirmatively supervise its premises on July 23, 2014 which resulted in the death of a

⁹ For example, Henriques testified about seeing the blow to the Victim and comforting him while waiting for the ambulance which did not happen based on the video.

man at the hands of the Appellant's patron and only three (3) days later it had another disturbance.

The Appellant argued that it fully understands the gravity of the situation of July 23, 2014 where a person lost his life. However, the Appellant argued that it cannot be held responsible for the actions of the Suspect as he was no longer a patron of the bar and no longer under its supervision at the time of the fight. *Cesaroni*. The Appellant argued that the Victim also was never a patron of the \$3 Bar but rather he had seen someone on the street that he wanted to confront. The Appellant argued that after the staff escorted the men outside, there was no way for staff to stop the ensuing fight or the killing which all happened within seconds. The Appellant argued that despite the City's scrutiny that the staff did not call the police, Henriques knew that the Victim had called the police and indeed after the 911 calls, the police only responded when an officer was flagged down by the Sienna valet.

In terms of the July 26, 2014 incident, the Appellant agreed that there was a disturbance for which it was responsible but argued it warranted at most a two (2) day suspension. The Appellant argued that revocation was not justified.

C. The Appeal before the Department

The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) (as the 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); *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964); and *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.

The Department reviews sanctions to ensure statewide consistency and appropriateness in the situation. It also supports progressive discipline barring the rare and extreme event where revocation may be warranted without prior discipline. It also accepts the principles of comity and deference to the local authorities and their desire to have control over their own town or city. At the same time, pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21, the Department ensures that tensions between local boards and licensees are settled in a consistent manner. Nonetheless, there is not a mechanical application of sanctions as each matter has its own sets of circumstances. See *C&L Lounge, Inc. d/b/a Gabby's Bar and Grille; Gabriel L. Lopes v. Town of North Providence*, LCA – NP-98-17 (4/30/99). At the same time, a sanction cannot be arbitrary and capricious. The unevenness of the application of a sanction does not render its application unwarranted in law but excessive variance would be evidence that an action was arbitrary and capricious. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). See *Jake and Ella's* (R.I. Super.) (overturning a revocation of a liquor license as arbitrary and capricious).

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).

D. Sanctions Prior to July 23 and July 26, 2014.

At the first stay hearing on August 4, 2014, the parties represented that the Appellant has received its license eight (8) weeks previously¹⁰ as a transfer of a license from Amici Sports Bar & Grille (“Amici”) to Appellant. It was represented that the Amici’s and Appellant’s license holder is the same person. It is understood that Gianfranco Marrocco is the Appellant’s license holder. The parties represented that Amici’s had prior discipline including a suspension for disorderly conduct in the Summer, 2013 but no licensing history for either Amici’s or Appellant’s was provided to the undersigned.¹¹

¹⁰ Thus, approximately in June, 2014.

¹¹ R.I. Gen. Laws § 3-5-22 provides as follows:

Reissuance of license after revocation. – In case any license issued is revoked, the board, body or official revoking the license shall, as part of the order of revocation, provide that no license be granted to the same person for the period of one year after the revocation, and in case the order is made, no license shall be issued during the year to the person whose license is revoked.

Section 14 of *Commercial Licensing Regulation & Liquor Control Administration* distinguishes between the grant and the issuance of the license. A license might be granted but it cannot be issued until “full compliance with the conditions and criteria necessary for the issuance of said license.”

The Appellant’s license holder apparently is Gianfranco Marrocco. He was also apparently the license holder of Karma Club which had its Class BX license revoked by the Board on February 17, 2014. (Administrative notice is taken of this date. See Order of Dismissal of *Karma Club, Inc. v. City of Providence Board of Licenses*, DBR No.: 14LQ005 (6/4/14)).

Without further facts, it is unclear to the Department whether what apparently was a transfer from Amici to \$3 Bar should have been allowed under this statute as the transfer was within one (1) year of a revocation of a liquor license that was apparently held by the same person as who holds the \$3 Bar license. The Department is not aware whether this issue came up before the Board when it transferred Amici’s license to \$3 Bar.

E. When Revocation of License is Justified

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.

In revoking a liquor license, 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* at 295-296 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 (R.I. 1980).

A liquor licensee is accountable for violations of law that occur on its premises and outside. *Vitali*. 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, 842-3 (R.I. 1966). See also *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965). As the Supreme Court has found, “the responsibility of a licensee for the conduct of his patrons within the licensed premises that makes it disorderly within the meaning of the statute is established by evidence showing a toleration or acquiescence in such conduct by the licensee.” *Cesaroni*, at 296. See also *AJC Enterprises; Schillers; and Furtado v. Sarkas*, 373 A.2d 169 (R.I. 1977).

Nonetheless, 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 *Stage Bands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328508 (R.I. Super.) (disturbances and a shooting on one night justified revocation) and *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation of license 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).

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*.

F. What Sanction is Justified

i. July 23, 2014 incident

On July 23, 2014, the Victim was struck by the Suspect with a two-by-four and later died. There is no dispute that the death of the Victim was a tragic event. However, the issue in this matter is not to ascribe blame in the Victim's death but to review the facts of the events at the Appellant's that ended in the assault (and later death) and to determine the facts as they relate to the Appellant's obligations as a liquor licensee.

The initial impression of this case was that there was a fight in the bar that spilled outside that led to the killing of a participant in the bar fight and while the fighting occurred, the bar staff were aware and did nothing. However, a thorough review of the testimony and exhibits present a more nuanced unfolding of events.

The video shows that the Victim and Suspect were never in the bar at the same time. The parties so stipulated as well. 9/23/14 transcript, pp. 154-7. The Suspect had been in the bar but was outside the bar on his cell phone [not drinking or eating] when he saw the Victim arrive outside and left. The Suspect was only ever at the bar with his friend, Tucker. He never was at the bar with either the Victim or the Victim's friend, Nassi. The Suspect never argued inside the bar or outside in front of the bar with the Victim, Nassi, or Tucker. Tucker, Nassi, and the Victim orally argued in the bar and the staff intervened in the front of the bar over the argument and in the back of the bar over

the oral argument. When the argument moved to the back of the bar, more staff joined the arguing patrons in order to move them along. A waitress got a bartender from behind a bar to join them. The bar staff moved Nassi, Tucker, and the Victim outside where they started to physically fight.

The City's Exhibit 13 is the Victim's cell phone log shows he called the police department at 5:47:07.¹² The timeline on the Appellant's security video is a minute fast so that the 5:47:07 call on the video timeline would actually be 5:48:07 p.m. The telephone log shows that the Victim was on the telephone to the police for one (1) minutes 35 seconds. The actual recording of his call is not that long but presumably he had to put through etc. The time of the telephone call corresponds with the time that the Victim and Tucker are arguing and walking to the back of the bar. The recording includes a female answering the Victim that he is at the \$3 Bar when he asks where he is so he can tell the police. The only conclusion to be drawn from the video, telephone logs, audio, and testimony is that once the Victim called the police to complain about Tucker stealing his money, Henriques (or a staff member) at least was aware that he called the police as she provided him with the location.¹³

Despite Henriques' testimony about seeing the blow to the Victim, based on the security video, she could not have witnessed the actual blow to the Victim. After the employees walked outside with the Victim, Tucker, and Nassi, they all were back inside

¹² Because of the UTC error, the log shows the call to be at 16:47:04 (4:47:04 p.m.) when it was really one (1) hour later. The Victim's cell phone log also shows that he called the police department at (correct time) 4:00 p.m. and 5:46 p.m. The testimony was that the Victim may have re-dialed after the 5:46 p.m. call or may have been patched through and it became the 5:47 p.m. call. 9/19/14 transcript pp. 126-9.

¹³ The City argued that based on Henriques' inconsistent testimony as compared to the video, it may not have been Henriques who provided the location. Based on the video, there was another waitress who also walked to the back with the Victim and Tucker and perhaps it was her voice on the recording rather than Henriques. Based on the video and who the Victim interacted with as he spoke on the cell phone at the time he called the police, the female voice was either waitress in the bar.

before the blows were struck. The video shows that an employee did see the Victim and Tucker fighting next to the car and they could have seen the wrestling and even some of the punching if they were standing in the doorway out of view of the camera. However, less than 15 seconds after all the staff were back in the bar, the Suspect appears in the parking lot. In fact, the Suspect appears in the parking lot less than one (1) minute after Tucker, Victim, and Nassi exited the bar into the parking lot. Despite most likely seeing the physical fighting (wrestling at least) outside, no call was made by the bar staff to the police or 911 and instead the staff returned inside and went about their duties.¹⁴

In a denial of renewal matter,¹⁵ *A.J.C. Enterprises v. Pastore*, 473 A.2d 269, 275 (R.I. 1984) found in discussing the disorderly provisions that “[T]here need not be a direct causal link between incidents occurring outside or nearby a drinking establishment and its patrons. Such a link is established when it can be reasonably inferred from the evidence that the incidents occurred outside a particular establishment and had their origins within.”

In *Stage Bands*, the Superior Court upheld a liquor license revocation as follows:

At the hearings, testimony was presented to the DBR's hearing officer. The DBR's decision lays out the facts in extensive detail, and this Court adopts those facts. (*Decision* DBR No. 06-L-0147.) Essentially, those facts are that the Hartford Avenue pedestrian gate was not locked. A disturbance involving at least ten people occurred inside the club at approximately 1:50 a.m. on July 29, 2006. The house lights were not turned on and the loud music was not turned off during the disturbance inside the club. A second disturbance involving at least five people occurred inside the club. The

¹⁴ The security camera did pick up one neighbor next to fence near the back of the bar who could have seen the fight over the fence as testified to by Henriques but there is no record of any neighbor calling in about the fight and Henriques was not near this neighbor.

¹⁵ In order to suspend or revoke a liquor license, there must be a showing that the holder has breached some applicable rule or regulation. In this matter, the City is relying on the disorderly provisions of R.I. Gen. Laws § 3-5-23. R.I. Gen. Laws § 3-7-6 requires that a denial of a renewal must be “for cause.” For cause has been interpreted to include (among other reasons) the violations of the disorderly provisions. *Chernov Enterprises, Inc. v. Sarkas*, 284 A.2d 61 (R.I. 1971).

testimony from all police representatives was credible, including that of Officer Mulligan. A third disturbance occurred outside the club on July 29, 2006. This disturbance involved five to eight people who were kicking a subject who was lying on the ground and had been shot in the head. Rescue vehicles could not enter the parking lot of Giza because the entrance was impassable due to the bottleneck of cars. Paramedics had to park the rescue vehicle on Hartford Avenue and carry the stretcher into the parking lot. At least four people were arrested at the Appellant's premises or in the vicinity of the premises on July 29, 2006. All five police officers assigned to District 5 responded to the scene on July 29, 2006. Officers from the gang unit, representative from the narcotics unit, NRT units, and District 2 vehicles responded to the scene on July 29, 2006.

In this case, the record indicates that three disturbances occurred within a matter of minutes: two inside Giza and one outside, culminating in a victim being shot in the head and kicked while his blood pooled on the ground around his head. [footnote omitted] Giza argues in its appeal that there is no connection between the shooting in the parking lot and the club itself. Therefore, it concludes, the DBR revoked the license without any evidence of disorderly conduct perpetuated by those inside Giza.

Even if there were no direct connection between the parking lot and the shooting, the case law of Rhode Island has made clear that a reasonable inference that the cause culminated inside that establishment can be made when a disturbance occurs immediately outside a drinking establishment. *See A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984). “[T]here need not be a direct causal link between incidents occurring outside or nearby a drinking establishment and its patrons. Such a link is established when it can be reasonably inferred from the evidence that the incidents occurred outside a particular establishment and had their origins within.” *Id.* at 275.

In this case, the facts are much stronger than a reasonable inference that the shooting outside was somehow connected to events inside Giza. There was uncontradicted testimony from Detective Green that the victim was inside the club before he was shot. He and his friend engaged in an altercation inside the club and later, outside the club, engaged in another altercation. (Tr. Oct 5, 2006 at 54-56.) Additionally, all testifying witnesses indicated that the victim's body was located inside the fenced in parking lot of the club. Furthermore, there was testimony from many of the witnesses at the DBR hearing that the door to Giza emptied directly into the parking lot. There is only one entrance/exit into the lot. It is more than reasonable for the DBR to conclude that the fights that culminated inside Giza and the shooting that occurred in the fenced in parking lot outside Giza occurred as a result of the activities inside Giza. *See, A.J.C. Enterprises* at 275.

See Stage Bands, Inc. d/b/a Club Giza v. Department of Business Regulation, 2009 WL 3328508 (R.I. Super.)

In *Stage Bands*, there were three (3) extreme disturbances in one night including a shooting. In citing to *A.J.C.*, the Court in *Stage Bands* found that a reasonable inference could be made that the shooting outside was connected to events inside the club.

Similarly, 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. A patron was injured in the bar as there was blood in the bar. A patron at the bar stabbed and killed another patron either inside or outside the bar but the patron was hurt in the bar. The patron died on the street in front of the bar. Thus, in *Cardio*, the victim and the killer physically argued inside the bar which escalated into a killing either inside or just outside the bar.¹⁶

In contrast to *Cardio* and *Stage Bands*, this was not a situation where bar patrons started fighting or physically fighting inside the bar and then the fight spilled outside and escalated into the killing of one of those patrons that had been fighting in the bar. There was no physical fighting between the Victim and the Suspect in the bar. Indeed, the Victim and the Suspect were never in the bar at the same time. This is not a situation where the Suspect was in the bar and threatened the Victim and left and then came back inside or outside the bar to “finish” something that had started at the bar.

As appropriately argued by the City, *Cesaroni* speaks of the licensee’s affirmative burden to supervise the conduct of its patrons. A licensee is responsible for its patrons’

¹⁶ Another example of the Department applying the same standard is in *El Tiburon Sports Bar, Inc. v. Providence Board of Licenses*, DBR No. 06-L-0087 (6/1/07). However in that matter, the Department found that the victim had been a patron of that bar but was assaulted down the street and there was no link between the bar and the assault. In discussing *Cesaroni*, *El Tiburon* found that there was no evidence to show that the bar had not supervised its patrons so as to be linked to the assault.

conduct within and outside of its premises. *Schillers*. This responsibility can be direct or inferred indirectly from patrons' or a bar's actions. E.g. the patron that makes threats after a fight in a bar, leaves, and comes back to the bar to carry out the threats.

Here, there is a direct link from the Appellant to Tucker, Stack, and Nassi arguing in the bar and being escorted outside of the bar where they then physically fought. As the City correctly noted in its brief, the Appellant is liable for such a disturbance and it is not a defense for a licensee that it was not aware of violation on its premises or tried to provide supervision to prevent a violation. *Infra*.

However, the Victim and Suspect never argued inside or outside the \$3 Bar. The Suspect never argued with anyone in the bar or outside the bar. Rather when the Suspect was outside the bar and he saw the Victim outside the bar, the Suspect ran down the street. Instead, the Victim orally argued inside the bar with Tucker, the Suspect's friend. The Victim called the police. A \$3 Bar employee heard the call and told the Victim his location in order to tell the police. The staff members moved the patrons that were orally arguing outside. Outside, the patrons started physically fighting. The police testimony was that the staff should not try to break up a fight. The employees all returned inside at 5:50:33 but did not call the police. Less than one (1) minute later, at 5:51:21, a staff member did check the parking lot; though there was a delay in calling for medical help so that when Jackson came into the parking lot approximately one (1) minute later no call had yet been made for medical help.

ii. July 26, 2014

On July 26, 2014, an upset patron left the \$3 Bar and scuffled outside in front which caused people to stop and look. The crowd outside the bar appeared to be about 20

people rather than 75 or 100. Two (2) patrons kept scuffling outside and were arrested. Police responded to the incident and the whole incident took at most ten (10) minutes.

iii. Conclusion

For July 23, 2014, the City faults the Appellant for 1) the altercation that erupted into violence; 2) failing to take affirmative steps to quell the altercation and prevent it from escalating such as failing to call the police;¹⁷ 3) for leaving a violent altercation unattended; and 4) for not calling rescue personnel for the seriously wounded Victim.

Here, Nassi, Tucker, and Victim¹⁸ orally argued inside and that fight spilled over outside and escalated into a punching match in the parking lot. However, none of them had argued or fought in the bar (or even in front of the bar) with the Suspect. Additionally, when the Suspect was in the bar, he never orally or physically fought with anyone in the bar or in front of the bar.

The Appellant is responsible for Nassi, Tucker, and the Victim's physical fight. While the staff were aware the Victim had called the police, it would have been preferable for the staff to also call the police once the staff returned inside leaving the men fighting outside since the staff did not know what was happening outside. There also was an apparent delay in calling 911 after the Victim was seen lying on the ground.¹⁹

¹⁷ The Appellant argued that while it is difficult to say, it most likely would not have mattered whether the staff called 911 at the time the fight turned physical. At 5:50:22, Tucker, Victim, and Nassi started wrestling and then started punching. At 5:50:46, the Suspect returned and the first blow is struck at 5:50:52. The time from the wrestling to the blow is 30 seconds. Taking 5:50:14 as the time the patrons started pushing each other, the time from then to the first blow is 38 seconds.

¹⁸ The Appellant argued that the Victim was never a patron of the \$3 Bar. It is true that when the Victim went in the bar, he immediately started arguing with Tucker and within three (3) minutes of entering the bar, he was escorted outside. Additionally, he never ordered a drink or food. Nonetheless, he was in the bar. The City conceded that two (2) of the men – Victim and Nassi - involved were not patrons.

¹⁹ Jackson appears one (1) minute and 21 seconds after a \$3 Bar employee sees the Victim. During that time, staff members were in the parking lot but did not call 911. Jackson called 911 (staff were aware she did).

Nonetheless, based on the facts that the Suspect never was in the bar with the Victim, never made threats about the Victim while inside or outside (in seating area) the bar, and left the bar before the Victim went inside the bar, a finding cannot be made that the Suspect's attack of the Victim is directly or indirectly related to the actions of patrons for whom \$3 Bar had a duty to supervise. Indeed, at the time of the attack by the Suspect, he had left the bar and was no longer a patron. Nor can it be inferred from the evidence that the actions by the Suspect had its origins inside the bar as the Suspect was only ever in the bar with his friend, Tucker, and never was in the bar with Nassi or the Victim so never even spoke to them in the bar (or in front of the bar).

If the Suspect had argued with the Victim and/or others in the bar and the fight escalated outside with the Suspect striking the Victim, the analysis would be different. If the Suspect had argued with the Victim and/or others in the bar and then left and came back to continue the fight inside or outside, the analysis would be different. *Cesaroni*. In both those scenarios, the bar would be directly or indirectly responsible for the actions of its patron and for the actions arising inside or emanating from inside the bar.

Thus, even accepting those four (4) failures by the Appellant as detailed by the City, those actions still do not indirectly link the Appellant to the Suspect's assault.

Despite the tragic death of the Victim, the issue is whether the events can be directly or indirectly linked to the bar are egregious enough to justify revocation. Without the death of the Victim, this is an oral argument among Nassi, Tucker, and the Victim in the bar that escalated into a physical fight outside the bar (which did not include guns or knives). The Appellant is responsible for Tucker, Victim, and Nassi fighting. The Appellant should have called the police about the fight as it was not aware

of whether the fight ended. However, it did know the Victim had already called the police so knew the police had been called. The staff did not immediately call 911 upon seeing the Victim outside.

Despite the Victim's death, the events at the bar are not egregious enough to warrant revocation since the Suspect's assault on the Victim cannot be linked directly or indirectly to the Appellant. The Appellant is also responsible for the July 26, 2014 scuffle.

The Appellant had two (2) disturbances happen three (3) days apart and within two (2) months of being licensed. Based on the closeness in time of the disturbances and of the closeness of both disturbances to the Appellant's licensing, the undersigned recommends that the Appellant's revocation be overturned and a suspension imposed that is limited to "time served" for violations of R.I. Gen. Laws § 3-5-23.

VI. FINDINGS OF FACT

1. On or about August 7, 2014, the Board notified the Appellant that its License had been revoked by the City.
2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision to the Director of the Department.
3. The hearing was held on August 25, 2014, September 17, 19, and 23, 2014.
4. Written closing were filed by October 3, 2014.
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. § 3-5-1 *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. In this *de novo* hearing, there was a showing made that warrants overturning Providence's decision to revoke the License.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of Providence revoking the Appellant's License be overturned and be reduced to a suspension of time served for violations of R.I. Gen. Laws § 3-5-23. However, prior to re-opening, the Appellant shall notify the Board of its security plan, including names of security staff, and when those security staff shall be on duty.

Dated: October 9, 2014

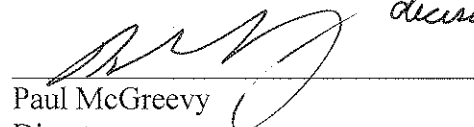

Catherine R. Warren
Hearing Officer

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 / see attached decision

Dated: 31 Oct 2014


Paul McGreevy
Director

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX, BLDG 68-69
1511 PONTIAC AVENUE
CRANSTON, RI 02920

<u>Gianco, Inc. d/b/a \$3 Bar</u>	:	
Appellant,	:	
	:	
v.	:	DBR No.: 14LQ043
	:	
The City of Providence Board of Licenses,	:	
<u>Appellee.</u>	:	

FINAL DECISION AND ORDER AFFIRMING REVOCATION

The Director of the Department of Business Regulation (“Department”) has reviewed the Decision and Recommendation of the Hearing Officer in this matter and modifies the Decision and rejects the Recommendation as provided herein.¹

STANDARD FOR DIRECTOR’S REVIEW

Central Management Regulation 2, Rules of Procedure for Administrative Hearings, Section 17 sets forth the relationship between the Hearing Officer’s decision and the Director’s ultimate order: “The decision of the Hearing Officer shall be reviewed by the Director of the Department who shall enter an order adopting, modifying or rejecting the decision of the Hearing Officer.” In *Envtl. Scientific Corp. v. Durfee*, the Rhode Island Supreme Court held that the director of the Department of Environmental Management “should give great deference to the hearing officer's findings and conclusions unless clearly wrong.” 621 A.2d 200, 209 (R.I. 1993).

¹ The Department received unsolicited email inquiries from non-parties in this matter, after the record had closed and after receipt of the Hearing Officer’s recommendation. These emails requested the status of the Decision and expressed concerns regarding the Department intentionally not issuing a final decision. Those parties were informed that their emails are not part of the record in this matter and that the Director was reviewing the recommendation of the Hearing Officer. There has been heightened media attention and public interest in this matter and the Department makes this disclosure in the interest of transparency and confirms that those email inquiries were not considered in the rendering of this Final Decision and Order.

In *Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, the court explained *Envtl. Scientific Corp.* as follows: “in a two-tiered administrative process, the ultimate decision-maker owes deference to the recommendations of the first-tier decision-maker only if those recommendations were based on determinations of witness credibility;” “[i]f the recommendations were not based on credibility determinations, the ultimate decision-maker may review the recommendations on a *de novo* basis.” 755 A.2d 799, 807 (R.I. 2000). *See also Birchwood Realty, Inc. v. Grant*, 627 A.2d 827, 831 (R.I. 1993). In this matter, the Director relies on the material facts as presented by the Hearing Officer and, as detailed below, submits the following analysis in modifying the recommendation of the Hearing Officer. The Director has deferred to the Hearing Officer’s findings of fact but draws different legal conclusions therefrom.

After a careful review of the Hearing Officer’s Decision and Recommendation, the Director:

- i) adopts Sections I, II, III, IV, V A through to and including E, VI, and VII (1) of the Hearing Officer’s Decision;
- ii) modifies and replaces Section V F of the Hearing Officer’s Decision with the Section V F below;
- iii) modifies Section VI (5) to state, “The facts contained in Sections IV and V A through to and including E are reincorporated by reference herein.”
- iii) modifies and replaces Section VII (2) of the Hearing Officer’s Decision with the Section VII (2) below;
- iv) rejects Section VIII, the Recommendation; and,
- v) affirms the City’s decision to revoke the Appellant’s License by Order as indicated below.

This revocation is based on the:

- i) The invalidity of the License under R.I. Gen. Laws § 3-5-22 because the Appellant's owner had a license revoked less than one year prior to the issuance of the Appellant's License; and additionally and alternatively, the
- ii) undisputed material facts as presented by the Hearing Officer which indicate that the Appellant was aware of the dispute between all of the parties and that Appellant is responsible for the operative facts and parties that gave rise to the beating and death in this matter, not just the control and conduct of the Suspect;
- iii) undisputed material facts as presented by the Hearing Officer which indicate that Appellant demonstrated a systemic and repeated lack of controls, training, and protocol on the licensed premises;
- iv) review of the Appellant's owner's licensing history which demonstrates that progressive discipline warrants revocation; and,
- v) need to ensure the protection of public safety.

The Director replaces Section V (F) of the Hearing Officer's Recommendation with the following:

V. DISCUSSION

F. What Sanction is Justified

1. City's failure to comply with R.I. Gen. Laws § 3-5-22

Pursuant to *Central Management Regulation 2, Rules of Procedure for Administrative Hearings, Section 14 C*, the Director takes administrative notice of Appellant's owner's holdings as indicated on the Secretary of State's online Corporate database. The liquor license of the

Appellant must be revoked because it is invalid under R.I. Gen. Laws § 3-5-22. Marrocco is the president of Appellant Gianco, Inc.² Appellant received its License as a transfer from Amici (Marrocco was also the license holder of Amici) in approximately June 2014.³ Marrocco is also the president of Karma Club, Inc. Karma Club, Inc. had its liquor license revoked by the Board on February 17, 2014.⁴ R.I. Gen. Laws § 3-5-22 provides:

In case any license issued is revoked, the board, body or official revoking the license shall, as part of the order of revocation, provide that no license be granted to the same person for the period of one year after the revocation, and in case the order is made, no license shall be issued during the year to the person whose license is revoked.

Therefore, Marrocco and the corporate entities of which he is president were ineligible for a new license until February 17, 2015.

The legislature provided that the Board is mandated to include the R.I. Gen. Laws § 3-5-22 rule in its order of revocation. In this case, it does not appear that the Board did so. However, R.I. Gen. Laws § 3-5-22 goes on to provide, in a separate clause: “in case the order is made, no license shall be issued during the year to the person whose license is revoked.” “In case the order is made” refers to the “order of revocation,” whether or not the Board fulfilled the mandate to include the § 3-5-22 rule in said order.

A “statute or enactment may not be construed in a way that would attribute to the Legislature an intent that would result in absurdities.” *Brennan v. Kirby*, 529 A. 2d 633, 637 (1987)(citing *City of Warwick v. Apt*, 497 A.2d 721, 724 (R.I. 1985)). An interpretation obliterating the rule when a municipality fails to abide by a statutory mandate would lead to an absurd result.

² Discussion, Section D. p. 16.

³ Discussion, Section D. p. 16.

⁴ Order of Dismissal, *Karma Club, Inc. v. City of Providence Board of Licenses*, DBR No. 14LQ005 (June 4, 2014).

Neither does the fact that Morrocco formed a separate corporate entity save him from the § 3-5-22 rule. The statute must be read to look at the “person” whose license is revoked, namely the individuals that form the leadership of the corporate entity.⁵ The Director “must give the words of the statute their plain and ordinary meanings.” *State v. Diamante*, 83 A.3d 546, 548 (R.I. 2014)(quoting *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1226 (R.I.1996)). Black's Law Dictionary (9th ed. 2009) defines “person” as “human being.”⁶ To read the statute otherwise would allow persons whose licenses have been revoked to gain new licenses simply by forming a new corporate entity. That result is absurd and, as such, is an untenable interpretation. *Brennan, supra*.

In the instant case, the License was granted via transfer from Amici Sports Bar & Grille, rather than as a new license. R.I. Gen. Laws § 3-5-22 applies not only to issuance of new licenses but also to transfers of licenses. Transfers are treated under the same circumstances as are issuances of new licenses. “The standard for transferring a license is the same as the standard applied when the Board is making an initial determination whether or not to grant a liquor license.” *Chapman St. Realty, Inc. v. Dep't of Bus. Regulation*, CIV.A. 2001-2217, 2002 WL 475281 (R.I. Super. Mar. 12, 2002).

It is inconsequential whether the parties raised the issue of the validity of the license under R.I. Gen. Laws § 3-5-22 at the Board or Department hearings. Under R.I. Gen. Laws § 3-2-2(a), “[t]he department has general supervision of the conduct of the business of...keeping for sale, and selling beverages.” Under R.I. Gen. Laws § 3-5-21(a), “[e]very license is subject to revocation...by the department...on its own motion, for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.” “Section 3-5-21(a) makes clear that DBR possesses *sua sponte* authority to

⁵ Further, where the legislature intends that “person” be meant to include entities other than human beings, it has specifically provided as such. For example, the Rhode Island Uniform Securities Act includes corporation in its definition of person. R.I. Gen. Laws § 7-11-101. The same is true of the Uniform Declaratory Judgments Act. R.I. Gen. Laws § 9-30-13.

⁶ See Also Merriam Webster Dictionary- <http://www.merriam-webster.com/dictionary/person>.

independently review a liquor license.” *Green Point Liquors, Inc. v. McConaghy*, PC/02-2837, 2004 WL 2075572 (R.I. Super. Aug. 10, 2004). “As DBR may exercise its *sua sponte* authority to review, suspend, or revoke a license on its own motion, this Court finds that DBR did not act in excess of its statutory authority in initiating an action, on its own motion, relating to the transfer of a license.” Id.

2. Appellant’s Responsibility for the Totality of All Operative Facts and Parties Not Just the Suspect’s Conduct

The Recommendation presented by the Hearing Officer in this matter is based on a distinction that the Victim and Suspect were never in the bar at the same time and that there was never any contact by the Suspect with the Victim inside Appellant’s premises. This analysis ignores the conduct that occurred inside the bar between the Suspect’s friend, the Victim, and the Victim’s friend.⁷ Appellant’s staff had numerous opportunities to separate the parties, de-escalate the fighting, but they failed to do so. That failure bears a direct causal link to the tragedy in this matter that cannot be minimized or ignored. The evidence establishes that a disturbance occurred on July 23, 2014 that resulted in the death by blunt force trauma with a two-by-four.⁸ There is a chain of events that causally links events inside of the establishment to the outside killing. The Rhode Island Supreme Court has made it clear that “there need not be a direct causational link between incidents occurring outside or nearby a drinking establishment and its patrons;” “[s]uch a link is established when it can be reasonably inferred from the evidence that the incidents occurred outside a particular establishment and had their origins within.” *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d 269, 275 (R.I. 1984).

At the start of the chain of events, the Suspect and Tucker (the Suspect’s friend) are in the establishment for at least 30-40 minutes.⁹ The Suspect leaves the establishment and Tucker

⁷ Recommended Decision, p. 19, 23.

⁸ Material Facts and Testimony, p. 3-12.

⁹ Material Facts and Testimony, p. 4.

remains inside.¹⁰ Eleven (11) seconds later the Victim enters the establishment and two (2) seconds after that Nassi (the Victim's friend) enters the establishment.¹¹ Seven (7) seconds later the Victim is yelling at Tucker inside the bar.¹² The Victim then makes a 911 call to report that Tucker assaulted him and stole his money.¹³ One (1) minute and eight (8) seconds later, the Victim and Tucker can be seen arguing and a man who appears to be bar staff is standing in between them.¹⁴ One (1) minute and five (5) seconds later, the Victim and Tucker can be seen arguing and a waitress is in between them.¹⁵ Throughout this time, staff allowed the parties to continue arguing.

Fifty nine (59) seconds later, Tucker, Nassi, and the Victim are wrestling outside.¹⁶ Thirty (30) seconds later, the Suspect strikes the Victim with the two-by-four. The fight outside was further described as Tucker hitting the Victim and Nassi hitting Tucker.¹⁷ The disturbance between the Victim and Tucker clearly initiated inside and can be directly attributed to the establishment. The Suspect patron entered the scene and hit Nassi then hit the Victim twice, before killing the Victim with a two-by-four.¹⁸ This chain of events evidences that the two inside arguments between Tucker and the Victim, where staff tried to separate the two, were causally connected to the Suspect later killing the Victim outside. The inside altercation essentially spilled outside at which point it can be inferred that the Suspect reacted to the ongoing physical altercation by first punching the Victim then killing him with a two-by-four. It may be reasonably inferred that had the inside disturbances been quelled before spilling outside,

¹⁰ Material Facts and Testimony, p. 4.

¹¹ Material Facts and Testimony, p. 4-5.

¹² Material Facts and Testimony, p. 5.

¹³ Material Facts and Testimony, p. 10.

¹⁴ Material Facts and Testimony, p. 5.

¹⁵ Material Facts and Testimony, p. 6.

¹⁶ Material Facts and Testimony, p. 6.

¹⁷ Material Facts and Testimony, p. 9.

¹⁸ Material Facts and Testimony, p. 9.

or had the parties been separated and gone through different exits, or exited at different times, the Suspect would not have reacted as he did nor had to the opportunity to attack the Victim.

To the extent that Appellant asserts that the argument inside the premises and the directly-related fight outside occurred quickly and the Appellant could not have reacted or prevented the altercation, it is clear from the undisputed facts that several of Appellant's staff members had opportunities to separate the Victim and the Suspect's friend inside the premises, but lacked the will, judgment, and/or skill to know how to react. Therefore, the speed at which the dispute occurred and escalated does not relieve the Appellant from responsibility for the actions that occurred on July 23, 2014.

The evidence establishes that the July 26, 2014 street fight was a twenty (20) person disturbance outside the establishment that resulted in two women being arrested.¹⁹ The disturbance began inside where a woman threw something on the ground, and then someone took her outside.²⁰ While outside, this woman pushed and shoved people.²¹ There were people falling to the ground.²² The large crowd was blocking traffic.²³ It can be reasonably inferred from the evidence that the disturbance outside was causally linked to the woman who threw something inside. *A.J.C. Enterprises, supra*.

3. Systemic and Repeated Lack of Controls, Training, and Protocol

Both incidents demonstrate that Appellant did not have a process, training, protocol, controls, guidelines or any other measures in place to assist staff in handling these issues. The only method of handling disputes demonstrated by Appellant's employees in both incidents was to move the cause of the disturbances (individuals) outside-where the disputes (in both incidents)

¹⁹ Material Facts and Testimony, p. 2.

²⁰ Material Facts and Testimony, p. 3.

²¹ Material Facts and Testimony, p. 3.

²² Material Facts and Testimony, p. 3.

²³ Material Facts and Testimony, p. 2.

escalated in ways that were unable to be managed. The employees' failure to follow a meaningful process in both incidents combined with reliance on other patrons and neighbors to call police is unacceptable. As is evident from the body of caselaw on issues involving violence on premises of liquor licensees, it is incumbent upon every liquor licensee to train its employees to react in a manner that promotes the safety and well-being of its employees, patrons, neighbors, and the community.

The other facts deemed relevant in fashioning an effective and appropriate sanction is that the staff did not take responsibility to call the police when the altercation began or when they observed the resulting death. While the Victim did call 911, that was before the Victim and Tucker had to be separated by a male staff member and then again by a waitress. The police should have been called directly by the staff at that point. When staff saw that the Victim had been beaten, the testimony is that the staff relied on their impressions that the neighbors called the police. However, in this situation, they should have directly called the police to completely assure that the public health, safety, and welfare needs were met.

Henriques testified that she heard the Victim say to a man, "you stole my F**\$400" and that she and the bartender told them to, "take it outside and the men went out the back door."²⁴ She described the Victim as "screaming that he was calling the cops."²⁵ This was not a low-key argument and the reaction of all of the employees was to escort the parties outside even when presented with a "very scary" and quickly escalating situation occurring outside the premises.²⁶ The most troubling fact which supports a lack of controls, training, and protocols is the failure of any of Appellants' employees to call police or to take some other mitigating action even while watching a "very scary" fight.

²⁴ Material Facts and Testimony, p. 11.

²⁵ Material Facts and Testimony, p. 11.

²⁶ Material Facts and Testimony, p. 12.

4. Progressive Discipline Warrants a Revocation

In fashioning a sanction, the Department considers “the number and frequency of the violations, the real and/or potential danger to the public posed by the violation, the nature of any violations and sanctions previously imposed, and any other facts deemed relevant in fashioning an effective and appropriate sanction.” *Jake and Ella's, Inc. v. Department of Business Regulation*, 2002 WL 977812, *6 (R.I. Super., 2002). The Department also follows the “principles of comity and deference to the local authorities and their desire to have control over their own town or city.” *Eagle Social Club d/b/a Ava's Wrath v. City of Providence Board of Licenses*, DBR No. 14LQ021; 14LQ026 (September 2, 2014).

Under the Administrative Procedures Act, R.I. Gen. Laws § 42-35-10(4), “[n]otice may be taken of judicially cognizable facts.” Notice may also be taken of “generally recognized technical or scientific facts within the agency's specialized knowledge,” but in order to do so, the parties must first be notified and given an opportunity to protest. In this case, taking administrative notice of the prior DBR orders is a “judicially cognizable fact” that does not require giving notice to the parties. “[D]ecisions, acts, and records of state agencies are often judicially noticed by state courts.” 29 Am. Jur. 2d Evidence § 165. The Department’s *Central Management Regulation 2*, entitled *Rules of Procedure for Administrative Hearings*, Section 14 (C) allows the Department to take such administrative notice of judicially cognizable facts in its proceedings.

When the Rhode Island Public Utilities Commission, Division of Public Utilities and Carriers suspended the operating authority of D'Agostino Auto Sales & Salvage, Inc. d/b/a Allens Avenue Towing, Inc. for a period of forty-five (45) days, the “Hearing Officer who made

the decision also took administrative notice of two previous violation-suspensions of D'Agostino's certificate #881 in August, 1987 and October, 1989." *D'Agostino Auto Sales v. Pub. Util. Comm.*, No. PC 91-1564, 1992 WL 813525, at *3 (R.I. Super. Feb. 5, 1992). "On those occasions, fifteen and thirty-day suspensions were imposed." *Id.* The Superior Court, in reviewing the appeal of the decision found that "[t]here is certainly nothing unreasonable in that added penalty [the 45 days] in view of D'Agostino's efficacious track record." *Id.* Thus, the Superior Court has upheld an agency that based a penalty on administrative notice of prior penalties.

In this case, the facts and circumstances support the Board's imposition of revocation of the License. In terms of the number and frequency of the violations, the Appellant had two (2) disturbances happen three (3) days apart and within two (2) months of being licensed. In terms of the real and/or potential danger to the public posed by the violation, a fight resulting in a patron killing another person who was in the establishment which is causally connected to a verbal altercation inside the establishment is a severe public danger. The Appellant's lack of ability to handle, even at the most basic level, these types of common altercations poses a risk of harm to the community.

In terms of the nature of any violations and sanctions previously imposed, the Appellant's owner has a history of liquor violations that bring into question his suitability to hold a liquor license. The License was transferred from Amici Sports Bar & Grill ("Amici") eight (8) weeks prior to the incidences.²⁷ The president of the Appellant, Gianfranco Marrocco ("Marrocco"), is the same person as the license holder of Amici.²⁸ The parties represented that Amici's had prior

²⁷ Recommended Decision, p. 16.

²⁸ Recommended Decision, p. 16.

discipline including a suspension for disorderly conduct in the summer of 2013.²⁹ Marrocco is also the president of Karma Club, Inc.³⁰ Karma Club, Inc. had its liquor license revoked by the Board on February 17, 2014.³¹ Prior to revocation, Karma Club was fined by the Board.³² Additionally, Marrocco is the president of ATO, Inc. which holds a liquor license for Skarr Hookah Lounge. Skarr had its license suspended for sixty (60) days due to a fight inside the establishment.³³ Skarr also had administrative penalties imposed on it by the Board.³⁴ Finally, Marrocco is the president of The Rack, Inc. The Rack, Inc. holds a liquor license for Smoke Cigar Lounge. The Board fined this liquor license in the amount of \$2000³⁵ and \$3000.³⁶ This history demonstrates that further progressive discipline would not deter future violations by the owner, who has continued to violate the liquor licensing laws despite imposition of the described penalties on his liquor establishments. The Department would be remiss if it did not consider the owner's licensing history (as established by prior Departmental Orders) and escalating consequences related to public safety in reviewing the facts in this matter.

In *Mathieu v. Bd. of License Comm'rs, Town of Jamestown*, the Rhode Island Supreme Court upheld denial of a renewal application of a liquor license (which is akin to revocation) for less egregious conduct than is at issue in the instant case. 115 R.I. 303, 308 (1975). In *Mathieu*:

The petitioner concede[d] that fistfights with attendant injuries occurred inside the licensed premises. She also concede[d] that the patrons of the licensed premises

²⁹ Recommended Decision, p. 16.

³⁰ Regarding Marrocco's status as president for the liquor licensees described herein, the Director takes administrative notice of the records of the Rhode Island Secretary of State.

³¹ Order of Dismissal, *Karma Club, Inc. v. City of Providence Board of Licenses*, DBR No. 14LQ005 (June 4, 2014). The Director takes administrative notice of all the Department decisions cited herein.

³² Declaratory Ruling Order, *Karma Club, Inc. v. City of Providence Board of Licenses*, DBR No. 13LQ030 (May 3, 2013).

³³ Recommendation and Interim Order Granting Motion for Stay with Conditions and Notice for De Novo Hearing, *ATO, Inc. d/b/a Skarr Lounge v. City of Providence Board of Licenses*, DBR No. 14LQ051 (September 18, 2014).

³⁴ Order of Remand, *ATO, Inc. v. City of Providence Board of Licenses*, DBR No. 14LQ031 (June 12, 2014).

³⁵ Order of Dismissal, *The Rack, Inc. d/b/a Smoke v. City of Providence Board of Licenses*, DBR No. 11-L-0098 (November 17, 2011).

³⁶ Order of Dismissal, *The Rack, Inc. d/b/a Smoke v. City of Providence Board of Licenses*, DBR No. 12-L-0017 (February 10, 2012).

congregated on the sidewalk and that police were required to disperse them. Likewise, she admit[ed] that there were bottle-throwing incidents in the parking ground outside the building.

In the instant case, a patron killed a person who had been in the bar with a two-by-four. The killing is much more egregious than the fistfights, bottle-throwing, and dispersal issues in *Mathieu*.

5. Protection of the Public Safety

Finally, the guiding rationale for upholding the revocation of Appellant's License is the need to ensure that the public is protected and public safety is promoted by liquor licensees. The Appellant and Mr. Marrocco have not demonstrated the competence or will to expend the resources to adequately train employees or put measures in place that protect the public interest. It is also troubling that that the License was issued to Appellant in violation of R.I. Gen. Law § 3-5-22 and without any conditions or acknowledgment of past licensing history and/or issues.

As guidance for the City, the Department recommends that the Board consider imposing requirements on licensees such as: i) considering and addressing past licensing history and success at managing public safety issues in granting licenses; ii) training for its employees on any issues related to potential threats to staff, patrons, neighbors, or third parties; ii) written protocols for reacting to altercations; iii) written protocols for when to contact police; iv) written protocols for de-escalating arguments or altercations between patrons; and v) an adequate and appropriate written response protocol for the wide and varying situations that arise at the premises of licensees. The nature and complexity of public safety issues facing business owners is growing ever more complex given cell phone communication, social media, and threats that may arise and escalate quickly without apparent notice. There is a compelling need for the licensees to comply with all statutory and regulatory mandates intended to protect the public and

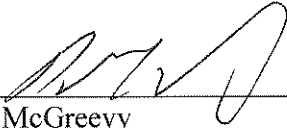
for the Board to ensure that its licensees have the controls, training, and protocols in place to promote public safety.

Section VII, paragraph 2 is deleted and replaced with the following:

For the reasons stated herein, the Department finds that the issuance of Appellant's License was in violation of R.I. Gen. Laws § 3-5-22 and the License should be revoked. Additionally and alternatively, the Department upholds the Board's decision to revoke the License for the reasons state in Sections F 2, 3, 4, and 5 above.

ORDER

Therefore, it is hereby ORDERED that the decision of the Board revoking the Appellant's License be affirmed.



Paul McGreevy
Director

Date: 31 Oct 2014

ENTERED as Administrative Order No. 1424 on the 31st day of October 2014.

NOTICE OF APPELLATE RIGHTS

THIS DECISION AND ORDER 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 that on this 31st day of October 2014, a true copy of this Decision and Order was sent by first class mail, postage prepaid to:

Peter Petrarca, Esq.
Petrarca & Petrarca
330 Silver Spring Street
Providence, RI 02904

Sergio Spaziano, Esquire
City of Providence Law Department
444 Westminster Street, Suite 220
Providence, RI 02903

And by electronic mail to: Maria D'Alessandro, Deputy Director, Division of Commercial Licensing, Department of Business Regulation, 1511 Pontiac Avenue Building 68-69, Cranston, RI 02920.

A handwritten signature in cursive script, reading "Kristin L. Masse", is written over a horizontal line.