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

Club Heat d/b/a Level II **Appellant,**	:	
v.	:	**DBR No. 12LQ064**
The City of Providence Board of Licenses, **Appellee.**	:	

DECISION AND ORDER

I. MATERIAL FACTS AND TRAVEL

Club Heat d/b/a Level II ("Appellant") was the holder of a Class EDX/N License authorizing it to offer alcoholic beverages for sale at the Appellant's nightclub establishment which occupied the second floor of the building located at 101 Richmond Street, Providence, Rhode Island (the "Premises"). On April 4, 2012, the Providence Board of Licenses ("Board") held a Show Cause hearing in response to an alleged incident occurring in the early morning hours of November 27, 2011. At the end of that first day of hearing, the Board contemplated scheduling up to three more hearing dates to address the November 27 incident.[1] On April 9, an emergency hearing was held in response to another alleged incident occurring in the early morning hours of April 8, 2012. The parties agreed to continue the matter until April 11 during

[1] November 27 Board Transcript at 73.

which time the Appellant would remain closed.[2] On April 11, the parties agreed to consolidate the two incidences for purposes of conducting the hearing on whether Appellant's license should be revoked.[3] On June 4, following an additional ten (10) scheduled hearing dates, the Board rendered a decision to revoke Appellant's retail liquor license. The decision was based on several findings, including, but not limited to:[4]

1. "The total number of patrons exiting Licensee's premises on [the] evening [early morning hours of November 27, 2011] was 848, more than twice its legal capacity." Board Decision at 2, ¶ 12.
2. During the April 8 incident, "[p]olice discovered one victim lying on the floor inside the club who was bleeding from a neck wou[n]d and had to be carried down the stairs by police and rescue personnel." Board Decision at 3, ¶ 8.
3. During the April 8 incident, an employee "was injured while attempting to quell a disturbance at the back door...He suffered a punctured lung and was hospitalized for a week as a result." Board Decision at 3, ¶ 9.

On June 11, 2012, the Appellant timely appealed the Board's decision to the Department of Business Regulation ("Department") and this matter came before the undersigned in his capacity as the Hearing Officer sitting as the designee of the Director of the Department. The Appellant filed a motion to stay the decision of the Board pending the outcome of the instant appeal, which was denied on July 3, 2012. The hearings on the merits proceeded over several sessions, concluding on November 1, 2012.

During the course of the hearings on the merits of the Board's revocation decision, the owner of the Premises, Richmond & Friendship, LLC ("Landlord"), obtained a default judgment against the Appellant on July 23, 2012. The Board filed a Motion to Dismiss the instant appeal

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[2] April 9 Board Transcript at 2 *et seq.*
[3] April 11 Board Transcript at 7.
[4] The selected Board findings are those that the undersigned found to be supported by adequate evidence to form the basis of the Department's *de novo* decision. For example, while the Board also found that "security was instructed to allow patrons to enter the premises after 1 am...in violation of RIGL 3-7-16.6(d), which prohibits Class N license holders from admitting patrons after 1:00 am," such evidence was neither convincing nor necessary for the determination of the case.

on September 20, 2012, arguing that the matter had become moot due to the Appellant's failure to maintain possession or control over the Premises.

Before any decision was rendered on the motion to dismiss or on the merits, the Board proceeded to grant and issue a new license to PVD Artistry, LLC d/b/a Spot ("PVD") to operate a liquor establishment at the Premises on October 4, 2012. At a hearing held before the undersigned on October 15, the attorneys for the Board, PVD, and the Landlord were given the opportunity to present argument as to whether the Board's actions had rendered the matter moot or whether the Department has the authority to order a license reinstated at the Premises where a new license has been issued to a third party on the same Premises.

Pursuant to R.I. Gen. Laws § 3-7-21(c), the Department "accept[ed] into evidence a stenographic transcript of...sworn testimony presented before the local board," including exhibits entered into the local board's record.[5] The Board elected to present some of its witnesses directly before the undersigned and to rest on the record of the testimony of other witnesses. The Appellant was given the opportunity to cross-examine all the witnesses called at both the Board and Department hearings, as well as the opportunity to call its own witnesses before the undersigned.[6]

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[5] Testimony before the board is substantive evidence that "may be rebutted by competent testimony presented at the hearing held by the director." Id. Rhode Island cases reviewing the Department's decisions have noted the statutorily-authorized practice of admitting the certified record without any indication that doing so is problematic or inadvisable. *See, e.g., Manuel J. Furtado, Inc. v. Sarkas*, 373 A.2d 169, 171 (R.I., 1977); *Edge-January, Inc. v. Pastore*, 430 A.2d 1063, 1064 (R.I., 1981).

[6] Though a stenographer was present at the proceedings, the Appellant did not pay the cost of producing the transcripts to the Department. Under Central Management Regulation 2: Rules of Procedure for Administrative Hearings, Section 15(E)(1), "[a] complete record of the proceedings shall be recorded on audiotape, or at the discretion of the Hearing Officer, by stenographic record." Though the undersigned did not order a stenographic record in this case, "[a]ny Party may on his, her or its own initiative order a stenographic record made of the proceedings." The Department's rules are clear that the "requesting Party [the Appellant in this case] shall incur all costs associated therewith." Because the Appellant failed to pay the stenographer's fees, no transcript of the Department level proceedings was produced. However, neither party objected to the Department making a decision based on the detailed notes of the undersigned taken during each day of hearing. Should this matter be appealed, R.I. Gen. Laws § 42-35-15(d) "require[s] the agency to transmit the record to the reviewing court within thirty days after a complaint is filed but the section does not require the agency to pay the stenographer's costs to have the

II. JURISDICTION

The Department has jurisdiction over appeals from decisions of local liquor licensing authorities under R.I. Gen. Laws § 3-7-21, subject to the relevant provisions of the Rhode Island Administrative Procedures Act, § 42-35-1 *et seq.*

III. ISSUES

1. Should the Department affirm or overturn the Board's liquor license revocation decision?
2. Has the matter been rendered moot by the Appellant's alleged eviction or the Board's October 4 decision?

IV. STANDARD OF REVIEW

The Department has the broad authority to "confirm or reverse the decision of the local board in whole or in part" under R.I. Gen. Laws § 3-7-21(a). Although the standard of review of the board's decision is not explicitly delineated in the statute, judicial interpretation of § 3-7-21 in light of the legislative intent to vest the Department with broad discretion as a "superlicensing authority," imposes a "de novo" review standard. *Hallene v. Smith*, 98 R.I. 360, 363 (R.I., 1964). In *Hallene*, the Rhode Island Supreme Court stated that "[w]hen § 3-7-21 is read in its entirety, it discloses by necessary implication a legislative intent to provide licensees with a de novo hearing of the cause rather than an appellate review of the decision." 98 R.I. 360, 365 (R.I. 1964). In other words, the appeal is treated as a "proceeding to transfer or remove a cause from the jurisdiction of a local board to that of the state tribunal...[and] transfers the jurisdiction of the cause from the local board to the [Department] by operation of law." Id. Accordingly, the Hearing Officer reviews the Board record certified to the Department and any evidence

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testimony transcribed." *A.J.C. Enterprises, Inc. v. Pastore*, 1981 WL 390926 (R.I.Super., 1981). Accordingly, the Rhode Island Superioir Court has held that "there is no obligation on the [Department] to send [the transcript] until such time as the appealing party has paid for the cost of the transcript or has taken steps to ensure its payment." *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d 269, 273 (R.I., 1984). *See also* Section 15(E)(2), id.

presented at the Department level *independent* of the local board's analysis. *See* Black's Law Dictionary, 9th ed. (2009)("De novo" review means "nondeferential review… usu. through a review of the administrative record plus any additional evidence the parties present.")

V. DISCUSSION

A. Grounds for Discipline

1. The November 27, 2011 Incident: Overcapacity

Under R.I. Gen. Laws § 3-5-21(a), a licensee is subject to discipline "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." This provision is triggered when the licensee or agent violates the law. In the instant case, the evidence indicates that the Appellant violated legal limits for maximum occupancy under the state Fire Code.

"The capacity of a licensed establishment is a condition of licensing," the violation of which subjects the licensee to discipline. *J.J.A.M. Sport, Inc. d/b/a La Cabana Night Club v. Town of Lincoln Board of License Commissioners*, DBR No. 08-L-0182 at 10. Licensees have a statutory duty to ensure compliance with occupancy limits under the Fire Code. R.I. Gen. Laws § 23-28.6-5(a) provides that "[a]dmissions to all places of assembly shall be supervised by the responsible management or by the person or persons delegated with the responsibility by the management, and the responsible person shall not allow admissions in excess of the maximum occupancy." Under R.I. Gen. Laws § 23-28.6-22(g), nightclubs must have "a person on duty or a crowd manager on duty, who has been trained by the fire marshal with regard to the emergency plan and basic crowd management techniques."

In the instant case, the record indicates that the 400-person limit was grossly exceeded when 848 people were counted exiting the establishment at closing time on November 27, 2011.

The official positioned at the main entrance, Fire Investigator Robert Riley, measured the largest occupancy count. Riley's testimony before the undersigned was supported by an authenticated photograph of the "clicker" devise employed by Riley, exhibiting a figure of 565. Riley testified that patrons were counted as they exited in a nearly single-file line and that non-exiting persons otherwise walking on the side walk were not included in his count. Riley further testified that that patrons included in the count were from Level II as opposed to patrons of neighboring clubs because the entrances and exits of those establishments are set apart by a sufficient distance. Riley further testified that he was not distracted while he was counting.

The second official, Patrolman Kenneth DeMarco, testified before the undersigned that he performed a head count of 191 patrons immediately as they exited one at a time from the narrow side door of the establishment, being careful not to include in the count any persons already present on the sidewalk. He further testified that he did not receive any calls nor encounter any other distractions during his count. Finally, Patrolman Ivan Tavarez provided an occupancy head count of 92 for the third door, the back metal staircase. Tavarez testified before the undersigned that he was focused on the task of counting only those individuals who exited the premises and that the lattice at the back landing controls the crowd in a manner that facilitated accurate head counting.

The Appellant challenged the reliability of the two counts provided by DeMarco and Taverez because those counts were not measured with the aid of a clicker and the original papers on which the counts were recorded were not produced, instead being incorporated into Riley's total count. However, the licensee's violation of law need not be proven beyond a reasonable doubt; rather, the Department can base its ultimate conclusion on a reasonable inference from the evidence. *J&A Commercial Center, Inc. v. Pastore*, 1990 WL 124376, *3 (R.I. Super., 1990).

The accuracy of the officers' counts can be inferred from the attention they committed to the task and their credibility in testifying before the undersigned. Moreover, Riley's count of 565 patrons alone, evidenced by the authenticated photograph of the clicker, demonstrates an overcapacity of 141%, which is in clear violation of the rule setting maximum occupancy at 400.

The Appellant further argues, based on the speculative testimony of Gaetano Gravino, a shareholder and officer of the Appellant, that it would be physically impossible to fit 800 individuals into an establishment with a 400 total occupancy, without any supporting evidence. At least one historic case indicates otherwise. The deadliest nightclub fire in U.S. history, "[t]he Cocoanut Grove fire broke out on the night of November 28, 1942" in Boston, Massachusetts, claiming 492 lives.[7] "Although the official capacity was only 600, there were more than 1,000 people in the club that night."[8]

The Appellant did not produce any evidence of a count conducted by its management on the night in question to refute the Board's evidence of overcapacity. One aspect of the statutory duty to abide by the Fire Code has been described by the Attorney General's office as a duty "to ensure an accurate count of the number of persons inside" a nightclub.[9] The fact that the Appellant did not present evidence of its own clicker count further brings into question the Appellant's commitment to fulfillment of its statutory duties as a liquor licensee and business operator.

2. <u>April 8, 2012 Incident: Disorderly Conditions</u>

Under R.I. Gen. Laws § 3-5-23(b), disciplinary action is justified "if any licensed person permits the [premises] to become disorderly as to annoy and disturb the persons inhabiting or

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[7] Lawrence M. Friedman and Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DEPAUL LAW REVIEW 251, 476-477 (2003).
[8] Id.
[9] State's Supplemental Response to Defendant's Motion for Bill of Particulars, *State v. Derderian*, 2005 WL 5769986 (R.I. Super., 2005).

residing in the neighborhood...or permits any of the laws of this state to be violated in the neighborhood." While § 3-5-21(a) addresses violations of law or conditions committed by the licensee or agent, § 3-5-23(b) imposes responsibility on the licensee for conduct of its patrons amounting to a violation of law or causing disorderly conditions in the neighborhood.

With respect to discipline for "permitting" violations of law to be committed on the premises or the neighborhood, the "licensee is absolutely accountable for any violations of the law which occur on his premises." *Manuel J. Furtado, Inc. v. Sarkas*, 74-674, 1975 WL 169939 (R.I. Super. Mar. 13, 1975)(citing *Vitali v. Smith,* 105 R.I. 760 (1969)). This absolute accountability stems from the licensee's "affirmative obligation and duty to supervise his premises to see that the laws are not violated." Id. An immediate "breach of the licensee's duty" "results when a violation of the law occurs on the premises." Id. In evaluating the breach, "what is all-important and decisive is whether there has been a violation of the law - not whether supervision was provided." *Vitali v. Smith*, 105 R.I. 760, 254 A.2d 766 (R.I. 1969). "[E]ven though the responsibility may be onerous, a licensee agrees to assume such an obligation by its acceptance of the license." *Shillers Inc. v. Pastore,* 419 A.2d 859 (R.I. 1980).

With respect to discipline for "permitting" the premises to become "disorderly" so as to "annoy and disturb" the neighborhood, an equally onerous duty has been imposed on the licensee. Once again, the "licensee assumes an obligation to affirmatively supervise the conduct of his patrons," the breach of which makes the licensee "absolutely accountable." *Cesaroni v. Smith*, 202 A.2d 292, 295-96 (1964); *Vitali*, id. Black's Law Dictionary defines "disorderly conduct" as "[b]ehavior that tends to disturb the public peace, offend public morals, or undermine public safety." The term would obviously include incidents that create a public safety concern such as injuries sustained by patrons or disturbances that command attention of police

force. The requisite "annoy[ance] or disturb[ance]" to the persons residing in the neighborhood is a flexible standard that may be established by testimony of the neighbors, by anonymous police complaints,[10] or by other evidence of the effect of an incident on community safety.[11]

In the instant case, the record establishes that at least two individuals were injured *inside* of the establishment on the night in question.[12] It may be reasonably inferred from the injuries that some "violation of law" occurred that precipitated them, *i.e.* criminal or civil battery. Moreover, injuries sustained by patrons and employees inside of the establishment clearly reflect conditions that "undermine public safety" within the meaning of the term "disorderly."

One victim, Christopher Banno, a security employee of the Appellant at the time of the incident, personally testified before the Board, subject to cross-examination by the Appellant. While responding to a group of people fighting inside the establishment, Banno testified that he sustained a deep laceration inside of his elbow and a puncture wound to the right side of his chest.[13] The testimony of Detective Theodore Michael corroborates this evidence. Michael also testified before the Board, subject to cross-examination by the Appellant, that he met a "bouncer", later identified as Banno, at the bottom of the stairs of the premises and observed a stab wounds to Banno's chest and arm area.[14] As a result of the disorderly conduct of

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[10] *Schillers, Inc. v. Pastore*, 80-1459, 1980 WL 335979 (R.I. Super. July 16, 1980).
[11] *PAP Restaurant, Inc. d/b/a Tailgate's Grill and Bar v. Town of Smithfireld, Board of License Commissioners*, DBR 03-L-0019 at 24 (May 8, 2003)("A licensee who generates such an effect on a local police force cannot be heard to say it did not disturb the surrounding neighborhood."); *Chalkstone Steakhouse d/b/a Breakpoint Café v. City of Providence Board of Licenses*, LCA-PR-05-33 at 13 (April 20, 2006)(an "incident forc[ing] the police department to commit additional resources to the establishment, jeopardize[es] the safety of other neighborhoods.")
[12] There was also evidence surrounding fighting occurring outside of the premises. "Rhode Island has consistently held that disorderly conduct outside and connected to a licensee's establishment constitutes credible evidence" justifying disciplinary measures. *J. Aliosio Enterprises, Inc. v. Department of Business Regulation*, 2001 WL 1005865 at 9 (R.I.Super.,2001). Given the strong evidence of disorderly conduct *inside* of the premises, the outside fighting need not be addressed in the instant case, however.
[13] May 7 Board Transcript at 8-10.
[14] April 30 Board Transcript at 17.

Appellant's patrons, Banno suffered a punctured lung for which he was hospitalized for one week.[15]

Another victim, identified by police as Sean Jones, was found wounded inside the establishment. Though the record does not include any testimony from Jones personally as to the location or cause of his injuries, his injured body was clearly witnessed *inside* of the Appellant's establishment at a distance from exits or entrances. Multiple witnesses, including Appellant's employees testifying in favor of the club, observed an individual identified as a heavyset black male, lying on the dance floor with blood coming from his neck area and pooling on the ground surrounding him. The undersigned can reasonably infer from the location of Jones's body that the injuries were sustained inside of the establishment. *See Stage Bands, Inc. v. Department of Business Regulations for the State of Rhode Island*, 2009 WL 3328508 (the Hearing Officer could reasonably infer that the victim's injuries were sustained inside the establishment's adjacent fenced-in parking lot area where "all testifying witnesses indicated that the victim's body was located inside the fenced in parking lot of the club.")

Speculative arguments that Jones may have been injured elsewhere are rejected in light of the testimony of the Appellant's employees that an injured individual such as Jones would not have been admitted into the establishment with pre-existing, visibly bleeding wounds. *See Chalkstone Steakhouse d/b/a Breakpoint Café v. City of Providence Board of Licenses*, LCA-PR-05-33 15 ("the [Hearing Officer] finds it incredible [that]...an individual who just happened to be stabbed in the neighborhood in an unrelated incident managed to transport himself, arrive at and break through the...crowds" to reach the Appellant's establishment.). Neither does the highly unlikely possibility that the wound was self-inflicted overcome the evidence against the

[15] May 7 Board Hearing at 10.

Appellant.[16] In a liquor license appeal, "proving causation by reasonable inferences is not proof that necessarily excludes every other possible cause." *Chapman Street Realty, Inc. v. Department of Business Regulation*, 2002 WL 475281 (R.I.Super., 2002)(citing *Edge-January, Inc. v. Pastore,* 430 A.2d 1063 (R .I., 1981).

In addition to Banno and Jones, other victims were identified through police testimony as having sustained injuries inside of the Appellant's establishment. Detective Michael testified before the Board, subject to cross-examination by the Appellant, that he observed an individual, with a cut over his eye, identified as Andre Spriges in the police report.[17] Spriges stated to the detective that "he got hit with a bottle" during "a large fight upstairs" (referring to the Premises).[18] Michael also testified that he observed an individual a large cut on his hand, identified as Justin Taylor.[19] Taylor stated that "he was upstairs in Level II and an altercation broke out."[20] Michael further testified that a third individual with what appeared to be a stab wound to the chest area, identified himself as Enrique Rivera told Michael he was there with friends at Level II, including victim Sean Jones.[21]

It is true that the statements given by Spriges, Taylor, and Rivera to police regarding the origin of their respective wounds are hearsay. However, "[b]oth the United States Supreme Court and [the Rhode Island Supreme Court] have stated directly that hearsay evidence is admissible in administrative proceedings." *DePasquale v. Harrington,* 599 A.2d 314, 316 (R.I.

[16] Lacerations isolated to the left temple and right side of the chest are inconsistent with injuries typical to suicide attempts or slip-and-fall accidents.
[17] April 30 Board Transcript at 20.
[18] Id.
[19] Id. at 22.
[20] Id.
[21] Id. at 23.

1999).[22] Citing *DePasquale*, the Rhode Island Superior Court has upheld the Department' reliance on statements made to police regarding fighting inside of a liquor establishment in investigation of injuries occurring therein. *Chapman Street Realty v. Department of Business Regulation*, 2002 WL 33957092 (R.I. Super. 2002). Moreover, statements to first responders made immediately after observing a violent encounter constitute "excited utterances" under Rule 803(2) of the Rhode Island Rules of Evidence. Id. "Excited utterances" have indicia of reliability because the startling event "temporarily stills the declarant's capacity [for] reflection and produces statements free of conscious fabrication." *State v. Krakue,* 726 A.2d 458, 462 (R.I., 1999).

B. Appropriate Disciplinary Measure

"There are two components to an administrative decision – a determination of the merits of the case, and a determination of the sanction. While the former component is mainly factual, the latter involves not only an ascertainment of the factual circumstances, but also the application of administrative judgment and discretion." *Jake and Ella's, Inc. v. Department of Business Regulation*, 2002 WL 977812, *5 (R.I. Super., 2002). "[S]anctions levied for liquor license violations should be reasonably related to the severity of the conduct constituting the violation." Id. at 6. In fashioning the appropriate disciplinary remedy, the Department may evaluate any factors of "aggravation and mitigation" it deems appropriate. *Santos v. Smith*, 99 R.I. 430, 433 (R.I., 1965). Among the factors the Department may consider are "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*, id. at 6.

[22] Citing *Richardson v. Perales,* 402 U.S. 389, 409-410, 91 S.Ct. 1420, 1431, 28 L.Ed.2d 842, 857 (1971); *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 705-06, 68 S.Ct. 793, 805-06, 92 L.Ed. 1010, 1037 (1948); *Craig v. Pare,* 497 A.2d 316, 320 (R.I.1985).

The public danger posed by the Appellant's violations supports revocation in the instant case. The November 27, 2011 overcapacity violation, even "when taken alone, already rises to the level warranting revocation of all licenses" because it represents an "egregious public safety violation, literally placing hundreds of patrons lives in jeopardy." Board's Memorandum in Opposition to the Motion to Stay at 8. The Appellant's argument that the Board did not consider overcapacity to be an immediate public danger is irrelevant to the Department's determination. Even if it initially appears that the Board may have minimized the seriousness of the overcapacity charge by waiting over six (6) months before issuing a revocation decision, the Department's decision, including its analysis of the public danger posed by the violation, is independent of the Board. *See, e.g., Hallene v. Smith, supra* (describing the "de novo" standard of review).

The Department's heightened concern with overcapacity violations is consistent with prior Department precedent. In *La Cabana Night Club, supra*, the Department upheld a local board's revocation decision because the overcapacity violation was deemed egregious. The Department stated that "[w]hile the Appellant is accurate in stating that there were not allegations of fighting or assaults or arrests that night, overcapacity is still a danger to the public." Id. at 13.

Numeric occupancy limits are calculated to approximate the number of persons that could successfully evacuate the building during an emergency, the weight that the structure can accommodate without structural damages, and other safety parameters. Difficulties in evacuation are further heightened in second floor establishments such as that of Appellant. Self-serving testimony by the Appellant's owner and employees that the establishment did not feel

"crowded" does not overcome the safety concern posed by violation of a limit the establishment of which the legislature has entrusted to the expertise of the Fire Marshall's office.[23]

While the overcrowding violation alone is enough to support the revocation decision, it should also be noted that the record clearly establishes that the April 8 incident resulted in a direct health and safety threat to at least two individuals, causing the severe bleeding and emergency rescue of Sean Jones and the punctured lung and week-long hospital stay of Christopher Banno. Failure to control patrons inside the establishment in an effective manner to prevent such injuries poses a public danger not only to the injured parties individually, but also to the remaining patrons.

Another factor of "aggravation and mitigation" that the Department may consider is the *mens rea* of the Appellant's management. The Department has "great reservations about the...imposition of the most severe penalty allowed by law" (revocation), where there is "reason to believe the violation was more the result of negligence rather than malicious intent." *Musone v. Pawtucket Bd. of License Com'rs*, 1984 WL 560365, *2 (R.I. Super., 1984). Stated reversely, imposition of revocation is most appropriate where the Appellant "abdicate[s] [its] responsibilities as a licensee." *In re Cardio Enterprises d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No. 06-L-0207 at 22 (March 28, 2007). In evaluating the Appellant's *mens rea*, the key issue is the degree of control the Appellant has over the outcome of the incident. For example, consideration of *mens rea* weighs against the "death penalty"[24] of revocation for an isolated incident of disorderly conduct occurring outside an establishment, in an area outside of the Appellant's direct control.

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[23] The Department will not entertain the Appellant's argument that fire and police responders erred in waiting until closing to conduct a count rather than ordering the establishment to be vacated immediately. The Department is not the proper venue for such complaints.

[24] *Jake and Ella's, supra*, id. at 6

At least with respect to the overcrowding incident, control over the number of admitted patrons was entirely within control of Appellant's agents. The fact that such a violation represents a state of mind of "greed over safety" weighs in favor of severe sanctioning. The statute codifying the Appellant's duty to comply with occupancy limits, R.I. Gen. Laws § 23-28.6-5 is appropriately entitled "[a]dmissions restricted and supervised." The Appellant and its agents are 100% responsible for controlling admissions into the establishment. In discussing violations of the Fire Code other than occupancy limits, the Rhode Island Superior Court has stated that "[l]esees and owners operate the building and are the ones who have control over the premises, allowing them to be in the position to render the building fire safe." *State v. Derderian*, 2005 WL 3338337 (R.I.Super.,, 2005). Responsibility attaches even if patrons "sneak in" the establishment without proper admission by the Appellant's agents. It is the obligation of the licensee to prevent unauthorized entries and to exercise its power to eject individuals from its establishment where necessary to comply with capacity regulations.

Revocation is consistent with the "long line of Department cases regarding progressive discipline and upholding the same." *El Chapin Restaurant v. City of Central Falls Liquor Board*, DBR No. 08-L-0274 at 3. The progressive discipline policy is flexible; "[t]here is no hard and fast rule that states a licensing authority must abide by a three-stage process to revoke a license, proceeding to a suspension for a second offense after having levied a fine in the first instances." *Jake and Ella's v. City of Newport, Board of License Commissioners*, LCA NE-01-01 at 5 (September 24, 2001). With regard to progressive discipline for over-crowding violation, the Appellant had already been charged with two counts of the same in 2008, fined $500 and closed for one day as a result of the second.[25] Another example of the Board's progressive

[25] City of Providence Board of License Violation History (dated January 18, 2012). Under R.I. Gen. Laws 3-5-21, violations occurring three years ago are excluded in determining whether a subsequent violation is fined as a first or

treatment is its progression from a warning on an underage drinking count to a first fine of $250 and a $350 fine on third and fourth occasions.[26] However, it should be clearly noted that the overcapacity violation is so egregious in the instant case that revocation would be justified even in the absence of any progressive discipline.

Counsel for the Appellant argued that revocation was not appropriate because the decision was inconsistent with the Board's treatment of other liquor licensees. The Department has previously stated that "a local licensing authority does not have the burden of proving that a given offender is the worst among others in order to have that offender accept responsibility for the consequences." *C/S Ventures, Ltd. V. City of Providence, Board of Licenses*, LCA-PR-00-13 (July 23, 2001).[27] "[I]n order to begin a serious discussion of uneven, unjust sanctioning, it is best to present specific evidence of either a pattern of sanctions issued for the same type of case that are different from the one at bar, or specific facts and circumstances surrounding another particular case which may establish an unfair discrepancy with a sanction at issue." *In Re the Great American Pub, Inc.,* LCA-NE-98-04 (October 6, 1998)(emphasis supplied). "In order to prevail on a selective enforcement claim, one must do more than establish that the challenged regulation was not applied with absolute uniformity." *Stage Bands, Inc. v. Department of Business Regulations for the State of Rhode Island*, 2009 WL 3328508 (R.I. Super.,

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second offense. The Department has cited this statutory provision in support of its consideration of the past three years of violation records in rendering a license renewal decision. *J. Aloisio Enterprises, Inc., d/b/a Club Confetti v. City of Providence, Board of Licenses,* LCA-PR-00-01 at 21 (January 5, 2001); *J. Aliosio Enterprises, Inc. v. Department of Business Regulation*, 2001 WL 1005865 at 2 (R.I.Super., 2001). However, neither the statute nor interpreting case law prohibit the Department from considering violations occurring more than three years ago for purposes of evaluating whether the Board has adhered to the notions of "progressive discipline."

[26] Id.

[27] *See also East Street Liquors, Inc. vs. Pawtucket Board of License Commissioners*, LCA-PA-99-07 (September 8, 1999)("Fundamental fairness requires consistency in sanctioning, although this is not to be confused with slavishly or mechanically following past precedent."); *In Re the Great American Pub, Inc.,* LCA-NE-98-04 (October 6, 1998)("The point is not to create an inflexible grid with no room for discretion.")

2009)(quoting *Felice v. Rhode Island Board of Elections,* 781 F. Supp 100 (D.R.I. 1991)).[28] "Obviously, each case has its own unique facts and circumstances which should be considered." Id. In the instant case, the Appellant failed to set forth a compelling argument that would support a finding of selective enforcement or unjust sanctioning. As the above discussion clearly illustrates, the Board was completely reasonable in revoking the Appellant's license.

C. Justiciability: Mootness

The Rhode Island Supreme Court "long has recognized the need...to confine judicial review only to those cases that present a ripe case or controversy." *City of Cranston v. Rhode Island Laborers' Dist. Council Local 1033*, 960 A.2d 529, 533 (R.I., 2008). Acting in a quasi-judicial capacity,[29] the Department "must address the threshold issue of justiciability before [it] may entertain the merits of the parties' substantive arguments." Id. A matter is not justiciable if it only raises "moot, abstract, academic, or hypothetical questions." *Morris v. D'Amario*, 416 A.2d 137, 139 (R.I., 1980). A matter is considered moot, and thus non-justiciable, if rendering a decision "would fail to have a practical effect on an actual controversy." *Hallsmith-Sysco Food Services, LLC v. Marques*, 970 A.2d 1211, 1213 (R.I., 2009). Accordingly, the Department will not decide a case if the passage of time and/or new circumstances render the Department unable to issue a decision granting the relief requested by the Appellant.

The Board filed its first motion to dismiss for mootness based on information and belief that the Appellant had been evicted from the Premises. The Board essentially argued that the matter became moot because the Department was powerless to reinstate the license once the

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[28] In *Stage Bands*, the Rhode Island Superior Court rejected the former licensee's argument "that it has been subjected to selective and disparate treatment" because "DBR chose to punish Giza more harshly because of some secret unarticulated agenda."

[29] *See Lyons v. Liquor Control Administrator*, 218 A.2d 1, 3 (R.I. 1966)(referring to the "decision of an administrative officer rendered in a judicial or quasi-judicial hearing").

Appellant lost possession and control of the Premises. The Department recognizes that licenses may only be issued in conjunction with particularly described premises. R.I. Gen. Laws § 3-5-9. It follows that the Department could not order the license to be "re-issued" or reinstated while the licensee is in dispossession of the premises. However, "there is a distinction between issuance of a license and the granting of a license." *Chapman Street Realty, Inc. v. Department of Business Regulation*, 2002 WL 475281, *4 (R.I. Super., 2002). Under Department Commercial Licensing Regulation 8, Rule 14:

> "A retail alcoholic beverage license may be granted but not issued pending full compliance with conditions and criteria necessary for the issuance of said license. All such "grants" of alcoholic beverage licenses shall be in writing. The license shall particularly describe the place or premises where the rights under the license are to be exercised. The applicant shall have no more than one (1) year after the original granting of the license to meet all conditions and criteria set forth in the granting order. If the applicant does not meet all conditions and criteria within one (1) year, the license shall become null and void without further hearing by the local licensing authority..."[30]

A liquor license may be "granted" before an initial license applicant gains dominion and control of the premises described in the application. Rule 14 refers to the "premises where the rights under the license are to be exercised," future tense. It does not necessarily require possession and control at the time of "granting." "Issuance" is considered conditioned on the closing of the premises purchase or signing of the premises rent agreement, as the case may be.[31] Any rights to the license terminate if the condition is not satisfied within the one-year maximum

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[30] *See also* Board of Licenses FAQs (online) http://www.providenceri.com/license/faqs (last visited November 26, 2012)("A license application that is 'granted' at a hearing is actually granted pending approval by all agencies involved in the application process. Examples of these other approvals are fire safety and zoning approval. Once these other agencies approve the operation of the business the license will be issued to the business and it may begin operation.").

[31] The practice of "approv[ing] the application but withhold[ing] the actual issuance of the license until the requirements of the statute have been fulfilled...is necessary to protect an applicant from assuming a substantial financial outlay or making a contractual commitment before he knows whether a license will be granted." *Angel v. Moberly*, 425 S.W.2d 538, 541 (Ky., 1968); *See also* 48 C.J.S. Intoxicating Liquors § 146 ("Under some regulatory provisions, an applicant must have possession of the premises, either as an owner or a tenant, in order to hold a liquor license, but he or she need not have such qualifications at the time of the application.")(citing *Schott v. Board of Liquor Control*, 157 N.E.2d 752, 754 (Ohio App., 1958).

period provided by Rule 14 or a shorter period provided by a the Department or reasonably imposed by a local licensing authority.[32]

The Department has the superlicensing authority to order a denied license to be granted and to order a revoked license to be reinstated. Like a license "granted but not issued," a reinstated license may be subject to an appellant's ability to obtain possession or control over the premises. Because the Department was in fact capable of rendering a decision that "would have a practical effect on [the] actual controversy,"[33] through conditional reinstatement, the matter did not become moot upon eviction. Accordingly, the Department proceeded with hearings on the merits.

Without awaiting either the Department decision on the mootness-based motion to dismiss or the decision on the merits, the Board proceeded to grant *and* issue the license for the Premises to a third party, PVD. The Board so proceeded despite an oral order by the Department to notify the Department before issuing a liquor license for third party operation at the Premises. It should be noted that oral orders by the Department are enforceable. The Rhode Island Supreme Court has held that "a person may be bound by the terms of an oral injunctive order," so long as there is no written order with the same effective date." *State v. Eckert*, 120 R.I. 560, 389 A.2d 1234, 1239 (R.I., 1978). An administrative hearing officer's oral order for a party to take or refrain from taking a specific action is analogous to an oral injunction issued by a judge.[34] By disregarding the oral order, the Board took affirmative steps placing PVD in an unfortunate position of the cross-fires of a pending appeal regarding a competing license.

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[32] Rule 14 provides for "no more than one (1) year," without limiting the Board's or Department's authority to impose a reasonable shorter period of time to satisfy the conditions precedent to "issuance."
[33] *Hallsmith-Sysco*, id.
[34] The Supreme Court of Massachusetts has addressed oral orders in more detail stating that an oral order is enforceable through contempt proceedings if it provides a "clear and unequivocal command." *Parker v. Com.*, 863 N.E.2d 40, 43 (Mass., 2007).

At a hearing before the undersigned, the attorneys for the Board, PVD, and the owner/landlord of the Premises all raised the question of whether the Department has the authority to order a license reinstated at the Premises where the license has been issued to a third party. Because the Board's revocation decision was ultimately upheld in the instant case, however, this Decision and Order does not directly affect the third party licensee, PVD. However, given the importance of this issue to the uniform and orderly enforcement of Title III, the Department's power in the face of unilateral Board action that interferes with pending appeals requires brief discussion.

R.I. Gen. Laws § 3-7-21 clearly vests the Department with authority to provide relief to the Appellant as the licensee whose liquor license has been revoked. *Earle v. Pastore*, 511 A.2d 989, 990 (R.I., 1986). If the Department had decided to reinstate the license, it would have had the corresponding *sua sponte* authority to reverse the October 4 decision granting the license to PVD. The Department's "powers to take independent action" have been inferred by judicial interpretation of §§ 3-5-21(a), 3-2-2, and 3-5-20, "which grant the [Department] general jurisdiction to supervise and enact rules for local boards." *City of Providence Bd. of Licenses v. State of Rhode Island Dept.,* 2006 WL 1073419 (R.I. Super., 2006)(*emphasis supplied*).[35] The Department has discretion to take "independent action" in the exercise of its "general jurisdiction" when a licensing authority attempts to deprive a licensee of a meaningful right to "de novo" review of the Board's revocation decision, subject, of course, to the Rhode Island Administrative Procedures Act, § 42-35-1 *et seq*. Because such relief is within the scope of the Department's broad powers as the state's "superlicensing" authority, the October 4 decision did not render the matter "moot."

[35] *See also Green Point Liquors, Inc. v. McConaghy*, 2004 WL 2075572 (R.I. Super., 2004)("The Department "may exercise its *sua sponte* authority to review, suspend, or revoke a license on its own motion…[or] initiat[e] an action, on its own motion, relating to the transfer of a license.")

Finally, it should be noted that the Department does not purport to have the authority to force the landlord to restore possession to the holder of a reinstated liquor license. If such an independent arrangement could not be reached within the relevant time period,[36] the holder of a reinstated liquor license has at least two other economically-sound alternatives: a) application to transfer the reinstated license to a party that could secure possession of the premises associated with the license for due consideration or b) application to transfer the license to a new location.[37] Under § 3-7-16.4(b), "Class ED licenses are nontransferable and are site specific." However, in absence of any citing case law, the Department interprets this provision[38] to limit transfer of the license outside of the Economic Development Zone, but not limiting transfer to another operator at the same Premises or transfer of an existing operator's license to another location within the ED zone. This is consistent with the Board's past practices because the license held by the Appellant was in fact transferred to the Appellant from Periwinkles Comedy Revue in September 2006.[39]

Furthermore, if the Department had reversed the October 4 decision, PVD could have applied for another ED license. Class ED liquor licenses are currently under the maximum limit cap by fifteen (15) in the City of Providence.[40] Moreover, had the Department decided in favor of the Appellant, PVD may have had a negligence cause of action against the Board to the extent

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[36] *See* footnote 32 herein.

[37] Both options are subject, of course, to all notice and hearing requirements for first time applications. Under R.I. Gen. Laws § 3-5-19 "in all cases of change of licensed place or of transfer of license, the issuing body shall, before permitting the change or transfer, give notice of the application for the change or transfer in the same manner as is provided in this chapter in the case of original application for the license."

[38] Though judicial review of questions of law is *de novo*, "it is also a well-recognized doctrine of administrative law that deference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency." *Pawtucket Power Associates v. City of Pawtucket*, 622 A.2d 452, 456 (R.I. 1993). *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Young v. Community Nutrition Institute,* 476 U.S. 974, 106 S.Ct. 2360, 90 L.Ed.2d 959 (1986); 3 Sutherland Statutory Construction § 65:1 (7th ed.).

[39] Public notice of the transfer is available at http://sos.ri.gov/documents/publicinfo/omdocs/notices/4749/2006/30302.pdf (last visited November 21, 2012)

[40] Board of Licenses FAQs (online) http://www.providenceri.com/license/faqs (last visited November 21, 2012).

that it reasonably relied on the validity of the issued license without being apprised of pending appeal of a competing license at the Premises, subject, of course, to the limits of sovereign immunity and statutory damage caps. *See, e.g., Martinelli v. Hopkins*, 787 A.2d 1158, 1167 (R.I. 2001)(Town of Burrillville found negligent in its issuance of an entertainment license). Such claims for damages would be clearly outside the jurisdiction of the Department, however.

VI. Findings of Fact

1. Sections I-V of this decision and order are incorporated herein as findings of fact.

VII. Conclusions of Law

1. The Department has jurisdiction over appeals from decisions of local liquor licensing authorities under R.I. Gen. Laws § 3-7-21, subject to the relevant provisions of the Rhode Island Administrative Procedures Act, § 42-35-1 *et seq.*
2. The matter is not moot because the Department has the legal authority to grant the requested relief.
3. The Appellant's violation of the maximum occupancy is grounds for discipline under R.I. Gen. Laws § 3-5-21(a).
4. There is sufficient evidence of "disorderly conduct" inside of the Appellant's establishment to justify discipline under R.I. Gen. Laws § 3-5-23(b).
5. The facts and circumstances surrounding the grounds for discipline justify revocation of the Appellant's liquor license.

VIII. Recommendation

It is recommended that the Revocation Decision of the Providence Board of Licenses be upheld in full.

As recommended by:

Date: 12/21/2012

Louis A. DeQuattro, Jr., Esq., CPA
Hearing Officer
Deputy Director & Executive Counsel

I have read the Hearing Officer's recommendation and I hereby (check one)

- ☑ Adopt
- ☐ Reject
- ☐ Modify

the recommendation of the Hearing Officer in the above-entitled Decision and Order of Remand.

Date: 21 Dec 2012

Paul McGreevy
Director

Entered as an Administrative Order No.: 12-074 this 21st day of December, 2012.

NOTICE OF APPELLATE RIGHTS

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

CERTIFICATION

I hereby certify on this 21st day of December, 2012 that a copy of the within Order and Notice of Appellate Rights was sent by e-mail and first class mail, postage prepaid to -

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