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

Ciello, LLC, **Appellant,**	:	
v.	:	**DBR No.: 18LQ004**
City of Providence, Board of Licenses, **Appellee.**	:	

DECISION

I. INTRODUCTION

This matter arose from an appeal filed by Ciello, LLC ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding the City of Providence, Board of Licenses's ("Board") decision of March 22, 2018 to revoke the Appellant's Class BVX, the 2:00 a.m. liquor license (extended hours),[1] and to deny renewal of the extended hours' license.[2] The Board also ordered it close at midnight for 60 days. By order dated March 30, 2018, the Department denied the Appellant's motion for stay. A hearing was held on the appeal on April 17, 2018. The parties were represented by counsel and the parties rested on the record.[3]

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.*

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[1] https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=8096&Inline=True.

[2] https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=8115&Inline=True.

[3] The hearing was held before the undersigned pursuant to a delegation of authority by the Director of the Department. The transcript of hearing was received on May 2, 2018.

III. ISSUE

Whether the Appellant committed the alleged violations, and if so, what is the appropriate sanction(s).

IV. MATERIAL FACTS AND TESTIMONY

For ease of reference, the testimony taken from the Board hearing will be summarized separately for the alleged violations.

A. October 6, 2017: Bottle Service

Detective Derek Shields, Providence Police Department ("PPD"), testified on the City's behalf. He testified that he was at the Appellant on October 6, 2017 to conduct an alcohol compliance check. He testified that he observed a patron in the VIP area holding a laminated piece of paper and referring to it when ordering and he observed a waitress place an ice bucket containing alcohol bottles on the table in front of patrons. He testified that he obtained a copy of the laminated piece paper and it was a bottle menu. See City's Exhibit (1) (certified record with photograph of the bottle menu indicating "bottle prices"). He testified that he saw another waitress fill a bucket with ice and alcohol bottles and took pictures. *Id.* (photographs of ice bucket with tequila bottle and ice bucket with Hennessy bottle). He testified that the ice buckets were put on a table in front of the patrons and he saw a bottle of Hennessey, Remy Martin, and tequila in the buckets. He testified that he spoke to the manager who said it was a mistake. On cross-examination, he testified that the bottles were not opened and the bottles were removed from the table.

B. November 12, 17, and 23, 2017: After hours

The Appellant agreed to the after hours violations on November 12, 17, and 23, 2017.

Detective Patrick Creamer ("Creamer"), PPD, testified that on November 12, 2017, he told the Appellant's manager that the club had to close at 1:00 a.m. because of the Department's

suspension.[4] He testified that the manager said she thought she could stay open because the Appellant was appealing said suspension so he explained that there was no stay of the suspension. He testified that the Appellant closed at 1:00 a.m., but when he returned at 2:05 a.m., there were still people inside and he was told they had not been paid. See Board transcript of December 20, 2017 at p. 14. He testified on November 17, 2017, a Thursday, he went to the Appellant at 1:50 a.m. and it was open. He testified he took drinks off people and the manager said the people there were promotors and staff, but he did not see anyone cleaning or being paid.

Sergeant David Tejada ("Tejada"), PPD, testified on behalf of the City. He testified that on November 23, he responded to the Appellant and despite the 2:00 a.m. license being suspended the club was still open. He testified that the manager told him that because it was the night before a State holiday (Thanksgiving), the club could stay open until 2:00 a.m.

C. November 12, 2017: Drinks outside Premises

Creamer testified that on November 12, 2017 when he at the Appellant's, he saw a patron walk outside at 1:10 a.m. holding a drink so he seized the drink and sent it to the toxicology lab. He testified that the toxicology report showed the drink was alcoholic, but while that report was apparently entered as an exhibit at the Board hearing, a copy was not in the certified record.

D. November 23 and December 2, 2017: Nudity

Tejada testified on November 23, 2017, he observed a woman wearing a bikini type outfit with her buttocks exposed dancing on the bar with a pole. Creamer testified in the early hours of December 2, 2017 at the Appellant's, he observed two (2) dancers wearing bikinis dancing behind the bar with poles. See City's Exhibit One (1) (certified record with various photographs of

[4] On September 14, 2017, the Department issued a decision suspending the Appellant's extended hours license for 180 days. *Ciello, LLC d/b/a Club Luv v. City of Providence, Board of Licenses*, DBR No.: 17LQ008 (9/14/17). The parties agreed this decision was appealed to Superior Court, but no stay was issued until December 7, 2017.

dancers wearing thong like bottoms showing their buttocks). The Appellant did not dispute what the dancers were wearing, but disputed there were violations of the Anti-Nudity Ordinance.[5]

E. December 2, 2017: Entertainment without License

Creamer testified that the Appellant did not have an entertainment license for December 1-2, 2017. He testified that the Appellant advertised that a DJ would play on December 1, 2017 and when he arrived early on December 2, 2017, there was loud music playing, strobe lighting, and a man with a microphone as well as the dancers. At the Board hearing, the Appellant stipulated that it did not have an entertainment license that night. See March 7, 2018 Board transcript at p. 37.

F. December 16, 2017: Tobacco sales without License; Violations of Conditions of Entertainment.

Creamer testified that he was called to the Appellant's on December 16, 2017 and he knew that the Appellant had a conditional entertainment license so that there was to be no DJ after 1:00 a.m. and when he arrived at 1:11 a.m., he could hear the music outside.[6] He testified that inside he heard music and saw a man with headphones on and a security guard told the man to stop. He testified that he observed three (3) charcoal hookah devices, not electronic, being smoked with charcoal on top burning. He testified that the Appellant does not have a tobacco license. On cross-examination, he testified that he is familiar with molasses without tobacco being used in hookah pipes. On cross-examination, he testified that he did not ask whether molasses or tobacco was being used and molasses is smoked by being burnt.

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[5] See transcript of Department hearing on April 17, 2018 at p. 6.

[6] See the minutes from the Board's December 13, 2017 meeting which state as follows:

> On a motion by Commissioner Rodriguez-Masjoan and seconded by Commissioner Newton, entertainment was approved for December 14 through December 17 with the following conditions: 1) no DJ after 1AM, 2) no strobe lights after 1AM and 3) no dancers after 1AM. This was approved 3-1; Commissioner Peralta voted nay.
> https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=6514&Inline=True.

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 (R.I. 1998).

B. The Appeal before the Department

After the end of prohibition of liquor within the United States, Rhode Island implemented a new system of statewide control of liquor coupled with local authority to grant certain licenses. See P.L. 1933 ch. 2013. The intent of the new system was to eliminate the old unsupervised system of local regulation that resulted in a lack of uniformity and grave abuses that seriously affected the public welfare and instead vested broad powers of control and supervision in a state system. *Baginski v. Alcoholic Beverage Commission*, 4 A.2d 265 (R.I. 1939).[7]

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[7] *Baginski*, at 266-267, found as follows:

> Chapter 2013 is a familiar and well-recognized example of the legitimate exercise of the police power. *Tisdall v. Board of Aldermen*, 57 R.I. 96, 188 A. 648. The act is entitled an act to promote temperance and to control the manufacture, transportation, possession and sale of alcoholic beverages. Its chief purpose may, without question, be said to be the safeguarding of the public health, safety and morals. *Clark v. Alcoholic Beverage Commission*, 54 R.I. 126, 170 A. 79.
>
> The traffic in intoxicating liquors has ever been a prolific source of evils, gravely injurious to the public welfare. The need of its regulation and control is undisputed. In a search for a system of effective, impartial and uniform regulation and control of this traffic our legislature enacted the above

In keeping with the Department's statewide oversight and mandate to "establish a uniformity of administration of the law for purpose of promoting temperance throughout the state," the Department has broad statutory authority to review liquor appeals. *Baginski,* at 268. See also *Tedford et al. v. Reynolds*, 141 A.2d 264 (R.I. 1958). *Baginski* held that since the Department[8] is a "superlicensing board," it has the discretion to hear cases "*de novo* either in whole or in part." *Baginski*, at 268. Thus, an appeal may hear new testimony in part and/or may rely on the hearing before the local licensing authority. However, as the review is *de novo* the parties start afresh during the appeal but the Department has the discretion to review the local authority partially *de novo* and partially appellate as seen fit. *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964). Since the Department is charged with ensuring statewide uniformity, it follows that the statutory scheme grants the Department the authority to revise or alter decisions of local boards. *Id.* Further, since the liquor appeal hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence. *Id.* See also *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (Department's jurisdiction is *de novo* and the Department independently exercises the licensing function).

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chapter [P.L. 1933 ch. 2013] which was later amended by P.L.1934, chap. 2088. This system is a departure from that which had long existed here prior to the advent of national prohibition. Then the regulation and control of substantially every phase of the liquor traffic was vested exclusively in the local governing bodies. The state exercised over this local administration no administrative supervision or control, except occasionally in some cities and towns the legislature intervened to set up state-appointed license commissions or police commissions with licensing powers; but such commissions were vested with purely local administrative powers only. They were not commissions with state-wide jurisdiction.

Chapter 2013 changed all this. Where, before, the emphasis was exclusively on control locally, now it is predominantly on state control. This is evident in many sections of the act. Running through the entire act is the central idea that the traffic in intoxicating liquors is a problem that is state-wide; and correspondingly, that state supervision and control, either originally in some phases or ultimately in others, alone can adequately cope with it. However, along with the incorporation into the law of this new idea, there has been retained a remnant of local administration. An example of this is the right of local boards to grant and to revoke, at least in the first instance, class C licenses. Such licenses correspond to the retail licenses, popularly known as saloon licenses under the old law.

[8] At that time the alcoholic beverage commission.

Thus, while there was not a totally new hearing before the Department, the proceeding before the Department is considered a *de novo* hearing. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision. Therefore, this appeal is not bound by the Board's reasons for revocation but whether the Board presented its case for revocation before the undersigned. The undersigned will make her findings on the basis of the evidence before her and determine whether that evidence justifies said revocation.

As the Department has statewide authority and indeed the statutory intent is to ensure statewide consistency, the Department reviews sanctions to ensure statewide consistency and appropriateness in the situation. It also supports progressive discipline barring the rare and extreme event where revocation may be warranted without prior discipline. It also accepts the principles of comity and deference to the local authorities and their desire to have control over their own town or city. At the same time, pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21, the Department ensures that tensions between local boards and licensees are settled in a consistent manner. Nonetheless, there is not a mechanical application of sanctions as each matter has its own sets of circumstances. See *C&L Lounge, Inc. d/b/a Gabby's Bar and Grille; Gabriel L. Lopes v. Town of North Providence*, LCA – NP-98-17 (4/30/99). Thus, the unevenness in the application of a sanction does not make it unwarranted in law. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). See also *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.). However, a sanction must be proportional to the violation and if there is an excessive variance in a sanction than it will be found to be arbitrary and capricious. *Jake and Ella's* 2002 WL 977812 (R.I. Super.). In reviewing local authorities' decisions, the Department ensures that

local authorities' sanctions are not arbitrary and capricious and that statewide such sanctions are consistent and appropriate (otherwise sanctions would be arbitrary).

An appeal proceeding held pursuant to R.I. Gen. Laws § 3-7-21 is considered a civil proceeding. See *Bd. 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).

C. Conditions of Licensing

R.I. Gen. Laws § 3-5-21 provides in part as follows:

> Revocation or suspension of licenses – Fines for violating conditions of license.
> (a) Every license is subject to revocation or suspension and a licensee is subject to fine by the board, body or official issuing the license, or by the department . . . for:
> (1) Breach by the holder of the license of the conditions on which it was issued; or
> (2) Violation by the holder of the license of any rule or regulation applicable; or
> (3) Any fraudulent act or "material misrepresentation" made by an applicant for a license or a licensee, including, but not limited to, any misrepresentation or information upon which the licensing board reasonably relies in rendering any decision concerning a license, licensee, or establishment; or
> (4) Breach of any provisions of this chapter; or
> ***
> (b) Any fine imposed pursuant to this section shall not exceed five hundred dollars ($500) for the first offense and shall not exceed one thousand dollars ($1,000) for each subsequent offense. For the purposes of this section, any offense committed by a licensee three (3) years after a previous offense shall be considered a first offense.
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A liquor licensee has the "responsibility to control the conduct of its patrons both within and without the premises in a manner so that the laws and regulations to which the license is subject will not be violated." *Schillers, Inc. v. Pastore*, 419 A. 2d 859, 859 (R.I. 1980). A liquor licensee

is accountable for violations of law that occur on its premises and outside. *Vitali v. Smith*, 254 A.2d 766 (R.I. 1969). It is not a defense that a licensee is not aware of the violations or provided supervision to try to prevent violation. While such a responsibility may be onerous, a licensee is subject to such a burden by the legislature and accepted such conditions by becoming licensed. *Therault v. O'Dowd*, 223 A.2d 841 (R.I. 1966). See also *Schillers* and *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965).

D. Arguments

The City argued that even if the bottles were not opened, there was a bottle service violation and the three (3) after hours violations were during the Department's suspension period and no stay had been issued. The City argued whether the Appellant actually violated the Anti-Nudity Ordinance or allowed the dancers to violate said ordinance, the Appellant is responsible for any violations of rules, regulations, or statutes on the premises. The City argued while the violations are not violent nor a direct threat to public safety, their totality shows an inability by the Appellant to comply with licensing requirements. The City argued that all violations were within the Appellant's control so the evidence is that the Appellant does not know what it is doing or does not care. The City argued that the sanctions imposed are consistent with progressive discipline.

The Appellant argued that the Department does not have jurisdiction over any possible violation of the Anti-Nudity Ordinance because it relates to entertainment as well as freedom of speech constitutional issues. The Appellant argued that for bottle service, the manager made a mistake and the violation cannot be enforced because there were no bottle sales. The Appellant argued that the hookah was only molasses without tobacco. Thus, the Appellant argued the only violations are the three (3) after hour violations and they would not rise to the level of a revocation.

E. Whether there were any Violations

a. October 6, 2017: Bottle Service

Pursuant to R.I. Gen. Laws § 3-7-26, R.I. Gen. Laws § 3-8-14, and Rule 11 of the Department's *Commercial Licensing Regulation 8 – Liquor Control Administration* ("CLR8")[9] bottle service (except for wine and aquardiente) is not allowed. See *City of Providence Bd. of Licenses v. Dep't. of Bus. Regulation*, 2013 R.I. Super. LEXIS 195 (bottle service not allowed). The Appellant argued that since there was no sale of the bottles of alcohol (due to police intervention) that it was not in violation of the statutory and regulatory prohibition of bottle service.

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[9] R.I. Gen. Laws § 3-7-26 provides in part as follows:

> Certain practices prohibited.
> (a) No licensee, employee or agent of any licensee who operates under a license to sell alcoholic beverages shall:
> ***
> (c) Nothing in this section shall be construed to prohibit a licensee from offering free food or entertainment at any time; or to prohibit licensees from including an alcoholic beverage as part of a meal package; or to prohibit the sale or delivery of wine by the bottle or carafe when sold with meals or to more than one person; or to prohibit free wine tastings. Except as otherwise limited by this section, nothing contained in this section shall limit or may restrict the price which may be charged by any licensee for any size alcoholic beverage to be consumed on the licensed premises.
> (d) Adherence to this section is deemed to be a condition attached to the issuance and/or continuation of every license to sell alcoholic beverages for consumption on the licensed premises, and this section shall be enforced by the applicable local licensing authority, its agents, and the department.
> (e) The provisions of this section are deemed to be severable and any final decision by a court of competent jurisdiction holding that any provision of this section is void, shall not make void nor affect any of the remaining provisions of this section.

R.I. Gen. Laws § 3-8-14 provides as follows:

> Sale of beverages by bottle. The department of business regulation shall adopt rules and regulations authorizing the holders of Class B-V licenses issued pursuant to this title to sell aquardiente by the bottle, for consumption on the premises of the license holder because this beverage is generally purchased by the bottle by ethnic tradition.

Rule 11 of CLR8 provides as follows:

> Dispensing Alcoholic Beverages – Retail
> Except Class B-H alcoholic beverage licensees, all alcoholic beverages must be served, dispensed or sold by an employee or owner of a licensed retail liquor establishment. Alcoholic beverages may not be served or dispensed by a patron, provided however, hotel service "mini bars" shall be permitted if said hotel holds a valid B-H alcoholic beverage license, but said "mini bars" shall only be allowed in the room of a registered hotel guest who is at least twenty one (21) years of age.

However, Rule 38 of CLR8[10] provides that evidence of the possession of unauthorized beverages is presumptive evidence of a sale.

The evidence was that the Appellant had a menu for the sole purpose of ordering and purchasing alcohol by the bottle and that the menu was given patrons who ordered alcohol bottles which were brought to the table by the Appellant's employees (the waitresses). The bottles were not opened because the police intervened. The possession of the bottles that were served even if not opened were unauthorized. Based on the foregoing evidence and presumption, the Appellant violated R.I. Gen. Laws § 3-7-26 and Rule 11 of CLR8.

b. November 12, 17, and 23, 2017: After hours

Rule 18 of CLR8[11] governs the hours of operation for a Class BV(X) licensee. The Appellant admitted to three (3) after hour violations. For November 12, 2017, the Appellant closed at 1:00 a.m. as required by the suspension and after being informed by the police that the suspension was in effect. However, people were still on the premises at 2:05 a.m. when Rule 18 of CLR8 requires all patrons be out by 1:20 a.m. and employees be out by 1:30 a.m. For November 17, 2017, the Appellant was open after 1:50 a.m. when it should have closed at 1:00 a.m. even

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[10] Rule 38 of CLR8 provides as follows:

> Unlawful Beverages – Retail.
> Possession of unauthorized alcoholic beverages in a licensed premises by the licensee or any of his employees shall be presumptive evidence that said beverages are for sale by the licensee and may result in suspension or revocation of the license.

[11] Rule 18 of CLR8 provides in part as follows:

> Hours of Business - Retail
> All patrons shall leave the licensed premises not later than 1:20 a.m. where the licensee is permitted to remain open until 1:00 a.m. Last call shall be at 12:45 a.m. Where licensee is permitted by local ordinance or permit to remain open until 2:00 a.m. all patrons must leave the licensed establishment by 2:00 am. All employees shall leave the licensed premises within one-half hour after the required closing time; provided the owner or employees may enter or be in a licensed establishment at any time for a legitimate business purpose with approval from the local police department. This paragraph shall not apply to a Class B-C license.
> ***

without the suspension as it was a Thursday night. For November 23, 2017, the Appellant was open after hours despite its suspension. An extended hours license allows a licenseholder to be open to 2:00 a.m. on Friday and Saturday and the day before a legal state holiday. See R.I. Gen. Laws § 3-7-7(a)(4). While November 24, 2017 was Thanksgiving, the Appellant's late night license was suspended so it could not be open after 1:00 a.m. on November 23, 2017. Based on the foregoing, the Appellant violated Rule 18 of CLR8 on three (3) different nights.

c. November 12, 2017: Drinks outside Premises

The testimony was that a patron exited one night holding a clear plastic cup with brown liquid. The testimony relied on a toxicology report to determine the liquid was alcohol. There was no testimony that the police officer smelled the cup and smelled alcohol and the liquor was not taken from an actual bottle of alcohol. As the toxicology report was not included in the record transmitted to the Department, it cannot be found that there was a violation of R.I. Gen. Laws § 3-7-7(a)(2) or Rule 27 of CLR8 (sale, service, storage of alcoholic beverages outside licensed premises prohibited).

d. November 23 and December 2, 2017: Nudity

The Appellant argued that the City's Anti-Nudity Ordinance[12] is unconstitutional. However, a determination of unconstitutionality of a statute is a not an issue that is properly before an

[12] The anti-nudity provision of the Providence Ordinance provides in part as follows:

> Sec. 14-230. - Nudity on premises where alcoholic beverages are offered for sale.
> (a) It shall be unlawful for any person maintaining, owning, or operating any commercial eating and/or drinking establishment, whether or not entertainment is provided, and at which alcoholic beverages are offered for sale for consumption on the premises to suffer or permit:
> (1) Any female person, while on the premises of the commercial establishment, to expose to the public view that area of the human breast at or below the areola thereof.
> (2) Any female person, while on the premises of the commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in subsection (a)(1) above.
> (3) Any person, while on the premises of the commercial establishment, to expose to public view his or her genitals, pubic area, anus or anal cleft.

administrative agency. See *Easton's Point Association et al v. Coastal Resources Management Council et al.*, 522 A.2d 199 (R.I. 1987).

Section 14-230(c) of the Ordinance prohibits the exposing of buttocks in premises that offer alcohol for sale which the Appellant does. There is no dispute that the Appellant's dancers were exposing their buttocks on November 23 and December 2, 2017. A licensee has the obligation to conduct its business to comply with the law and is responsible for violations of the law even if it had no knowledge of such violations. *Supra*. See also *Vitali* and *Scialo*. See also *The Vault, LLC v. City of Providence, Board of Licenses*, DBR No.: 16LQ008 (9/14/16). (Here the Appellant certainly was aware of the actions of its dancers). While dancing falls within entertainment, the Board is not imposing sanctions on the Appellant's liquor license for violating the Ordinance but rather for allowing the Ordinance to be violated. R.I. Gen. Laws § 3-5-21 makes it a violation to violate the conditions of licensing (must comply with the law and regulations) and to violate the law and regulation. Thus, the Board can impose sanctions for violations of conditions of licensing and violating the law and regulations.[13]

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(4) Any person while on the premises of the commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus or anal cleft.

(b) If shall be unlawful for any female person, while on the premises of any commercial eating and/or drinking establishment, whether or not entertainment is provided, and which alcoholic beverages are offered for sale for consumption on the premises, to expose to the public view that area of the human female breast at or below the areola thereof, or to employ any device or covering which is intended to give the appearance of or simulate such areas of the female breast as described herein.

(c) It shall be unlawful for any person, while on the premises of any commercial eating and/or drinking establishment, whether or not entertainment is provided, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view his or her genitals, pubic area, anus or anal cleft or buttocks, or to employ any device or covering which is intended to give the appearance or simulate the genitals, pubic area, buttocks, anus or anal cleft.

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[13] See *Secretos, LLC v. City of Providence, Board of Licenses*, DBR No.: 15LQ010 (8/11/15); *Luna Night Club, Inc. v. City of Providence, Board of Licenses*, DBR No.: 14LQ0045 (3/5/15); *Club Heat d/b/a Level II v. City of Providence Board of Licenses*, DBR No. 12LQ064 (12/21/12); and *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 (11/26/08).

Based on the foregoing, the Appellant violated R.I. Gen. Laws § 3-5-21 (violation of the Anti-Nudity Ordinance violates conditions of licensing/rules and violates the law) on November 23 and December 2, 2017.

e. December 2, 2017: Entertainment without License

It was undisputed that entertainment was offered when the Appellant did not have a license for entertainment on December 1, 2017. Such a violation is a violation of R.I. Gen. Laws § 3-5-21 as discussed above. Said statute makes it a violation to violate the conditions of licensing (must comply with the law and regulations) and to violate the law and regulation. Based on the foregoing, the Appellant violated R.I. Gen. Laws § 3-5-21 on December 1, 2017.

f. December 16, 2017: Tobacco sales without license, violations of conditions of entertainment.

The Appellant argued that the hookah smoking was just of "molasses" (part of hookah tobacco) and not of hookah tobacco (tobacco and molasses). It offered no evidence to support this argument. The City's testimony was that on that evening three (3) hookah devices with charcoal on top burning were being smoked when observed by the police detective. The inference from the testimony is that hookah tobacco was being smoked. Public smoking is prohibited by R.I. Gen. Laws § 23-20.10-1 *et seq*. There was no evidence that the Appellant is a "smoking bar" as allowed by R.I. Gen. § 23-20.10-6 which would make it exempt from the prohibition on public smoking. The violation of statute is a violation of R.I. Gen. Laws § 3-5-21 as discussed above. Said statute makes it a violation to violate the conditions of licensing (must comply with the law and regulations) and to violate the law and regulation. Based on the foregoing, the Appellant violated R.I. Gen. Laws § 3-5-21 on December 16, 2017 when it allowed public smoking.

In addition, the testimony was that night, there was entertainment on offer that was in contravention on the entertainment license given with conditions for that night. See footnote Six

(6). There was no to be no DJ after 1:00 a.m. and the detective observed a man with headphones playing music after 1:00 a.m. Based on the foregoing, the Appellant violated R.I. Gen. Laws 3-5-21 (violated a condition of licensing) on December 16, 2017 by allowing a DJ after 1:00 a.m.

F. Sanctions Prior to October, 2017

According to the Board's licensing history, the liquor license was transferred to the Appellant on September 16, 2016. In March, 2017, the Appellant received a two (2) day License suspension and an $1,750 administrative penalty for hours of operation, sale of tobacco without a license, and permitting smoking in a public place violations in November, 2016. The other sanctions listed on the Board's licensing history relate to an eviction; however, the Appellant was not evicted. See Board's transcript of March 7, 2018 hearing at p. 23. While the licensing history does not note any other sanctions, on September 14, 2018, the Department suspended the Appellant's BV liquor license for 30 days and its extended hour license for 180 days for violations of R.I. Gen. Laws § 3-5-21 (serious security violations). *Supra.*

G. When a Suspension or Revocation of License is Justified

In order to impose discipline such as a revocation, cause must be found. R.I. Gen. Laws § 3-7-6 provides that applications for retail liquor licenses may be denied for cause. *Chernov Enterprises, Inc. v. Sarkas*, 109 R.I. 283 (1971) found that cause shall mean, "we have said that a *cause*, to justify action, must be *legally sufficient*, that is to say, it must be bottomed upon substantial grounds and be established by legally competent evidence." *Id.* at 287 (italics in original).

The Court revisited the issue in *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d 269 (R.I. 1984). In discussing the cause standard of R.I. Gen. Laws § 3-7-6, the Court found,

> In determining whether the statutory standard now under consideration is so vague as to offend due process, we are mindful of the principle that vague legislative

> standards may be saved if the needed specificity has been supplied by judicial interpretation. (citation omitted). The requisite judicial gloss was supplied in [*Chernov*] wherein the court emphasized that in authorizing revocation for cause, the Legislature never intended either to confer upon a licensing authority a limitless control or to countenance the of an unbridled discretion. The cause, the court noted, that would justify revocation had to be "legally sufficient"; that is, it must be bottomed upon substantial grounds and established by legally competent evidence. *Id.* at 274.

Thus, in order to sanction a liquor license, there must be substantial grounds established by the preponderance of legally competent evidence

The revocation of a liquor license is a relatively rare event and is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety. See *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.) (disturbances and shooting on one night justified revocation) and *Pakse Market Corp. v. McConaghy,* 2003 WL 1880122 (R.I. Super.) (upheld revocation when had four (4) incidents of underage sales within three (3) years). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside justified revocation); *PAP Restaurant, Inc. v. d/b/a Tailgate's Grill and Bar v. Town of Smithfield, Board of License Commissioners*, DBR No.: 03-L-0019 (5/8/03) (series of infractions justified revocation). The Department has a long line of cases regarding progressive discipline and upholding the same. The progressive discipline imposed on a licensee depends on the violations and the circumstances of a licensee's violation(s) and must not be arbitrary or capricious. Thus, the Department will uphold a revocation where an incident is so egregious as to justify revocation without progressive discipline. However, the Department will decline to uphold a revocation where the violation is not so egregious or extreme and the local authority has not engaged in progressive discipline. *Infra.*

H. What Sanctions are Justified

In summary, the Appellant violated R.I. Gen. Laws § 3-5-21 five (5) times (two (2) violations of the Anti-Nudity Ordinance; once for violating conditions of entertainment license, once for permitting smoking; once for entertainment without a license). The Appellant violated Rule 18 of CLR8 three (3) times (various after hours violations). The Appellant violated R.I. Gen. Laws § 3-7-26 and Rule 11 of CLR8 once (bottle service).

In terms of progressive discipline, as discussed above the imposition of sanctions is not based on a mechanical grid and must be proportional (e.g. appropriate progressive discipline). See *Jake and Ella's*. Thus, if a licensee received a ten (10) day suspension for disorderly conduct and then violated conditions of licensing by one (1) after hour violation, it does not follow that the sanction must be higher than the ten (10) day suspension for the prior disorderly violation, but rather the sanction would be more than if it would be for a first violation. The Board recently imposed a $750 administrative penalty on a liquor licensee for each underage sale of alcohol violation.[14] Suppose those violations had been imposed after a ten (10) day disorderly conduct suspension, the sanction could be in that scenario $1,000 for each violation because of the prior violation, but most likely would not also result in a longer than a ten (10) day suspension; though, it could include short suspension. Recently, the Board gave warnings to two (2) liquor licensees regarding the sale of tobacco to a minor and in another matter imposed a $250 administrative penalty for the sale of flavored tobacco.[15] Those penalties would certainly go up if they occurred after a disorderly conduct suspension, but most likely would not result in longer suspension than the disorderly conduct violation due to nature of the violation.

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[14] https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=8096&Inline=True.

[15] https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=7033&Inline=True.

Two (2) recent cases where licensees had their extended hour licenses revoked were based on the progressive discipline in relation to continuous disorderly violations. In *Moe's Place, Inc. d/b/a D'Noche v. City of Providence, Board of Licenses*, DBR No. 14LQ022 (6/24/14), the licensee received a two (2) day suspension for disorderly conduct when two (2) drunk patrons that had fought inside (but not physically) were escorted outside where they were belligerent but not physical. That licensee had recently had a five (5) day suspension for nuisance and a seven (7) day suspension for various violations such as overcapacity and drinks advertising and a disturbance so that a two (2) day suspension was imposed for the disorderly conduct despite it not being physical. Subsequently, the licensee had its fourth disorderly conduct violation in less than two (2) years when a patron brought a knife inside the premises despite security pat-downs and stabbed another patron. As a result, the Class BV license was suspended for 60 days and the 2:00 a.m. license was revoked. See In *Moe's Place, Inc. d/b/a D'Noche v. City of Providence, Board of Licenses*, DBR No. 14LQ054 (12/3/14).

In *J. Acqua, Inc. d/b/a Acqua Lounge v. City of Providence*, Board of Licenses, DBR No. 16LQ014 (11/28/16), the licensee had two (2) administrative penalties within two (2) years prior to the incident and two (2) separate suspensions for disorderly conduct within two (2) years prior to the incidence. In that matter, a patron brought a gun into the premises and fired it into the ceiling. The licensee received a 60 day suspension of its Class BV license and revocation of its 2:00 license.

The Department's statutory mandate and role as a superlicensing authority informs its decisions on ensuring that sanctions are not arbitrary and capricious. Indeed, when it fails in its obligation to backstop local authorities' decisions, the Superior Court will overturn the Department's decision. See *Jake and Ella's.*

In *Pakse*, the Department and Superior Court upheld the progressive discipline imposed on said licensee for repeated underage violations. The Court found that the local authority was

authorized to impose a reasonable sanction that would deter the licensee from repeatedly violating the law, and the Department found that the local authority's imposition of a two (2) day suspension for the first offence with progressively harsher sanctions for the second and third offense, and revocation for the fourth was not arbitrary and capricious because it was based on the premise that the licensee's continued (repeated) violations posed a danger to the community. Thus, the Court upheld the Department's conclusion that revocation represented a reasonable punishment after the logical progression of suspension sanctions related to repeated violations posing a public danger.

The Appellant's violation of the Anti-Nudity Ordinance could easily be addressed by the Board by having no entertainment license. The Department does not have jurisdiction over entertainment licenses, but presumably the Board only issues them on a monthly basis so it can frequently review an applicant's suitability and ensure that an applicant complies with all entertainment requirements and any conditions. The Appellant's violations of R.I. Gen. Laws § 3-5-21 in relation to entertainment are easily prevented by no longer allowing entertainment licenses. The Board suspended the Appellant's entertainment license for 60 days. See City's Exhibit One (1) (certified record including Board's letter dated March 26, 2018).

Unlike *Pakse* which related to repeated underage drinking violations, the violations here relate to entertainment, bottle service, smoking, and three (3) after hours violation.

The Appellant blamed its manager for its problems.[16] The manager did not seem to be aware of the liquor licensing statute in terms of bottle service and after hours requirements, but a liquor licensee is expected to know and understand its statutory and regulatory requirements.

Previously, the Board imposed a two (2) day suspension of the Appellant's liquor license and $1,750 administrative penalty for hours of operation, public smoking, sale of tobacco without a

[16] The Appellant represented that the manager had been fired.

license violations in 2016. For repeated similar violations, the sanctions imposed would be more severe than the initial violations. Here, the violations are repeated and there was an intervening suspension imposed by the Department for security violations[17] and there was a bottle service violation and other R.I. Gen. Laws § 3-5-21 violations. In addition, the after hour violations were during the Department's extended hour license suspension.[18]

Nonetheless, this matter does not rise to the disorderly conduct levels in *Moe's* or *J. Acqua* that merited the extended hours' license revocation and a BV license suspension. Instead, it is a series of violations (non disorderly conduct) in the context of prior violations, but not disorderly conduct. At this time, such violations merit a long suspension of the license balanced with higher administrative penalties. *Secretos, LLC v. City of Providence, Board of Licenses*, DBR No.: 15LQ010 (8/11/15).[19]

In this matter, the Board reduced the hours of operation to 12:00 a.m. for 60 days. Such a sanction on BV and 2:00 a.m. license is longer than the initial sanction in 2017 by the Board for similar violations and longer than if these current violations had occurred without the intervening suspension (and more severe than *Secreto's*).

Based on the foregoing and mindful of the parameters of progressive discipline and *Jake and Ella's*, it is recommended that the Board's sanction be modified as follows:

1. The extended hour revocation is reduced to a 65 days suspension.

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[17] The Appellant argued that as the Department's suspension was stayed, it could not be considered prior discipline. While the sanction may have been stayed, there has been no decision finding there were no violations or that the suspension was inappropriate. Rather the implementation of the suspension has been stayed. Therefore, the Department's findings of violations and the suspension still can be considered as part of progressive discipline.

[18] However, it should be noted that one (1) violation was for late night opening on Thursday night which would be a violation whether the Department's suspension was in effect or not. Also, for another violation when the suspension was applicable, the Appellant properly closed at 1:00 a.m., but did not ensure that patrons and employees left on time.

[19] In that case, there were ten (10) R.I. Gen. Laws § 3-5-21 violations (non violent) that occurred after three (3) prior R.I. Gen. Laws § 3-5-21 violations. The new violations merited a 22 days suspension of liquor license (no extended hour license) and administrative penalties because of the types of violations (included overcapacity).

2. The BV hours of operation are reduced to 12:00 a.m. for 65 days.[20]

3. An administrative penalty of $9,000 ($1,000 for each violation: three (3) after hours, two (2) anti-nudity; condition of licensing, entertainment without a license, public smoking violations, bottle service[21]) is imposed.[22]

4. A police detail is mandatory for Friday and Saturday nights as well as any night before a State holiday.

5. The Appellant shall provide the Board with a resume for any manager hired.

6. The Appellant shall appear before the Board 60 days from the execution of this decision to update the Board as to its operations.

I. The Renewal

Pursuant to R.I. Gen. Laws § 3-7-6,[23] a liquor licensee's Class B application for renewal of license may be denied "for cause."[24] On the same day as the Board's revocation, but in a separate proceeding the Board denied the Appellant's renewal of its extended hours' license. The certified record only included the Board's letter of revocation and the minutes thereof. No transcript was provided for either the revocation or denial of the renewal proceedings. As apparently the denial of

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[20] The Appellant has already had its hours reduced to 12:00 a.m. and no stay was granted so there is no time left to serve on the 2:00 a.m. suspension or reduction of hours.

[21] While bottle service violates a statute and a regulation, for the purposes of the administrative penalty, bottle service is being considered one (1) violation.

[22] R.I. Gen. Laws § 3-5-21(b) provides that an administrative penalty of $500 may be imposed for any violation and any subsequent violation may be fined $1,000 if the subsequent violation is within three (3) years of the first offense. The Appellant had violations in 2017 and 2018 so it is less than three (3) years from the prior offense.

[23] Said statute provides as follows:

> Renewal of Class A, Class B, Class C, Class D, Class E, and Class J licenses. The holder of a Class A, Class B, Class C, Class D, Class E, or Class J license who applies before October 1 in any licensing period for a license of the same class for the next succeeding licensing period is prima facie entitled to renewal to the extent that the license is issuable under § 3-5-16. This application may be rejected for cause, subject to appeal as provided in § 3-7-21.

[24] See *A.J.C. Enterprises* and *Chernov*.

the renewal was based on the same violations as the revocation, there are no grounds to deny renewal as those violations have been addressed in the revocation proceedings and penalties imposed.

VI. FINDINGS OF FACT

1. On or about March 22, 2018, the Board issued a decision revoking the Appellant's extended hour license and denying renewal of the extended hour license.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision and requested a stay. By order dated March 30, 2018, the Department denied the request for a stay.

3. A hearing on this matter was held on April 17, 2018 with the parties resting on the record.

4. 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. The Appellant violated R.I. Gen. Laws § 3-5-21 five (5) times. The Appellant violated Rule 18 of CLR8 three (3) times. The Appellant violated R.I. Gen. Laws § 3-7-26 and Rule 11 of CLR8 once.

3. In this *de novo* hearing, there was no showing by the Board to support the revocation of the extended hours' license as well as the denial of the BVX renewal application. Instead, the violations warrant a suspension of the 2:00 a.m. liquor license and the imposition of other penalties as set forth above.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board be modified as set forth above. The administrative penalties shall be due on the 31st day after execution of this decision.

Dated: May 25, 2018

Catherine R. Warren
Hearing Officer

ORDER

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

_____ ADOPT
_____ REJECT
_____ MODIFY

Dated: May 29, 2018

Elizabeth Tanner, Esquire
Director

NOTICE OF APPELLATE RIGHTS

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

CERTIFICATION

I hereby certify on this 30 day of May, 2018 that a copy of the within Order was sent by electronic delivery and first class mail, postage prepaid to: Mario Martone, Esquire, Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904, and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI 02920.