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

Secreto, LLC, **Appellant,**	:	
v.	:	**DBR No.: 15LQ010**
City of Providence, Board of Licenses, **Appellee.**	:	

DECISION

I. INTRODUCTION

On or about July 1, 2015, the Providence Board of Licenses ("Board" or "City") notified Secreto, LLC ("Appellant" or "Secreto") that its Class BV license ("License") located at 702 Public Avenue, Providence, Rhode Island License had been revoked. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed said revocation to the Director of the Department of Business Regulation ("Department"). A partial and conditional stay of the Board's order was issued on July 15, 2015 by the Department.[1] A hearing was held in the revocation matter on July 28, 2015 before the undersigned sitting as a designee of the Director.[2] [3] For the revocation, the parties orally closed on the record.

[1] As the stay was not issued until July 15, 2015, the Appellant was closed for 14 days prior to the stay being issued. The stay conditioned re-opening of the Appellant on not serving liquor past 7:00 p.m.

[2] The transcript was received August 4, 2015.

[3] On or about June 29, 2015, the Board notified the Appellant that its License had been suspended for ten (10) days and imposed an administrative penalty of $1,500. Pursuant to R.I. Gen. Laws § 3-5-21, the Appellant appealed the administrative penalty to the Department. The Appellant did not appeal the ten (10) day suspension. This appeal was assigned case no. DBR No. 15LQ009. At the hearing on July 28, 2015, the appeals were consolidated and the parties were to submit written argument on the suspension by August 7, 2015; however, on August 6, 2015, the Appellant notified the undersigned that the Board transcript for the suspension hearing had not yet been received and requested

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. ISSUES

Whether to uphold or overturn the Board's revocation of the Appellant's License.

IV. MATERIAL FACTS AND TESTIMONY

At the Department hearing, Sergeant Scott McGregor ("McGregor"), Providence Police Department, testified on behalf of the Board. He testified he went to the Appellant on March 21, 2015 because of parking issues and heard music outside and confirmed that the music he heard outside was being played inside. He testified that he asked the doorman what the capacity was and the doorman said the manager had said it was 148 and the doorman had the count on his counter at 135. He testified that it was so crowded inside that he went to the back of the building to speak to the manager and he could see a disc jockey ("DJ") who was singing and using a microphone and that there people dancing and smoking hookah. He testified he asked the manager, Cesar Ventura ("Ventura"), for his hookah license, what the capacity was, and a copy of the liquor license, but the manager only provided the liquor license. He testified that based on his prior experience at Secreto, the DJ equipment was usually stored in the basement, but that night it was not there but there was a man in the basement who told him he was from New York and he was there to sign autographs and sing. He testified that the manager had told him he had a rapper in from New York to sign autographs. He testified that he went outside for about ten (10) minutes and heard the New York DJ singing and interacting with the crowd. On cross-

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that a decision be issued on the revocation be issued without waiting for the transcript and argument on the administrative penalty. The Board did not object. The undersigned agreed so that these matters are no longer consolidated and a separate decision will issue in the suspension matter. (The transcripts were forwarded on August 7, 2015 but the parties need time to submit written briefs).

examination, he testified there was no dance floor but that people were moving to the music in groups. On redirect, he testified that there was hookah on the tables inside.

McGregor further testified that on May 6, 2015, a parking issue was brought to his attention and when arrived at Secreto, he could hear loud music and called three (3) officers to the club to perform a patron count. He testified that while he was there, there was a DJ speaking Spanish and one of his officers was able to translate and that the DJ was announcing what song he was going to play. He testified he spoke to the manager at the side door and he could smell the hookah smoke. He testified that when he arrived at Secreto, it was not admitting any more patrons. He testified that Secreto has three (3) doors and he stationed an officer at each door to count and advise them to subtract anyone coming in so there would be no double counting. He testified that 108 patrons were counted exiting the front door, 30 from the rear, and 16 from the side, and that he then counted 15 still inside. On cross-examination, he testified that he did not put the dancing in his police report because he did not think it was an issue. He testified there was no dance floor but people were moving.

Sergeant David Tejada ("Tejada"), Providence Police Department, testified on behalf of the Board. He testified that on May 8, 2015, he performed a compliance check on Secreto and when he was about 100 feet away, he heard music outside and there was no other location from which music would be emanating. He testified that when he went inside and hookah was being smoked and a DJ set-up with two (2) men playing bongos and drums. He testified there was a VIP seating and he saw a man holding a half-empty bottle of whiskey and the man told him he was cleaning up. He testified there was no reason for the man to be in the lounge area with a half empty bottle. He testified the man told him he took it off the bar but it would make more sense for the bartender to be putting the bottle away. He testified the VIP table was about eight (8) to

ten (10) feet from the bar and the table was like a low like a coffee table and had empty glasses, like tumblers, with swizzle sticks and the man was standing there with the half-empty bottle. He testified the man identified himself as an employee[4] of the Appellant. On cross-examination, he testified that manager confirmed to him that the man worked for him. He testified that he did not see the man take the bottle off the table.

Tejada further testified on direct that on May 30, 2015, he received an anonymous complaint about noise at Secreto, and when he arrived, the front and side gates were closed but not the back. He testified he sat outside and saw patrons leave by the back door and then the side gate went up and more patrons came out. He testified that the manager (Ventura) came out and closed the gate and locked it. He testified that this was about 2:40 a.m. He testified that the License is a BV so should be shut at 1:00 a.m. He testified that the individuals leaving were dressed like patrons and not staff. On cross-examination, he testified that the people exiting did not have shirts or coordinated outfits identifying them as staff. He testified about five (5) minutes after the first group left, Ventura came out with a couple of people and locked up.

Tejada further testified on direct that he also found various advertisements online for the Appellant. He testified that one (1) advertisement indicated that there would be karaoke and a DJ. He testified another one indicated that a DJ would be playing and indicated the price of bottles as a "drink" special. He indicated two (2) advertisements were for drink specials and price of drinks hosted by a DJ and another one advertised for drink specials all night and a DJ. On cross- examination, he was asked if "hosted by" on an advertisement could mean that a pre-selected play list was being played but he thinks that would be semantics and a DJ hosting really would be playing music as opposed to background music. Finally, he testified that he spoke with the State Fire Marshal's office and the Appellant's capacity is 77.

[4] The individual, Mr. Mendez, was at the hearing and identified himself as well but did not testify.

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.,* 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. 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).[5]

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[5] *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

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[6] 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).[7] 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

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> 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.
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> 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 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.
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> 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.

[6] At that time the alcoholic beverage commission.

[7] See also *Jake and Ella's v. the Department of Business Regulation*, 2002 WL 977812 (R.I.Super. 2002)

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).

In this matter, there was a *de novo* hearing on the revocation. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision. Thus, this appeal is not bound by the Board's reasons for revocation but whether the Board presented its case for revocation or suspension 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 and the penalty.

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).

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.

An appeal proceeding held pursuant to R.I. Gen. Laws § 3-7-21 is considered a civil proceeding. See *Board of License Commissioners of Tiverton v. Pastore*, 463 A.2d 161 (R.I. 1983). In civil proceedings, unless otherwise specified, the burden of proof generally needed for moving parties to prevail is a fair preponderance of the evidence. *Jackson Furniture Co. v Lieberman*, 14 A.2d 27 (R.I. 1940). See also *Parenti v. McConaghy*, 2006 WL 1314255 (R.I.Super.); and *Manny's Café, Inc. v. Tiverton Board of Commissioners*, LCA TI-97-16

(11/10/97) (Department decision discusses burden of proof for proceedings held pursuant to R.I. Gen. Laws § 3-7-21). Thus, in order to sanction a liquor license, there must be substantial grounds established by the preponderance of legally competent evidence

C. Arguments

The Board argued that the Appellant is a Class BV license but is acting as a nightclub and that the series of infractions supports revocation. The Appellant argued that there are some licensees that are continually suspended for the same activity again and again but never revoked, but for other licensees, the Board seeks revocation. The Appellant argued that progressive discipline is warranted in this matter and that the Appellant can be warned that another DJ or overcapacity violation would rise to the level to consider revocation.

D. Prior Sanctions

The Appellant obtained its License in February, 2012. The only blemishes on its record prior to 2015 was that on May 10, 2013, it was warned about entertainment without license and on November 6, 2013, it was fined for violating its hours of operation and public smoking. In June, 2015 the Board imposed a ten (10) day suspension for a shooting.

E. The Board's Findings

An order to show cause was issued to the Appellant with 13 counts. At the Board's hearing, the Board defaulted the Appellant for non-appearance[8] and then took testimony in order to decide the sanctions. The Board found that the Appellant had violated all 13 counts. The Order to Show Cause (dated July 1, 2015) listed the 13 counts. The first count was violating R.I. Gen. Laws § 3-5-21 and the second count was violating R.I. Gen. Laws § 3-5-23.

[8] Apparently, the Board refused a short continuance for the licensee despite the fact that the Appellant's now-counsel represented to the Board that he believed he would be retained by the Appellant but had not been yet at the time of the Board hearing so that no one appeared for the Appellant at the Board hearing.

R.I. Gen. Laws § 3-5-21 states 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 or by the division of taxation, on its own motion, for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.

R.I. Gen. Laws § 3-5-23 states in part as follows:

> (b) If any licensed person permits the house or place where he or she is licensed to sell beverages under the provisions of this title to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood . . . he or she may be summoned before the board, body, or official which issued his or her license and before the department, when he or she and the witnesses for and against him or her may be heard. If it appears to the satisfaction of the board, body, or official hearing the charges that the licensee has violated any of the provisions of this title or has permitted any of the things listed in this section, then the board, body, or official may suspend or revoke the license or enter another order.

Case law has found that R.I. Gen. Laws § 3-5-23 prohibits a liquor licensee from causing either directly or indirectly an annoyance in the neighborhood.[9] In order to violate R.I. Gen. Laws § 3-5-21, a licensee must violate a condition of licensing. In order to find that a licensee violated one of those statutes, there must be a finding that a condition of licensing was violated or the licensee directly or indirectly caused an annoyance in the neighborhood. The Board's finding for counts one (1) and two (2) were general violations of the statute without any grounds for the violation. In reviewing the Board's counts three (3) through thirteen (13), those counts are the types of counts that could fall under either statute except for count thirteen (13) which was a finding that the licensee violated R.I. Gen. Laws § 3-5-29 which prohibits the leasing or lending of a License. There was no evidence presented to the Department regarding the leasing of the License. Thus,

[9] *Cesaroni* found that "disorderly" as contemplated in R.I. Gen. Laws § 3-5-23 means as follows:

> The word "disorderly" as used here contemplates conduct within premises where liquor is dispensed under a license that causes either directly or indirectly conditions in the neighborhood in annoyance of or disturbing to the residents thereof. *Cesaroni* at 296.

count thirteen (13) shall be dismissed. Additionally, at the Department's hearing the City dismissed counts eight (8) and twelve (12).[10] Therefore, the counts to be reviewed are three (3), four (4), five (5), six (6), seven (7), nine (9), ten (10), and eleven (11) in order to determine if the actions alleged in those counts either constitute disorderly conduct or a violation of a condition of licensing.

Count Three – Entertainment Without a License (three (3) counts)

The City relied on R.I. Gen. Laws § 5-22-4[11] to argue that the use of the DJ constituted entertainment without a license. There undisputed evidence was that on March 21, 2015 and May 6, 2015, the Appellant had a DJ who performed and interacted with the crowd. The evidence for May 8, 2015 was there was a DJ set-up (but no testimony regarding a DJ performing) and a man playing the bongo and man playing the drums. Thus, the evidence supports a finding that the Appellant offered entertainment without a license on three (3) different occasions so violated R.I. Gen. Laws § 3-5-21 by violating a condition of licensing.

Count Four (4) – Occupancy (two (2) counts)

The Board found a violation of R.I. Gen. Laws § 23-28.6-5[12] (capacity). The evidence was undisputed that the Appellant has a legal capacity of 77. The Appellant disputed the method

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[10] Count twelve (12) was duplicative of count ten (10).

[11] R.I. Gen. Laws § 5-22-4 provides as follows

> Town or city license required. – No person shall publicly or for pay, or for any profit or advantage to himself or herself, exhibit or promote or take part in any theatrical performance, or rope or wire dancing or other show or performance, or conduct, engage in or promote any wrestling, boxing, or sparring match or exhibition, nor shall any person for any pecuniary profit or advantage to himself or herself, promote any public roller skating in rinks or halls, or give any dance or ball, without a license from the town or city council of the town or city in which that performance, show, exhibition, dance, or ball is sought to be given.

[12] R.I. Gen. Laws § 23-28.6-5 provides in part as follows:

> Admissions restricted and supervised. – (a) Admissions 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 as provided in § 23-28.6-3 [repealed], provided, subsections (c), (d), and (e) below do not apply to churches and places of worship, wherein patrons retain their outer clothing for

of counting and argued that the Appellant's building should have been shut down and emptied; otherwise, the count could be confused with patrons coming and going. The first finding of overcapacity is based on the undisputed evidence that on March 21, 2015, the Appellant's doorman told the police officer that they were at capacity of 135. The second finding is based on the count on May 6, 2015 by police officers counting patrons exiting at closing time so it would be surprising if anyone was entering, but the testimony was that McGregor instructed the officers to subtract anyone entering. The total count was of 169 so more than twice the capacity.

The Department has previously held that "the capacity of a licensed establishment is a condition of licensing." *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) at 10. R.I. Gen. Laws § 23-28.6-5(a) imposes a duty on management to comply with occupancy limits by requiring that the management of any place of assembly shall not allow admissions in excess of the maximum occupancy. *J.J.A.M Sport Inc.* relied on counts from two (2) police officers to find there was overcapacity (which was not disputed by that licensee).

The Board is not imposing penalties under R.I. Gen. Laws § 23-28.1-1 *et seq*. Instead, pursuant to the liquor licensing statutes, the Board can impose sanctions for violations of conditions of licensing. A condition of licensing is that an establishment stays within capacity. In this matter, the evidence was that three (3) police officers counted out the patrons as they exited and those that remained inside and found the Appellant to be overcapacity. While capacity is set by the Fire Marshal (etc.), the Board has the authority to find under the testimony presented at hearing that the Appellant violated a condition of licensing by being at overcapacity. See *J.J.A.M Sport Inc.* The

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immediate exit, and where they are confined for a period not exceeding two (2) hours duration. Only those portions of a building used exclusively for religious worship are included in this exception.

evidence supports a finding that the Appellant was overcapacity on two (2) different nights and thus violated a condition of licensing.

Count Five (5) – Hours of Operation

The Board found the Appellant to be in violation of R.I. Gen. Laws § 3-7-7.[13] The undisputed evidence was that several people exited the Appellant at 2:40 a.m. which is not allowed for by statute or regulation. The Appellant argued that there was no evidence that the people exiting were patrons. However, even if the people exiting were employees, they could not be exiting at 2:40 a.m. as the regulation requires employees to exit within one-half-hour of closing time so by 1:30 a.m. Thus, the evidence supports that there was one (1) violation of hours of operation which is a violation of conditions of licensing.

Count Six (6) – Sale of Alcohol by the Bottle

The Board found a violation of R.I. Gen. Laws § 3-8-14[14] which prohibits "bottle service." See *City of Providence Board of Licenses v. Department of Business Regulation*, 2013

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[13] R.I. Gen. Laws § 3-7-7 states in part as follows:

> (a)(1) A retailer's Class B license is issued only to a licensed bona fide tavern keeper or victualer whose tavern or victualing house may be open for business and regularly patronized at least from nine o'clock (9:00) a.m. to seven o'clock (7:00) p.m. provided no beverage is sold or served after one o'clock (1:00) a.m., nor before six o'clock (6:00) a.m. Local licensing boards may fix an earlier closing time within their jurisdiction, at their discretion.

Rule 18 of *Commercial Licensing Regulation 8 Liquor Control Administration* ("CLR8")states in part as follows:

> Hours of Business Retail
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> (a) 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.
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> ***
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> (d) No one, other than the owner, employees, or law enforcement personnel, shall be admitted to the premises after the required closing time or before legal opening time.

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

WL 6149323 (R.I. Super.). The police testimony was that an employee was holding the bottle near the VIP lounge, and it would make more sense if a bartender had been cleaning up the bottle at the bar. It was not challenged by the Board that it was an employee seen holding a half-filled whiskey bottle by VIP sitting. The employee was seen when there were no patrons in the area. If the employee had been holding a half-filled whiskey bottle outside the bar area and at the VIP seating time with patrons, the clear inference would have been that the bottle was being served to those sitting in the VIP seating. Here, the inference can either be the employee picked up the half-empty whiskey bottle from the VIP section or the employee was cleaning up and walking around with the bottle. Without more evidence[15] the undersigned declines to make the former inference.

Count Seven (7) - Sale of Tobacco Without a License.

The issue for the liquor license is not the local tobacco license but that public smoking is not allowed unless the establishment is a smoking bar. The Appellant argued that the City needs to rely on the Department of Health ("Health") to prosecute bars that are acting as smoking bars but are not actually smoking bars. R.I. Gen. Laws § 23-20.10-9(e) provides that during an otherwise mandated inspection, Health or the local fire department shall inspect for compliance with R.I. Gen. Laws § 23-20.10-1 *et seq*. Health could also receive complaints about the failure of a "smoking" establishment to have the statutory and regulatory required ventilation. However, a liquor licensee's compliance with the public smoking prohibition is a condition of licensing unless exempted as a smoking bar. A local licensing authority can take action against a licensee for failing

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> 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.

[15] Apparently photographs were taken of the VIP area that were submitted at the Board hearing, but were not submitted at the Department hearing. It is not known what they would have shown.

to comply with a condition of licensing. *Luna Night Club, Inc. v. City of Providence, Board of Licenses*, DBR No. 14LQ0045 (3/5/15); and *J.J.A.M. Sport, Inc.* In this matter, there was no evidence that the Appellant was a smoking bar. As the Appellant is not a smoking bar, it cannot allow public smoking. See *ATO, Inc. d/b/a Skarr Lounge v. Providence Board of Licenses*, DBR No. DBR Nos. 14LQ0031; 14LQ0014; 12LQ0076; 14LQ0051 (3/24/15). Therefore, the offering of hookah on March 21, 2015, May 6, 2015, and May 8, 2015 violates a condition of licensing.

Count Nine – Operation of Unlicensed Night Club

The Board argued that the Appellant has a Class BV license but acts more like a nightclub which is a Class N license. The Board found that the Appellant was in violation of R.I. Gen. Laws § 3-7-16.6[16] which speaks of the requirements needed to obtain a Class N license and

[16] R.I. Gen. Laws § 3-7-16.6 provides in part as follows:

> Class N nightclub license. – (a) Notwithstanding any provision of this title to the contrary, any town or city council, by ordinance, may authorize the licensing authorities designated as having the right, power, and jurisdiction to issue licenses under this title pursuant to § 3-5-15 to designate and issue a special class of Class N nightclub licenses within its jurisdiction.
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> (b) A Class N license, when so authorized, shall be required by each establishment within the jurisdiction which:
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> (1) Has as its primary source of revenue the sale of alcoholic beverages and/or cover charges;
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> (2) Holds a Class B or Class ED license;
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> (3) Has a fire department occupancy permit of no less than two hundred (200) persons and no greater than ten thousand (10,000) persons; or any establishment with a fire department occupancy permit of less than two hundred (200) persons that holds an entertainment license.
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> (c) Any establishment with a Class N license which admits patrons under twenty-one (21) years of age on the premises of the establishment when alcoholic beverages are being sold, served, or permitted on the premises shall, during the time the patrons are permitted on the premises:
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> (1) Require one form of identification. The identification shall contain the bearer's photograph, and must be one of the following: state driver's license, US military identification, state issued identification card, or passport, from every person claiming to be twenty-one (21) years of age or older;
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> (2) Identify patrons over twenty-one (21) years of age with both an identifiable hand stamp and a bracelet and shall require every patron to show both hand stamp and bracelet before purchasing an alcoholic beverage;
>
> (3) Sell not more than one alcoholic beverage to an eligible patron in a single transaction, and shall prohibit a patron from carrying more than one alcoholic beverage from a bar or drink dispensing location;
>
> (4) Not permit any patron who leaves the premises to be readmitted prior to closing without payment of the same admission or cover charge required of patrons entering the premises initially.
>
> (d) The licensing authority of each town or city shall set the closing time for each establishment holding a Class N nightclub license within its jurisdiction pursuant to § 3-7-7(a)(1) and (a)(4), and notwithstanding other provisions of those subdivisions, an establishment holding a Class N

the conditions of holding a Class N license. There is no provision in the statute regarding ordering an entity to cease and desist from acting like a nightclub. R.I. Gen. Laws § 3-7-16.6 is only about what an applicant needs to do to be licensed as a nightclub and the conditions of that licensing. An entity can be denied a nightclub license if an entity applies for a nightclub license and does not meet the requirements of R.I. Gen. Laws § 3-7-16.6. However, the Appellant has not applied for a Class N license nor holds a Class N license so there can be no "violation" of that statute. This count is dismissed.

Count Ten (10) – Holding a Dance

Pursuant to R.I. Gen. Laws § 3-7-7,[17] for a class B licensee to hold a dance, the licensee needs permission. The testimony was that there was no dance floor or area set aside for dancing at the Appellant's location. The only evidence was that on certain nights, some patrons were moving to the music.[18] Thus, there was no substantial evidence to support the finding that the licensee was holding a dance without a permit on those nights.

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nightclub license which is permitted to remain open until two o'clock (2:00) a.m., shall not admit patrons after one o'clock (1:00) a.m.

(e) The licensing authority of each town or city will establish the cost and duration of all Class N nightclub licenses issued by that authority.

(f) Notwithstanding the provisions of § 3-5-17, no licensing authority may issue a Class N nightclub license unless the following notice requirements have been met:

(1) Any establishment applying for a Class N nightclub license, or the renewal of that license, or which is the subject of a hearing relating to its Class N nightclub license, must provide the general public with notice of its application by posting a twenty-four (24) inch by thirty-six (36) inch notice on its premises, in a manner clearly visible to the general public, at least thirty (30) days prior to the hearing date before the licensing authority for the license, and at least thirty (30) days prior to hearings related to the license on appeal to the director. If any hearing is scheduled to occur in less than thirty (30) days, the applicant or Class N nightclub license holder must post this notice within three (3) business days after its receipt of notification of that hearing from the licensing authority or the director.

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

(3) Holders of licenses are not permitted to hold dances within the licensed premises, unless proper permits have been properly obtained from the local licensing authorities.

[18] While the advertisements entered into evidence may have referred to dancing, there was no evidence linking those advertisements to the nights at issue.

Count Eleven (11) – Permitting the Advertising of Drink Specials

The Appellant admitted to a violation of the conditions of licensing by advertising drinks special in violation of R.I. Gen. Laws § 3-7-26 and Rule 16 of CLR8.[19]

F. The Appellant's Violations

Based on the evidence, the Appellant violated R.I. Gen. Laws § 3-5-21 by engaging in three (3) instances of entertainment without a license, two (2) instances of overcapacity, one (1) instance of violating hours of operation, three (3) instances of permitting public smoking; and one (1) instance of offering drinks special.

G. When a Suspension or Revocation of License is Justified

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

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[19] R.I. Gen. Laws § 3-7-26 states 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:
>
> (1) Cause or require any person or persons to buy more than one drink at a time by reducing the price of that drink;
>
> ***
>
> (b) (1) No licensee shall advertise or promote in any manner, or in any medium, happy hours, open bars, two-for-one nights and/or free drink specials.
>
> ***
>
> (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.
>
> ***

Rule 16 of CLR8 states as follows:

> Happy Hour - Retail
>
> No licensee or employee or agent of an alcoholic beverage license shall sell, offer to sell or deliver to any person or group of persons any drinks at a price less than the price regularly charged for such drinks during the period of Monday through Friday until 6 P.M. or Friday at 6 P.M. through Sunday.
>
> All licensees shall maintain a schedule of the prices charged for all drinks to be served and consumed on the premises or in any room or part thereof. Such prices shall be effective for the period of Monday through Friday until 6 P.M. and/or Friday at 6 P.M. through Sunday provided; however, that the Friday through Sunday time period may be extended for an additional 24 hours on those weekends which have a Monday holiday following, provided such holiday is recognized and observed by the State of Rhode Island.
>
> Happy hour and any similar type activities are prohibited.

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).

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 a shooting on one night justified revocation) and *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation of license when had four (4) incidents of underage sales within three (3) years). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside justified revocation); *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).

Thus, the Department will uphold a revocation where an incident is so egregious as to justify revocation without progressive discipline.[20] 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 Sanction is Justified

The Board argued that revocation was justified because small incidents lead to major incidences. However, the Board chose to impose a ten (10) day suspension for disorderly

[20] Progressive discipline relies on the sanctions imposed on a licensee by a licensing authority.

conduct that occurred **after** these violations. If that shooting was so egregious, the Board would have chosen to revoke or impose a longer suspension. There was no evidence that any of these violations at issue caused the disorderly conduct in June, 2015. Indeed, the Board argued that if revocation was not justified, the Department should impose a significant penalty. And the Appellant argued that it was appropriate to indicate that another incident of overcapacity or using a DJ could rise to the level of revocation in terms of progressive discipline.

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 v. the Department of Business Regulation*, 2002 WL 977812 (R.I.Super. 2002).

Pakse upheld a revocation of Class A liquor license when the liquor store had four (4) incidents of underage sales in less than three (3) years. The operative facts of *Pakse* are that the local authority engaged in progressive discipline of increasing the length of suspensions for underage violations. The local licensing authority had imposed a two (2) day suspension for the first offense, four (4) days for the second offense, 15 days for the third offense, and revocation for the fourth offense. In contrast to *Pakse*, the Superior Court overturned the Department in *Jake and Ella's* finding that a license revocation was arbitrary and extreme. In that matter, the licensee had two (2) after-hour violations with the first violation receiving a monetary sanction and the second violation receiving a revocation. The Court found that the Department ignored the concept of proportionality that was expected to be applied so that there was an abuse of discretion. The Court found that sanctions need to be reasonably related to the severity of the conduct and in considering the type of sanction to be imposed, factors such as real/potential

danger to the public, the nature of any previous violations sanction, the type of violations, and other relevant facts should be considered. In that matter, the local authority jumped from a monetary fine to a revocation for identical violations without a finding that the violations were egregious and extreme. The Department has consistently reviewed local decisions in light of the concept of progressive discipline as well as proportionality in terms of types of violations unless the violation is so egregious as to warrant immediate revocation. Thus, the Department ensures that the sanctions that are imposed are proportional to the violations and that progressive discipline is followed as appropriate.

In *DL Enterprises d/b/a East Bay Tavern v. East Providence City Council*, DBR No.:14LQ019 (5/23/15) *decision on reconsideration* (6/20/15), a short time after the licensee received a 14 day suspension for disorderly conduct, the licensee advertised drink specials in violation of R.I. Gen. Laws § 3-7-26 and Rule 16 of CLR8. Drawing on prior cases and mindful of the mandates of proportionality and progressive discipline, a five (5) day suspension was imposed as the incident happened right after the 14 day disorderly conduct. In this matter, the drinks special violation occurred prior to the ten (10) day suspension for disorderly conduct.[21]

The Board has recently been imposing administrative penalties for allowing public smoking. See *ATO, Inc. d/b/a Skarr Lounge*. In this matter, there have been three (3) instances of public smoking. The Appellant has been previously fined for public smoking.

As the Department found in *City of Newport v. The Great American Pub d/b/a Thames Street Station*, LCA-NE-99-21 (3/23/00), overcrowding is "not a matter to be taken lightly." *Id.* 5. It is important that licensees maintain their appropriate capacity. There was a two (2) week suspension imposed in *Great American Pub* for overcapacity after a one (1) week suspension

[21] The testimony was that all instances happened before the ten (10) day disorderly conduct suspension and it was not alleged that the advertisements were any more recent.

was imposed two (2) years prior for overcapacity. In *J.H. Enterprises d/b/a The Rhino Bar and Grill v. Newport City Council*, DBR No.: 07-L-0185 (11/8/07), there was a three (3) day suspension imposed for one (1) count of overcapacity.[22] The Board relied on *Club Heat d/b/a Level II v. Providence Board of Licenses*, 12LQ064 (12/21/12) to argue for revocation; however, that revocation was upheld for disorderly conduct and overcapacity after other progressive discipline.[23] This year the Board imposed an administrative penalty of $3,000 for one (1) count of overcapacity. That penalty had to be reduced to $1,000 in order to comply with the statutory limit in R.I. Gen. Laws § 3-5-21 on the amount of an administrative penalty. See *Luna Night Club, Inc.*

The Appellant was licensed in 2012 and until this year had no suspensions until the ten (10) day disorderly conduct suspension. The Board now tries to bring these violations that occurred prior to the disorderly conduct and argue that they justify revocation. However, that is disproportional to the actual violations and timings of the violations. Based on the forgoing, in light of progressive discipline and proportionality of sanctions as well as weighing the type of violations, revocation is not justified. In reviewing prior cases, a suspension of 22 days is appropriate. This sanction reflects the following: a) 14 days for the two (2) counts of overcapacity;[24] b) five (5) days for three (3) instances of entertainment without a license;[25] c) one

[22] In that matter, the licensee had previously been suspended for another violation for three (3) days two (2) years prior and the prior year had a three (3) day suspension for a different violation.

[23] In that matter, the license was revoked by the Board and afterwards that licensee was evicted from its premises. The Board then issued a license to another entity which ran the risk of losing its license if the initial revocation was not upheld. However, that whole matter was actually moot as the licensee had been evicted from the premises so could not meet the conditions of licensing. *Baker v. Department of Business Regulation*, 2007 WL 1156116 (R.I.Super.). The situation surrounding Club Heat was very different from the matter before the Department.

[24] This is consistent and proportional with prior statewide sanctions for overcapacity.

[25] This suspension was imposed as there were three (3) different instances of entertainment without a license.

(1) day for violating hours of operation;[26] and d) two (2) days for advertising drinks special.[27] In addition, an administrative penalty of $3,000 for allowing public smoking is imposed.[28]

VI. FINDINGS OF FACT

1. On or about July 1, 2015, the Board notified the Appellant that its License had been revoked. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed said revocation to the Director of the Department.

2. A partial and conditional stay of the Board's order was issued on July 15, 2015 by the Department.

3. A hearing was held in the revocation matter on July 28, 2015 before the undersigned sitting as a designee of the Director. Oral arguments on the revocation were made at that time.

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 by engaging in three (3) instances of entertainment without a license, two (2) instances of overcapacity, one (1) instance of violating

[26] The Appellant was previously fined for violating hours of operation.

[27] D&L received a five (5) day suspension for such a violation right after a disorderly conduct suspension but this violation occurred prior to the Appellant's disorderly conduct.

[28] 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 an administrative penalty imposed for public smoking and hours of operation in 2013 so less than three (3) years prior to the subsequent offense.

hours of operation, three (3) instances of permitting public smoking, and one (1) instance of offering drinks special.

3. In this *de novo* hearing, there was no showing by the Board to support the revocation of the Class BV license. Instead, the violations warrant a suspension of the License.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board be modified to the following:

1. The class BV license is suspended for 22 days.[29]

2. An administrative penalty of $3,000 is imposed.

Dated: August 7, 2015

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: 8/11/15

Macky McCleary
Director

[29] The Appellant has already been closed for 14 days so has served 14 days of its suspension. In addition, the stay was conditioned on liquor not being served after 7:00 p.m. which resulted in half-day suspensions during the pendency of this appeal. Those half-day suspensions shall be applied to the remaining eight (8) days of suspension. Thus, there is no time left to serve on the suspension.

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 11th day of August, 2015 that a copy of the within Decision was sent by first class mail, postage prepaid to Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904 and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and by hand delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.