

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

Ada's Creations, Inc.	:	
Appellant,	:	
	:	
v.	:	DBR No. 13LQ045
	:	
The City of Providence Board of Licenses,	:	
Appellee.	:	

DECISION AND ORDER

I. INTRODUCTION

Ada's Creations, Inc. ("Appellant") is a Class B and N liquor licensee (nightclub) located on 1137 Broad Street in Providence, Rhode Island. On April 25, 2013, the City of Providence Board of Licenses ("Board") rendered a decision against the Appellant ("Decision"), from which the Appellant timely appealed to the Department of Business Regulation ("Department"). With its appeal, the Appellant made a motion for a stay of the Decision pending resolution of the appeal. After carefully balancing the interests of both parties, the Department issued a Recommendation and Interim Order Granting the Motion for a Stay on May 13, 2013, postponing the effectiveness of the Decision until the resolution of the *de novo* hearing.

This Decision and Order of the Department ("Order") follows the *de novo* hearing conducted on May 21, 2013 before the undersigned in his capacity as Hearing Officer, sitting as the designee of the Director of the Department. The *de novo* hearing was

conducted in conformance with the Rhode Island Administrative Procedures Act, R.I. Gen. Laws §§ 42-35-1 *et. seq.*, and the Department’s Central Management Regulation 2, Rules of Procedure for Administrative Hearings. In addition to the live testimony of witnesses, cross-examination, and oral argument from counsel, the undersigned “accept[ed] into evidence a stenographic transcript of...sworn testimony presented before the local board,” (“Board Transcript”) and relevant exhibits, as provided for under R.I. Gen. Laws § 3-7-21(c).

II. JURISDICTION

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

III. ISSUES

1. Did the Board satisfy its burden of proof to demonstrate that the Appellant violated provisions of Title III and/or conditions of its liquor license?
2. Was the penalty imposed by the Board reasonable in light of all the attendant circumstances?

IV. STANDARD OF REVIEW

The Department has the broad authority to “confirm or reverse the decision of the local board in whole or in part” under R.I. Gen. Laws § 3-7-21(a). Although the standard of review of the board’s decision is not explicitly delineated in the statute, judicial interpretation of § 3-7-21 in light of the legislative intent to vest the Department with broad discretion as a “superlicensing authority,” imposes a “de novo” review standard. *Hallene v. Smith*, 98 R.I. 360, 363 (R.I., 1964). In *Hallene*, the Rhode Island Supreme

Court stated that “[w]hen § 3-7-21 is read in its entirety, it discloses by necessary implication a legislative intent to provide licensees with a de novo hearing of the cause rather than an appellate review of the decision.” *Id.* at 364. In other words, the appeal is treated as a “proceeding to transfer or remove a cause from the jurisdiction of a local board to that of the state tribunal...[and] transfers the jurisdiction of the cause from the local board to the [Department] by operation of law.” *Id.* at 365. Accordingly, the Hearing Officer reviews the Board record certified to the Department and any evidence presented at the Department level independent of the local board’s analysis.

V. DISCUSSION

In reviewing the Board’s decision, “there are two components to an administrative decision,” (1) a determination of the merits of the case,” *i.e.* the alleged violations, and (2) “a determination of the sanction.” *Jake and Ella's, Inc. v. Department of Business Regulation*, 2002 WL 977812, *5 (R.I. Super., 2002). “While the former component is mainly factual, the latter involves not only an ascertainment of the factual circumstances, but also the application of administrative judgment and discretion.” *Id.*

In a *de novo* appeal of a liquor license decision from a local licensing authority imposing revocation, suspension, or fines, the local authority has the initial burden of proof to establish the merits of the case: that a violation of a Title III statute and/or Department regulation occurred on the premises and the requisite causal connection between the licensee and the violation. In reviewing the appropriateness of the sanction imposed, the Department adheres to the principal that “sanctions levied for liquor license violations should be reasonably related to the severity of the conduct constituting the violation.” *Jake and Ella's, id.* at 6. In fashioning the appropriate disciplinary remedy,

the Department may evaluate any factors of “aggravation and mitigation” it deems appropriate. *Santos v. Smith*, 99 R.I. 430, 433 (R.I., 1965). Among the factors the Department may consider are “the number and frequency of the violations, the real and/or potential danger to the public posed by the violation, the nature of any violations and sanctions previously imposed, and any other facts deemed relevant in fashioning an effective and appropriate sanction.” *Jake and Ella's*, *id.*, at 6.

A. Grounds for Discipline

Under R.I. Gen. Laws § 3-5-21(a), “[e]very 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...on its own motion...for breach of any provisions of this section,” Title III. In the instant case, the Board alleged violations of the following provisions of Title III: 1) § 3-7-23, 2) § 3-7-7, 3) § 3-7-16.6(g)(2), 4) § 3-7-16.6(d), and 5) § 3-7-16.6(h), each of which is examined in turn below. Alleged violations 1-4 all involve events on the evening of December 31st into the early morning hours of January 1st, a period of time referred to herein as “New Years Eve” or the “night in question.”

1. R.I. Gen. Laws § 3-5-23: Disorderly Premises

The evidence presented by the Board justifies the conclusion that the Appellant permitted its premises to become disorderly during two separate occasions on the night in question, resulting in liability for two counts of violating R.I. Gen. Laws § 3-5-23. Under § 3-5-23(b), “[i]f any licensed person permits the [licensed establishment]...to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood,” the Board in the first instance and the Department on appeal “may

suspend or revoke the license or enter another order” such as a fine or a restriction on the license.¹

With respect to the first count, Officers Hersperger, Colon, Mendez, and St. Lawrence all testified before the undersigned that they responded to the Appellant’s establishment pursuant to a dispatch call. The call apparently arose from a 911 caller who stated a disturbance was occurring on the second floor of the establishment.² However, once the officers gained entry into the second floor of the establishment, they were unable to personally observe any disturbance taking place inside.

It is the testimony of Patrolman Francisco Colon before the undersigned that provides the necessary support for finding a violation of R.I. Gen. Laws § 3-5-23 in this situation.³ When Colon responded to the dispatch call at approximately 2:19 a.m., he observed a bouncer and a group of individuals on the sidewalk. Colon approached the bouncer who responded to Colon’s inquiry that there had in fact been a disturbance upstairs and that the group of subjects standing on the sidewalk were responsible for said disturbance and were ejected from the club for that reason. The bouncer’s statement to Colon is reliable evidence against the Appellant that a disturbance did in fact occur inside. The bouncer conveyed important information in the form of observations that were within the scope of a nightclub employee’s employment responsibilities of

¹ The Board also cited Providence Code of Ordinances Section 14-1 which provides that business licensee may only be open past 1:00 a.m. if so licensed by the Board and “further provided that the operation of said businesses between said hours shall not or create a nuisance.” However, the Department is limiting its analysis to the Title III standard for “disorderly” premises.

² Cognizant of the fact that the 911 caller’s identity was never established nor the details of the call presented to the undersigned, this evidence was received primarily to demonstrate the reason that the officers arrived at the scene, not to conclusively establish whether or not the disturbance did in fact occur. It should be noted that no objection to the admission of this evidence was mounted and the communication from the dispatcher was corroborated by multiple witnesses on the record.

³ Colon’s testimony before the Department is recorded on the audio file of the proceeding at approximately 16:00-26:00 minutes. This testimony is substantially supported by his prior consistent testimony before the Board which appears in the Board Transcript at pages 15-24.

monitoring, preventing, and mitigating any disturbances inside or immediately outside the establishment.⁴

After receiving the above information from the bouncer, Colon ordered the responsible patrons to disperse from the sidewalk and observed them walking down street, leaving the area. Colon then proceeded to the second floor and unsuccessfully attempted to locate the 911 caller, but, like the other officers, did not personally observe any disturbance at that time because, as the bouncer indicated, the patrons causing the disturbance had already been ejected.

When Colon returned to the outdoor area in front of the club, he observed two groups of patrons fighting, one group being the group that he had previously dispersed. Colon's personal observations of this disturbance between the two groups of the establishment's patrons immediately outside the club were credible and reflective of his experience as a police officer of five years.

With respect to the second count, Officers Alicia Hersperger⁵, Jose Mendez⁶, and Raymond Majeau⁷ provided credible and consistent testimony before the undersigned as to their observations and actions at the establishment immediately prior to the club's 3:00 a.m. closing time. At approximately 2:45-2:50 a.m., the officers were short-posted in front of the establishment to monitor exiting patrons pursuant to a routine dispersal

⁴ While no evidentiary objections to this evidence were mounted, it should be noted that the discussion in section V(A)(2) pertaining to other statements made to police by Appellant's employees is applicable.

⁵ Hersperger's testimony before the Department is recorded on the audio recording of the proceeding at approximately 2:00 – 16:00 minutes. This testimony is substantially supported by her prior consistent testimony before the Board which appears in the Board Transcript at pages 5-15.

⁶ Mendez's testimony before the Department is recorded on the audio recording of the proceeding at approximately 27:00 – 40:00 minutes. This testimony is substantially supported by his prior consistent testimony before the Board which appears in the Board Transcript at pages 33-42.

⁷ Majeau's testimony before the Department is recorded on the audio recording of the proceeding at approximately 40:00 – 45:00 minutes. This testimony is substantially supported by his prior consistent testimony before the Board which appears in the Board Transcript at pages 42-45.

assignment. Hersperger and Mendez personally observed patrons pushing and shoving each other in the inside establishment's hallway as they were making their way to the exit. As the disturbance moved through the doorway to the outside, the patrons began to fight more vigorously on the sidewalk immediately outside the door. Mendez and Majeau testified that the group of individuals who were fighting consisted of about fifteen (15) of the Appellant's patrons.

Attempting to break up the fighting, Majeau issued several commands to the crowd. However, the crowd was hostile towards law enforcement and refused to respond, causing Majeau to utilize police department issued pepper spray. Approximately five subject patrons were yelling at the police, taunting to engage them in physical force. Finally, the hostile crowd started to run away from the scene. Mendez chased down one suspect, a Mr. Vasquez and arrested him about a block or two away from the establishments. However, the other four suspects ran away before they could be apprehended. Vasquez was charged with disorderly conduct and resisting arrest as a result of the disturbance on Appellant's premises.

During the ensuing fighting, the officers observed an assault on a particular victim. Mendez specifically observed five patrons kicking the victim and one patron in particular, later identified as a Mr. Vasquez, who kicked the victim in the head. The victim appeared to be injured and unconscious and was lying in a snow bank with his pants pulled down and genitals exposed. It is unimaginable what additional damage to

the fallen victim and/or other victims this group of patrons would have done had the police not responded to the scene.⁸

Under R.I. Gen. Laws § 3-5-23, the “licensee assumes an obligation to affirmatively supervise the conduct of his patrons.” *Cesaroni v. Smith*, 202 A.2d 292, 295-96 (1964). Black’s Law Dictionary defines “disorderly conduct” as “[b]ehavior that tends to disturb the public peace, offend public morals, or undermine public safety.” 9th ed. (2009). The term would obviously include the two incidents here because fighting inside and outside of the premises constitutes a public safety concern that commands attention of police officers. The requisite “annoy[ance] or disturb[ance]” to the persons residing in the neighborhood is a flexible standard that may be established by reference to the police effort that was expended to address the disturbance. *See PAP Restaurant, Inc. d/b/a Tailgate’s Grill and Bar v. Town of Smithfield, Board of License Commissioners*, DBR 03-L-0019 at 24 (May 8, 2003)(“A licensee who generates such an effect on a local police force cannot be heard to say it did not disturb the surrounding neighborhood.”); *Chalkstone Steakhouse d/b/a Breakpoint Café v. City of Providence Board of Licenses*, LCA-PR-05-33 at 13 (April 20, 2006)(an “incident forc[ing] the police department to commit additional resources to the establishment, jeopardize[es] the safety of other neighborhoods.”). The testimony of all the officers in the instant case clearly established the public safety concern that was created and the police effort thereby expended.

It is clear that the duty to supervise the licensee’s establishment is at its height within the perimeter of the establishment. Accordingly, there is no doubt that the duty

⁸ Hersperger and Colon stayed with the victim and called for a rescue vehicle. However, the two officers testified that the victim left the premises before the rescue arrived. The victim did not supply any additional information to law enforcement or file a complaint for what appeared to have been an assault.

under § 3-5-23 was violated under the circumstances giving rise to both counts, once based on the statement of the bouncer that a disturbance occurred inside of the premises around the time of the 911 call and a second time based on the testimony of Mendez and Hersberger that patrons were pushing and shoving each other in the inside hallway around the 3:00 a.m. closing time.

Furthermore, the obligation to supervise is not automatically cut off at the entrance or exit and a licensee may be subject to discipline when “disorderly incidents occurred just outside a licensee's premises and had their genesis within.” *Edge-January, Inc. v. Pastore*, 430 A.2d 1063, 166 (R.I., 1981). In this case, the Board presented sufficient evidence to establish the causal link between something inside the Appellant’s premises and the outside disturbance. In regards to the first count, the causal connection is established by the fact that the same group that the bouncer indicated were involved in the inside disturbance were also involved in the later outside disturbance. *Stage Bands, Inc. v. Department of Business Regulations*, 2009 WL 3328508 (R.I. Super., 2009)(where the victim “engaged in an altercation inside the club and later, outside the club, engaged in another altercation,” “it is more than reasonable for the DBR to conclude that the fights culminated inside”). In regards to the second count, the causal connection is established by testimony that the outside disturbance was effectively “spilling out” of the inside disturbance. *Manuel J. Furtado, Inc. v. Sarkas*, 118 R.I. 218, 224 (R.I., 1977)(discipline was appropriate where “disturbances commenced within the licensed premises and spilled out onto the sidewalk”).

2. R.I. Gen. Laws § 3-7-7: After Hours Liquor Sales

Class N nightclubs that hold Class B licenses⁹ are subject to discipline for violating the rules pertaining to the hour at which sales of alcoholic beverage must cease. Under R.I. Gen. Laws § 3-7-7(a)(1), the default time that an establishment holding a regular Class B license must close and sales of alcoholic beverages must cease is 1:00 a.m. However, the Appellant in the instant case holds a license with the special designation BX, which represents permission from the Board for the Appellant to remain open and serve alcohol until 2 a.m. on certain nights including New Year's Eve, hereinafter referred to as "2 a.m. permission."¹⁰ This 2 a.m. permission was obtained under § 3-7-7(a)(4), which provides that "[a]ny holder of a Class B license may, upon the approval of the local licensing board," "close at two o'clock (2:00) a.m." "on Fridays and Saturdays and the night before legal state holidays."

Holders of Class B licenses with 2 a.m. permission are strictly prohibited from selling alcoholic beverages after 2 a.m. This is true even where the establishment is permitted to be open past 2 a.m. Under R.I. Gen. Laws § 3-7-7(b)(1), upon the approval of the local licensing authority, a Class B licensee may receive an "extended hours permit" to remain open for "one hour past" the close of sales time on Thursdays, Fridays, Saturdays, and nights before legal holidays. However, "the extended hours permit shall not permit the sale of alcohol during the extended one-hour period." Accordingly, even though the Appellant was the holder of an "extended hours permit" authorizing it to

⁹ Class N nightclubs are required to hold either a Class B or Class ED (special economic development zone in Providence) liquor license under § 3-7-16.6(b)(2). The hour restrictions for Class ED licensees are set by the local licensing authority rather than by statute. R.I. Gen. Laws § 3-7-16.4 ("The local licensing authority may specifically restrict the level of retail alcoholic beverages sold as well as the hours of sale.")

¹⁰ The term "2 a.m. permission" is used herein because, though the General Assembly used the term "2 a.m. licenses" in § 3-7-7(a)(4), the R.I. Supreme Court has concluded that "use of the term 'license' ... was pure happenstance." *28 Prospect Hill St., Inc. v. Gaines*, 461 A.2d 923, 925 (R.I., 1983). Permission for 2 a.m. closing under § 3-7-7(a)(4) does not create a separate class of license that would trigger due process requirements, but represents the discretion of the municipality to set and adjust closing times. Id.

remain open until 3:00 a.m. on New Years Eve, one hour past the 2 a.m. permission time applicable that night, it was strictly prohibit from serving alcohol past 2 a.m. Patrons who are served drinks before 2 a.m. may finish the drink after 2 a.m., but no new drinks may be poured.

The evidence presented by the Board that the Appellant did in fact serve alcohol after past 2 a.m. supports the conclusion that the Appellant violated R.I. Gen. Laws § 3-7-7. Detective John St. Lawrence,¹¹ whose qualifications were stipulated to, testified before the undersigned that, upon entry onto the second floor of the establishment at approximately 2:25 a.m., he personally observed a female bartender pouring and serving a drink in a clear plastic cup. St. Lawrence approached the bartender and, in response to his questioning, she admitted that the drink that she had poured was Hennessey and that she made it for a patron, a female sitting at the bar. Based on his observation and the employee's statement, it is clear that the drink at issue was poured for a patron after 2:00 a.m., as distinguished from a drink that was poured before 2:00 a.m. but had not yet been fully consumed by a patron.

Gathering additional evidence of the R.I. Gen. Laws § 3-7-7 violation, St. Lawrence seized the plastic cup and the liquid contained therein from the bartender. He maintained exclusive custody of the container until he arrived at his police vehicle and poured a portion of the liquid into a plastic evidence vial and discarded the remainder. St. Lawrence further testified that he maintained exclusive custody of the evidence vial until his arrival at the police station.

¹¹ St. Lawrence's testimony before the Department is recorded on the audio recording of the proceeding at approximately 45:00 – 60:00 minutes. This testimony is substantially supported by his prior consistent testimony before the Board which appears in the Board Transcript at pages 24-32.

Upon arriving at the station, St. Lawrence labeled the vial with the name of the Appellant's establishment and date and placed it inside an evidence bag and into a locked cabinet located inside of a locked office. The evidence vial remained secure in the locker until Detective Pat Creamer¹² delivered the vial and accompanying paperwork to the Rhode Island Department of Health Forensic Science Laboratory on January 4, 2013. Creamer testified that the evidence remained in his exclusive custody from the time he took it out of the locked cabinet until he delivered it to Chelsey Danella,¹³ the authorized lab technician.

Danella testified before the undersigned as to her receipt of the evidence. In addition, her signature appears as an acknowledgment of receipt on the Evidence Examination Request and Receipt and Summary of Analytical Findings ("Findings"), a Department of Health record, the photocopy of which was admitted as an exhibit without objection. The test results pertaining to the evidence sample, as documented on the Findings, were read into the record: 9.1 grams of ethanol per 100 cubic centimeters of liquid.

The Appellant raised two evidentiary issues on the record regarding the above-described evidence, citing the rules pertaining to hearsay and chain of custody. R.I. Gen. Laws § 42-35-10(1) governs evidence at administrative hearings, providing "[t]he rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where

¹² Creamer's testimony before the Department is recorded on the audio recording of the proceeding at approximately 1:00:00 – 1:08:00 minutes.

¹³ Danella's testimony before the Department is recorded on the audio recording of the proceeding at approximately 1:08:00 – 1:13:00.

precluded by statute) if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs.” As interpreted by the Rhode Island Supreme Court, the reference in § 42-35-10 to the Superior Court Rules of Evidence “provide[s] the usual and most helpful standard for a hearing officer in adjudging the competency of evidence.” *DePasquale v. Harrington*, 599 A.2d 314, 317 (R.I., 1991). “However, a hearing officer may take into account evidence that would be excluded from a trial by jury if it would be prudent to do so.” *Id.* “An expert administrative tribunal concerned with advancing the public welfare should not be rigidly governed by rules of evidence.” *Id.* Accordingly, neither of the evidentiary objections required the Hearing Officer to reject the evidence establishing violation of R.I. Gen. Laws § 3-7-7.

Chain of custody is not a strict evidentiary rule. Rather, “a showing of continuous chain of custody is relevant only to the weight of the evidence, *not to its admissibility.*” *State v. Cohen*, 538 A.2d 151, 154 (R.I., 1988)(emphasis in original). The proponent of a piece of evidence subject to a chain of custody objection “does not have the burden of eliminating all possibilities of a break in the chain of custody but must satisfy the [decision maker] that in all reasonable probability no tampering has taken place.” *State v. Reyes*, 673 A.2d 454, 457 (R.I., 1996)(citing *State v. Bracero*, 434 A.2d 286, 290 (R.I., 1981)). “[I]t is to be presumed that the integrity of evidence routinely handled by governmental officials was suitably preserved” unless the objecting party makes “a minimal showing of ill will, bad faith, evil motivation, or some evidence of tampering.” *United States v. Roberts*, 844 F.2d 537, 549 (8th Cir., 1988). Accordingly, the Rhode Island Supreme Court has upheld the a lower court’s admission of evidence against a chain of custody objection where “[t]he defendant offered no evidence to rebut” the

probability that no tampering has taken place, *Cohen*, supra, and where the “defendant presented no evidence of tampering, and in all reasonable probability, the [tested] specimen was not tampered with.” *State v. Nelson*, 982 A.2d 602, 613 (R.I., 2009)(citing *Bracero*, supra).

These principals apply equally to administrative proceedings in which the Department acts in a quasi-judicial capacity.¹⁴ Even where the “chain of custody relating to the [test specimen] sample was somewhat compromised,” courts have “decline[d] to hold that such a compromise renders the report [of the result] immaterial or irrelevant so as to preclude admission in an administrative proceeding” unless there is “express or implicit support in the evidence” of “some deliberate act of tampering or extremely gross negligence in the handling of the sample.” *Gallagher v. National Transp. Safety Bd.*, 953 F.2d 1214, 1219 (10th Circ., 1992). In the instant case, the chain of custody evidence clearly survives the objection where St. Lawrence and Creamer testified that they followed police department procedure and that only three persons in St. Lawrence’s unit had access to the locked evidence cabinet. Appellant’s generalized questioning of the lab technician’s qualifications and the travel of the sample at the Department of Health does not justify rejecting the evidence in light of the presumption that government employees following routine procedure for handling evidence would not have tampered with the evidence absent specific proof to the contrary.¹⁵

¹⁴ *Lyons v. Liquor Control Administrator*, 218 A.2d 1, 3 (R.I. 1966)(referring to an order following appeal to the state liquor licensing authority as a “decision of an administrative officer rendered in a judicial or quasi-judicial hearing”).

¹⁵ Neither was the Board required, as a pre-requisite to admission of the test results, to explain the scientific methodology of the Department of Health test where no specific objection to the scientific basis of the test was mounted by the Appellant.

With regard to the hearsay objection to the statement of the female bartender, both the United States Supreme Court and this court have ruled that hearsay evidence is admissible in an administrative proceedings. *DePasquale, supra, id.*, at 316. Citing *DePasquale*, the Rhode Island Superior Court has upheld the Department' reliance on statements made to police officers in liquor licensing cases. *Chapman Street Realty v. Department of Business Regulation*, 2002 WL 33957092 (R.I. Super., 2002). Such statements are particularly reliable when made by an employee regarding matters within the scope of his or her employment. Rhode Island Rules of Evidence, Rule 801(d)(2)(D)(a statement by a party's agent or servant made during the existence of the relationship concerning a matter within the scope of the party's agency or employment is admissible against that party). For example, in *Musone v. Pawtucket Bd. of License Com'rs*, the statement of an employee to police that he failed to ask for identification in the sale of an eight pack of beer was admissible against the owner of the liquor establishment. 1983 WL 486850 (R.I. Super., 1983).

3. R.I. Gen. Laws § 3-7-16.6(g)(2): Cooperation with Law Enforcement

R.I. Gen. Laws § 3-7-16.6(g)(2) requires that “[a]ny establishment that holds a Class N nightclub must...[c]ooperate with law enforcement officials.”¹⁶ This is an unquestionably critical duty of licensees; however, the evidence does not support a violation in this case.

Detective John St. Lawrence, whose qualifications were stipulated to, testified before the undersigned that he arrived on the scene at approximately 2:16 a.m. on the

¹⁶ The Board also cited R.I. Gen. Laws § 11-32-01, the criminal “obstruction of justice” statute which requires proof of specific intent. Because the evidence failed to establish violation under the broader “cooperation with law enforcement” civil provision applicable to nightclubs, analysis of the criminal statute is unnecessary. See, e.g., *State v. Duffy*, 441 A.2d 524 (R.I., 1982).

night in question. He observed several marked police officer vehicles parked in front of the establishments, and, not seeing those officers outside or at the entrance, inferred that they were already inside of the club.¹⁷ Upon entry into the front hallway, St. Lawrence attempted to gain entry through the metal door leading up to the second floor, but was unable to open it. He expressed legitimate concerns for the safety of the officers inside.

There were two door hosts in the hallway area whom St. Lawrence asked several times to open the door. They cooperated with St. Lawrence by explaining that they did not possess a key to open the door and indicating they would attempt to locate one. St. Lawrence testified that he witnessed the employees making several radio calls in Spanish and Appellant's General Manager, who speaks Spanish, confirmed before the undersigned that those calls were in fact attempts to locate a key.¹⁸ Several minutes later the door opened from the inside out as several patrons exited and St. Lawrence was able to gain entry. During the delay, which appears from the testimony to have been less than six minutes, the door hosts did everything in their power to cooperate with St. Lawrence.

The fact that several officers had gained entry prior to St. Lawrence's arrival further indicates that personnel were not intentionally encumbering law enforcement. One of the officers who was already on the second floor when St. Lawrence arrived was Officer Mendez. Mendez testified that he was able to gain entry, without any apparent delay, upon knocking on the door to the second floor. Finally, the General Manager also testified before the undersigned that the door was locked to prevent additional patrons from gaining entry in avoidance of capacity issues, further indicating lack of motive to obstruct police.

¹⁷ Patrolwoman Hersperger corroborated this testimony.

¹⁸ The testimony of the Appellant's General Manager before the Department is recorded on the audio recording of the proceeding at approximately 1:18:00 - 1:32:00.

4. R.I. Gen. Laws § 3-7-16.6(d): After Hours Admissions

In addition to the strict limitations on the hours of liquor sales discussed in section 2 herein, Class N licensees are also bound by strict limitations on the hours in which new patrons may be admitted into the establishment. Under R.I. Gen. Laws § 3-7-16.6(d), “an establishment holding a Class N 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.” To summarize the various time-based restrictions, the Appellant was permitted to admit patrons until 1:00 a.m., to serve alcohol until 2:00 a.m., and to remain open (without serving alcohol) until 3:00 a.m.

The evidence presented by the Board that the Appellant did in fact admit fifteen (15) patrons after 1 a.m. justifies the conclusion that the Appellant violated R.I. Gen. Laws § 3-7-16.6(d) and is chargeable with 15 counts thereof. The undersigned heard testimony from Patrolwoman Hersperger who was assigned to patrol the south side area of Providence on the night in question. While patrolling the Broad Street area at approximately 1:25 a.m., she observed the velvet ropes still outside in front of the Appellant’s establishment. She testified that the establishment appeared to her to be open at that time as was reasonable to infer from the velvet ropes which has the tendency to hold out to the public that the establishment has not closed off to patron access. In response, Hersperger pulled over on Broad Street and remained there in a fixed position for 10 to 15 minutes, approximately from 1:25 a.m. to 1:35-1:40 a.m. for the purpose of determining whether or not patrons were in fact being admitted into the establishment at that time.

At her post, Hersperger observed 15-20 people approaching the Appellant's establishment from a parking area typically utilized by club patrons. She further observed a person reasonably appearing to be a bouncer stationed outside. Hersperger performed head count of persons that entered through the front door of the establishment resulting in a count of 15 people. Though the bouncer was stationed at the door, she did not observe any of the 15 persons who entered being escorted back out by the bouncer or otherwise exiting the establishment within the 10 to 15 minutes she was in surveillance of the entry area.

Hersperger further testified that it appeared that the bouncer looked over in her direction and noticed the police presence, and, thereafter, another individual assisted the bouncer pulling the velvet ropes inside. After observing that the door had been closed and patrons were no longer being admitted, Hersperger left her fixed position to respond to a call.

As stated previously, Hersperger's testimony before the undersigned was credible and reflected her eight years of experience in the police force and her experience with the assignment to the South side area of Providence. She was careful to confirm that the time of the cited observations and the 15 person head count was after 1 a.m., by noting the time displayed on the computer in her police vehicle and cross-checking the time with her personal watch. She testified that the times displayed in the vehicle and her watch were consistent and that she was certain that she counted 15 persons in her head count.

5. R.I. Gen. Laws § 3-7-16.6(h): Police Detail

The final allegation against the Appellant was failure to have a police detail on February 17, 2012. R.I. Gen. Laws § 3-7-16.6(h) provides that "the licensing authority of

each town or city will develop requirements for police details for the purposes of public safety and traffic control in and around the premise of each establishment holding a Class N nightclub license.” The Appellant presented evidence to the Board that the club manager submitted a timely request for a detail and argued that failure of the police department to respond to such a request is not grounds for disciplining the licensee. However, because the Board decided only to issue a Warning in conjunction with this violation, further review of this allegation and defense by the Department is not necessary for resolution of this case and any opinion on this issue is reserved for future cases.

B. Appropriate Disciplinary Measure

With respect to the alleged violation of R.I. Gen. Laws § 3-7-16.6(g)(2), cooperation with law enforcement, the Board’s imposition of a fine of \$500.00 should be overturned based on the lack of sufficient evidence as discussed under Section V(A)(3) herein. With respect to the disciplinary action taken for violations that were proven on the record, the Decision assessed a fine of \$500.00 for one count of violating § 3-7-7 by serving one alcoholic beverage after 2 a.m. and a total fine of \$3,000.00 for violations of § 3-7-16.6(d), \$200 per count for each of the 15 patrons admitted after 1 a.m. It appears from the undersigned’s review of the record and circumstances that these fees are a reasonable exercise of the Board’s authority to impose up to \$500.00 per violation in this case.^{19, 20} In so determining, the public safety perspective was considered; “[a] statute

¹⁹ A maximum \$1,000 fine for each count that is a subsequent offense is authorized under R.I. Gen. Laws § 3-5-21(b). It appears from the Department’s review of the violation history provided by the Board that there was a prior violation relating to the “Hours of Operation” on March 15, 2007. However, § 3-5-21(b) provides “[f]or the purposes of this section, any offense committed by a licensee three (3) years after a previous offense shall be considered a first offense.” To constitute a subsequent offense, the offense must occur on a date subsequent to date of the first offense. Accordingly, all counts relating to hours of operation, 16 in total, are chargeable as first offenses under the statute.

²⁰ The Department has implied “*authority...to review monetary penalties imposed by local licensing authorities*” under § 3-7-21. *Town of New Shoreham v. Racine*, 1992 WL 813547 at 3 (R.I.Super.,

prohibiting the sale of liquor for several hours following midnight of each day,” and disciplinary measures for violating said statutes, are “intended to promote the peace and quiet of the neighborhood in which the licensee is situated, and to promote the health and welfare of the public.” *28 Prospect Hill St. v. Gains*, 1982 WL 609133, *4 (R.I. Super., 1982).

Turning to the three day suspension imposed for permitting the premises to become disorderly on two occasions, the Department finds that the disciplinary measure is justified under the circumstances. There was sufficient evidence that the licensee’s onerous duty of supervision over patrons was violated. The assumption of this duty and the consequences thereof are business realities that nightclubs are bound to face when patrons are permitted to become disorderly inside and immediately outside in a manner commanding police resources. Though the evidence regarding the first disturbance following the 911 call was not itself egregious, the evidence of the nature of the fighting and aggression of the Appellant’s patrons during the second incidence around closing time is certainly compelling.

In this particular case, the licensee’s prior history of disorderly conduct is also an aggravating factor to be considered. Prior violations that appear to be relevant from the violation history provided by the Board include a citation for “Disturbances” on February

1992)(emphasis supplied). This is a “right to review” fines, as distinguished from a duty or obligation to do so, that is exercised within the Department’s discretion when it determines that “the matter rises to a level that impacts its broad authority over statewide licensing.” *In the Matter of The Rack, Inc. d/b/a Smoke*, 11-L-098 (11/17/11); *In the Matter of Friendship, Inc. d/b/a Club Ultra*, 08-L-0289 (01/08/09); *In the Matter of 224 Atwells, LLC d/b/a Forbidden City*, 11-L-0096 at 2 (10/31/11); *Sidebar, LLC, d/b/a Side Bar v. Providence Board of Licenses*, DBR No. 05-L-0262 (5/29/07). In the instant case, the fines and underlying charges rose to the level of “statewide concern” because of their substantial amount, the importance of close of sale and close of entry statutes to the control of alcohol consumption, the disputes as to application of the cooperation with law enforcement statute, and due to the fact that the case involved interlocking testimony pertaining to violations resulting in suspension and fines.

17, 2012 and four citations for “Inability to maintain supervision” on July 21, 2012, September 17, 2012, October 6, 2012, and November 17, 2012. Given the violation history and the public safety threats created in this case, the three-day suspension is a reasonable means of punishing the licensee without putting the establishment permanently out of business.

VI. Findings of Fact

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

VII. Conclusions of Law

1. The Department has jurisdiction over appeals of municipal liquor decisions pursuant to R.I. Gen. Laws § 3-7-21, which imposes a *de novo* review standard.
2. The Board presented insufficient evidence to sustain a violation of R.I. Gen. Laws § 3-7-16.6(g)(2).
3. The Board presented sufficient evidence to sustain 15 counts of violating R.I. Gen. Laws § 3-7-16.6(d), one count of § 3-7-7, and two (2) counts of violating R.I. Gen. Laws § 3-5-23.
4. The Board’s imposition of fines totaling \$ 3,500 and a three-day suspension for the violations described in paragraph 3 of this section is reasonable under the circumstances.

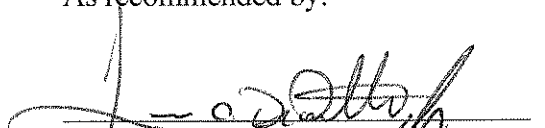
VIII. Recommendation

It is recommended that the Department uphold Paragraphs 1, 2, and 4 on page 4 of the Board’s Decision, collectively providing for a fines totaling \$ 3,500 and a three-day suspension for two (2) counts of violating R.I. Gen. Laws § 3-5-23, one count of

violating 3-7-7, and fifteen (15) counts of violating 3-7-16.6(d). It is recommended that Paragraph 2 pertaining to "failure to cooperate" is overturned.

As recommended by:

Date: 6/19/2013



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

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

- Adopt
- Reject
- Modify

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

Date: 19 June 2013


Paul McGreevy
Director

Entered as an Administrative Order No.: 13-032 this 20th day of June, 2013.

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 20th day of June, 2013 that a copy of the within Order and Notice of Appellate Rights was sent by e-mail and first class mail, postage prepaid to -

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