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

ATO, Inc. d/b/a Skarr Lounge,	:	
Appellant,	:	
	:	**DBR No. 14LQ0031**
v.	:	**DBR No. 14LQ0014**
	:	**DBR No. 12LQ0076**
City of Providence, Board of Licenses,	:	**DBR No. 14LQ0051**
Appellee.	:	
	:	

DECISION

I. INTRODUCTION

On or about September 11, 2014, the Providence Board of Licenses ("Board" or "City") notified ATO, Inc. d/b/a Skarr Lounge's ("Appellant") that its Class BX liquor license ("License") would be suspended for 60 days and an administrative penalty of $38,000 would be imposed on its License. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board's decision to the Director of the Department of Business Regulation ("Department"). The undersigned was designated by the Director of the Department to hear the appeal. By order dated September 18, 2014, the Department stayed the License suspension and the administrative penalties for allowing public smoking (hookah).[1]

On or about June 5, 2014, pursuant to R.I. Gen. Laws § 3-5-21,[2] the Appellant also appealed the Board's decision to impose an administrative penalty of $2,400 on its License. The undersigned was designated by the Director of the Department to hear the appeal. By order dated September 22,

[1] The Board imposed a $2,000 administrative penalty for entertainment without a license and a $36,000 administrative penalty for allowing public smoking (hookah). The stay order only stayed the penalty for the hookah smoking. The entertainment without a license administrative penalty was not addressed.

[2] See case law discussion below.

2014, the undersigned consolidated the 60 days suspension and hookah penalties matter (14LQ051) with the June penalty matter (14LQ031). On October 17, 2014, the undersigned was appointed substitute hearing officer for an April, 2014 appeal (14LQ014) by the Appellant of the imposition of an administrative penalty of $1,750 on its License by the Board. On October 17, 2014, the undersigned was appointed substitute hearing officer for a 2012 appeal (12LQ076) by the Appellant of the imposition of an administrative penalty of $1,000 on its License by the Board. By order dated October 22, 2014, these four (4) matters were consolidated.

A hearing was held on February 25, 2015. Pursuant to R.I. Gen. Laws § 3-7-21(c), the parties agreed to base most of the appeal on the record before the Board. At hearing, the Appellant represented that it had paid the penalties in the matters designated as 14LQ0014, 14LQ0034, and 12LQ0076, and that those matters could be dismissed. At hearing, further testimony was taken and oral closings were made with both parties represented by counsel and resting on the record.[3]

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-1 *et seq.*, R.I. Gen. Laws § 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 the Board's suspension and/or administrative penalties.

IV. MATERIAL FACTS AND TESTIMONY

At the Board hearing, Arlene Redondo ("Redondo") testified on behalf of the Board. She testified that on August 2, 2014 she was at the Appellant's where she was assaulted in the ladies' room by Misty Machado ("Machado"). She testified that her friend, Heidi Tejada ("Tejada"), had left the bathroom in front of her but before she could leave, Machado entered and punched

[3] The undersigned received the transcript of hearing on March 10, 2015.

her in the face. She testified that she tried to unlock the bathroom door but it was being held shut. She testified there was fighting for two (2) or three (3) minutes before she finally got the door unlocked. She testified that when she got out of the bathroom someone grabbed her from behind to separate her from Machado. She testified she was brought to the back kitchen area and a waitress gave her water and napkin for the blood. She testified that she did not speak to management or security and no one offered to call the police or an ambulance. She testified that she lost her cell phone and purse in the bathroom during the fight. She testified that she heard her friends outside. She testified that she had leave by the back and when she got outside she saw Gianfranco Marrocco ("Marrocco"), the Appellant's owner, and he looked at her but said nothing. She testified that she met her friends outside and walked to the emergency room. 8/13/14 Tr. 17.[4] She testified that she was injured in the attack and had blood gushing from her teeth, lips, and nose and lost consciousness at the emergency room. She testified that her teeth were moved in the attack so she might need root canal. She testified that a police officer at the emergency room overheard her conversation so approached her about what happened.

On cross-examination, Redondo testified that she knew Machado, but did not have a friendship with her and did not know why Machado would attack her. She testified that her friends did not call an ambulance because they were looking for her and when they found her they walked to the emergency room because that is "what I told them to do." 8/13/14 Tr. 22. On re-direct examination, she testified that Marrocco reached out to her a day or two (2) later via a friend. On questioning from the Board, she testified that it was a one-person bathroom. On re-cross examination, she testified that she knew Machado but that she never was a "best friend." 8/13/14 Tr. 29.

[4] The date and Tr. refers to the date of transcript of the Board hearing held on August 13, 2014 with the number following being the page number of the transcript.

At the Board hearing, Detective Carlos Sical testified on behalf of the Board. He testified that on August 2, 2014, he was at Rhode Island Hospital to meet with a victim of an assault and he overheard Redondo telling her sister about the assault at the Appellant's. He testified that he spoke to Redondo and Tejada about the assault. He testified that Tejada told him she was coming out of the bathroom with Redondo when Redondo was pushed back inside by Machado so she (Tejada) tried to get back into the bathroom but was stopped by "DJ Bigness" and another bouncer blocked her as well. He testified after speaking to Redondo and Tejada, he called dispatch to find out if there had been a call about the incident and was told no and he advised dispatcher to send someone to hospital to take a report.

At the Board hearing, Patrol Officer Richard Mendez testified on the Board's behalf. He testified that on duty on August 2, 2014, he responded to a call to Rhode Island Hospital and confirmed with dispatch that no calls had been received previously about said assault.

At the Board hearing, Police Officer Steven Shea, Communication Liaison Officer, testified on behalf of the Board and testified that the call for an assault at the Appellant's came from Rhode Island Hospital. On cross-examination, he testified that his records would not include 9-11 calls as that is a State agency.

At the Board hearing, Sergeant David Tejada ("Sergeant Tejada") testified on behalf of the Board. He testified that he contacted 9-11 and it received no calls on August 2, 2014 from or about 292 Atwells Avenue (Appellant's location) and no calls that referenced the Appellant.

At the Board hearing, Patrol Officer Trent Tastings testified he was on duty on August 2, 2014 and performed a compliance check at the Appellant's where he observed hookah smoking (to which Appellant's counsel stipulated). 8/18/14 Tr. 7. He testified that the Appellant's music

was loudly amplified and he heard it before he entered the premises. On cross-examination, he testified that he did not see a disc jockey, microphone, or a turntable.

At the Board hearing, Sergeant Stephen Gencarella testified on behalf of the Board. He testified that on August 1, 2014, he responded to the Appellant's and he could hear the music from the building from two (2) buildings away and when inside, he saw people dancing and smoking hookah. He testified that on July 25, 2014 and August 3, 2014, he responded to the Appellant's and on both days, he could hear elevated music from outside the building. On questioning from the Board, he testified that he spoke to manager who showed him that the source of the music was an Ipod.

At the Board hearing, Ernesto Bueno testified on behalf of the Appellant. He testified that he is known as "DJ Bigness" and that he was "promoting" at the Appellant's on August 2, 2014 (8/18/14 Tr. 21) and witnessed the altercation. He testified that Machado was about to go to the bathroom and the door opened up and Redondo and Tejado came out and Redondo put her hands up. He testified that he ran over and grabbed "the friend" (Tejada) who was kicking and screaming "let me go" and "I'll f*** the b**** up." 8/18/14 Tr. 21. He testified that he and Tejada went and got a bouncer, Gary, and he and Gary went into the bathroom and each grabbed one of the women. He testified that Gary grabbed Machado and he grabbed Redondo and took her to the back and gave her napkins and asked her if she needed anything. He testified he never blocked anyone from going to the bathroom and that the bathroom door opened when he and the Gary went inside to break up the fight.

On cross-examination, Beuno testified that he did not know the victim or her friend. He testified that when he brought Redondo to the back, Bosh (a bar employee) and Giselle (a manager) were there. He testified that they walked Redondo out through the back and Machado

through the front so that they would not keep fighting. He testified that they kept Machado in the bathroom until Redondo left. 8/18/14. Tr. 52. On questioning from the Board, he testified that he is friends with Machado and he saw her hit Redondo. He testified that Machado told him that she and Redondo used to be best friends but then Redondo stole Machado's boyfriend. He testified that Tejada wanted to go back inside the bathroom to beat up Machado and he stopped her which is why he thinks Tejada told the police that he blocked the door.

At the Board hearing, Giselle Lama ("Lama") testified on behalf of the Appellant. She testified that on August 2, 2014, she was the closing manager. She testified she did not see the fight between Tejada and Redondo. She testified that after the fight DJ Bigness (Beuno) brought Redondo behind the bar. She testified that she got Redondo water and asked her if she wanted anything but she only wanted her purse so she sent someone to look for the purse but it was not found. She testified that someone else came in and said Redondo's friends were waiting for her so they walked her outside via the back but around to the front where her friends were. She testified that Marrocco was outside in the driveway and that Bosh is the "hookah guy" (8/18/14 Tr. 59) and he got Redondo water. On cross-examination, she testified that Redondo was bleeding. She testified that she thought to call an ambulance but Redondo wanted her friends to take her to the hospital. On questioning from the Board, she testified that Redondo was answering all questions without a problem.

At the Board hearing, Gareth Wilson testified on behalf of the Appellant. He testified that he was working security at the Appellant's on August 2, 2014 and a woman told him there was a fight in the ladies' room. He testified that he went to the bathroom and went between the two (2) women fighting to break it up. He testified that he thinks the DJ took a woman out while he stayed in the bathroom with the other one. He testified that he waited about five (5) minutes

to see if it "clear" and that the other woman (Redondo) was gone so then they escorted the other woman (Machado) out. 8/18/14 Tr. 70. He testified that no one stopped him from going into the bathroom. On cross-examination, he testified that both the DJ and the woman told him there was a fight. He testified that the DJ and a female bouncer took away the victim (Redondo).

Gianfranco Marrocco (the Appellant's owner) testified on behalf of the Appellant. He testified he was at the Appellant's on August 2, 2014 and he was outside and he saw Lama walking with the victim. He testified that he asked Redondo what happened and asked what he could do and she said she just wanted her pocketbook. He testified that her friends came and got her and they left. He testified that none of the friends asked him to call an ambulance. He testified that she was coherent. He testified he spoke to her and he could not physically restrain her and call an ambulance.

On cross-examination, Marrocco testified that neither he nor the staff called the police because the situation was under control. He testified that if the victim had been incoherent or stumbling, he would have called the ambulance or the police. He testified that the situation was under control and Redondo refused help. He testified that he did not see Redondo's injuries as she was covering her mouth. On questioning from the Board, he testified that he tried reaching out to Redondo via a friend but never heard from her. He testified that Machado apologized to him for the fight and told him that she and Redondo used to be best friends but then Redondo "took her man from her or whatever. It's always over a guy." 8/18/14 Tr. 107-108. He testified that the police were not called because the situation was under control and the parties had been separated and separately escorted out of the premises. He testified that he leaves it up to security whether to call the police.

At the Board hearing, Tejada testified on behalf of the Appellant. She testified that she drove to the hearing with Marrocco but that he did not offer any inducements, gifts, or money in regard to her testimony. She testified she is friends with Redondo and was with her in the club when she got in a fight with Machado. She testified she and Redondo were walking out of the bathroom and she was in front, and Machado came in and she saw the door shut and she did not know what was going on so she went to get security. She testified that security went to the bathroom and she was held to the side since she was trying to see what was happening and security went into the bathroom. She testified she does not know DJ Bigness. She testified that no one stopped her from going back into the bathroom. She testified she did not recall telling any police officers that the DJ or bouncers blocked the bathroom door. She testified that everyone was trying to get into the bathroom. She testified that she disagreed with the police report that said she said that DJ Bigness and the bouncer blocked the door. She testified that Redondo used to be friends with Machado and knew each other since they were 15.[5] She testified that Redondo started dating Machado's boyfriend or ex-boyfriend.

On cross-examination, Tejada testified that she has known Redondo since 2002. She testified that she and Redondo and Machado's ex-boyfriend were at the Appellant's on August 2, 2014. She testified that she recognized Machado because Machado and Redondo had been in many previous altercations in other locations. She testified that she did not see the fight but saw Machado go into the bathroom and she got the female bouncer. She testified that when she was outside, her friends said that Redondo was cleaning herself up and that they were going to go to the emergency room. She testified that she met up with Redondo outside of the Appellant's in front and Redondo asked where her purse was but she (Tejada) did not know and Redondo said she needed to go to the hospital. She testified that at the hospital, Redondo and the boyfriend

[5] Redondo's testimony was that she is 25. 8/13/14 Tr. 6.

went inside and she, Tejada, stayed in the car talking on the phone so that when she went inside the hospital she did not see Redondo's injuries. 8/21/14 Tr. 29-30.

Tejada testified that she went to see Marrocco because her name kept being brought up and she wanted to ask him what was going on. She testified that the police were looking for her and she did not want to be involved in anything negative. She testified that Redondo told her to just leave it but to show up for the hearing. She testified that since Redondo was not talking to her, she figured she would talk to Marrocco. She testified that she never wrote a report for the police and does not know DJ Bigness and the police lied in their report over what was said and she would not have cursed when she saw Machado going into the bathroom. On questioning from the Board, Tejada testified that she is not saying the police are lying about the report but she never told the police that DJ Bigness held the door closed and she does not know him.

At the Department hearing, Marrocco testified on behalf of the Appellant. He testified that as soon as he received the License, it opened as a hookah bar. He testified that when the Appellant opened, it did not have a city tobacco license because such a license did not exist but later, it obtained a city tobacco license and it obtained the cigarette dealer's license from the State when it opened. He testified that he has submitted an affidavit of smoking bar to the Division of Taxation ("Taxation") in 2012, 2013, and 2014. See Appellant's Exhibit One (1) (said affidavits). He testified that he requested Taxation inspect the premises but was told Taxation is backed up. He testified that music is now played by using a preselected song list on an Ipod and there is no disc jockey but rather speakers on the wall.

On cross-examination, Marrocco testified that he was not at the Appellant's licensing application hearing in 2011. He testified that a February 2012 consent order between the Appellant and the Board agreed that music will not permeate the walls of the building. See City's

Exhibit Two (2) (February 23, 2012 consent order). On redirect testimony, he testified that the consent order does not contain anything about hookah.

At the Department hearing, the Appellant represented it has been closed since November 29, 2014 which the City did not dispute. The parties agreed to confirm the closure in writing to the undersigned. To date, the parties have not confirmed whether the Appellant is closed or open so that the conclusion is that the Appellant has been closed since November 29, 2014.

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

a. The Appeal Pursuant to R.I. Gen. Laws § 3-7-21

The hearing for the appeal pursuant to a R.I. Gen. Laws § 3-7-21 that is before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) (as the hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence); *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964); and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (Department's jurisdiction is *de novo* and the Department independently exercises the licensing function). Thus, while there was not a full new hearing before the Department, the proceeding before the Department is considered a *de novo* hearing. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision. Thus, this appeal is not bound by the Board's reasons for suspension but whether the Board presented its case for 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 suspension.

The Department reviews sanctions to ensure statewide consistency and appropriateness in the situation. It also supports progressive discipline barring the rare and extreme event where revocation may be warranted without prior discipline. It also accepts the principles of comity and deference to the local authorities and their desire to have control over their own town or city. At the same time, pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21, the Department ensures that tensions between local boards and licensees are settled in a consistent manner. Nonetheless, there is not a mechanical application of sanctions as each matter has its own sets of circumstances. See *C&L Lounge, Inc. d/b/a Gabby's Bar and Grille; Gabriel L.*

Lopes v. Town of North Providence, LCA – NP-98-17 (4/30/99). At the same time, a sanction cannot be arbitrary and capricious. The unevenness of the application of a sanction does not render its application unwarranted in law but excessive variance would be evidence that an action was arbitrary and capricious. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). See *Jake and Ella's* 2002 WL 977812 (R.I. Super.) (overturning a revocation of a liquor license as arbitrary and capricious).

An appeal proceeding held pursuant to R.I. Gen. Laws § 3-7-21 is considered a civil proceeding. See *Board of License Commissioners of Tiverton v. Pastore*, 463 A.2d 161 (R.I. 1983). In civil proceedings, unless otherwise specified, the burden of proof generally needed for moving parties to prevail is a fair preponderance of the evidence. *Jackson Furniture Co. v Lieberman*, 14 A.2d 27 (R.I. 1940). See also *Parenti v. McConaghy*, 2006 WL 1314255 (R.I.Super.); and *Manny's Café, Inc. v. Tiverton Board of Commissioners*, LCA TI-97-16 (11/10/97) (Department decision discusses burden of proof for proceedings held pursuant to R.I. Gen. Laws § 3-7-21).

b. Administrative Penalties

Pursuant to R.I. Gen. Laws § 3-7-21, the Department does not have authority to hear appeals of fines. However, the Superior Court found that the Department has implied jurisdiction to review administrative fines imposed by local boards pursuant to R.I. Gen. Laws § 3-5-21. See *The Rack, Inc. d/b/a Smoke v. Providence Board of Licenses,* 2013 WL 3865230 (R.I.Super.). The Court found that the Department did not have to apply a *de novo* standard of review to appeals of administrative fines but that the Department must review the record and articulate and document a substantial, non-arbitrary rationale for invoking its discretion to dismiss appeals of fines imposed by local licensing boards and that the exercise of such discretion must be reasonable. The Court further

found that if the monetary fine imposed on a licensee by a local liquor licensing board is within statewide limits set by statute then such a finding by the Department may be sufficient basis for the Department to dismiss a licensee's appeal. *Id.* at pp. 14-17.

C. Arguments

The Appellant argued that the Board's main witness, the victim, lied about the relationship she had to the attacker. The Appellant did not dispute that the victim was punched in the ladies' room but argued that as soon as the attack was known about, it was stopped and assistance given the victim. The Appellant argued that it was always going to be a hookah bar. The Appellant argued that other hookah bars, Nara and Opa, have not been penalized like it has.[6] The Appellant argued that enforcement against public smoking vests in Department of Health

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[6] The Appellant submitted the licensing history of both bars. However, except for representations that they are hookah bars, there was no evidence that they are allowing public smoking. The Appellant submitted the transcript of the hearing for the transfer of a Class B license to Opa in 2009 where the applicant stated that it would be a coffee bar and maybe a restaurant. Opa now is apparently called Phoenicians or at least it is in the Board's licensing history (as the address is the same as Opa's application hearing address). Based on Nara's licensing history, it has been licensed since at least 2010 and has been penalized once for $250 over the sale of tobacco. Phoenicians (Opa) apparently has not been penalized for public smoking.

The unevenness in the application of a sanction does not make it unwarranted in law. See *Pakse. Jake and Ella's* did not find that every sanction must be exactly the same for every violation for every club but rather *Jake and Ella's* stands for the proposition that a sanction must be proportional to the violation and if there is an excessive variance than that could be arbitrary and capricious. See also *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1973). Indeed, one cannot re-litigate every licensees' violations in determining another licensee's sanction. For these reasons it is very hard to demonstrate uneven application of sanctions. The Superior Court in *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.) a liquor appeal from the Department, addressed the claim by a liquor licensee regarding uneven application of sanctions. The Court found as follows:

> It is well-settled that, '[i]n order to prevail on a selective enforcement claim, one must do more than establish that the challenged regulation was not applied with absolute uniformity.' *Felice v. Rhode Island Board of Elections,* 781 F. Supp 100 (D.R.I. 1991). The court further noted that,
>
> [s]pecifically, the claimant must prove:
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> 1. That she was treated differently from others similarly situated, and
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> 2. That such selective treatment was the product of intentional or purposeful discrimination in that it was based on impermissible considerations such as membership in a protected class, intent to inhibit or punish the exercise of a constitutional right or malicious bad faith intent to injure the claimant. *Id.* (citing *Yerardi's v. Randolph Selectmen,* 932 F.2d 89, 92 (1st Cir.1991); *LeClair v. Saunders,* 627 F.2d 606, 609-10 (2nd Cir. 1980); *E & T Realty v. Strickland,* 830 F.2d 1107, 1114 (11th Cir. 1987)).

Assuming that both Narr and Phoenicians (Opa) are smoking bars, there is not a claim to be made on what the Appellant argued is the unfair application of the law by the Board.

("Health") and not the Board. The Appellant argued that it did not say it was going to be a hookah bar when it applied but it said it would be a lounge and has been a hookah bar since the day it opened.

The City argued that the police officers heard the music from two (2) blocks away so that violates the consent order. The City argued that in terms of the fight, that while the victim did not disclose her full relationship with her attacker, there is no dispute that she was attacked and seriously injured. The City argued that the discrepancies in the testimony are from the Appellant's witnesses regarding who got which bouncer, etc. The City argued that the victim came into contact with the DJ, the manager, the bar back, bouncers, and no one called the police or ambulance. The City argued that police should have been called. The City argued the police reports showed consistent stories on the night of the incident and the victim's friend came to the Board hearing with Marrocco and then changed her story about the bathroom door being blocked but she did testify that there were people around the bathroom door which sounds like it was blocked. The City argued that at the Appellant's application hearing, it never said it was going to be a hookah bar but rather was to be a lounge with a full menu but food is to be incidental in a smoking bar. The City argued that neighbors need to know an applicant is going to be a smoking bar because neighbors might not object to a restaurant but might to a smoking bar.

D. The Violations

a. <u>The August 2, 2014 Incident</u>

There was contradictory testimony regarding who got which bouncer and who was in back with Redondo after the fight. The certified record contained the police report in which Redondo stated she had known the suspect (Machado) for several years and is dating the

suspect's ex-boyfriend but at hearing, she testified that she did not know why Machado would attack her. In addition, Tejada's testimony differed from what she apparently told the police.

The testimony was that the fight was in a one-person bathroom which would indicate that the door to the outside locked since there would be no individual stalls. Redondo's testimony was that she tried to unlock the door but it was being held shut. One person-bathroom doors are usually locked from inside but Tejada had already left the bathroom so it would have already been unlocked and could not be locked from the outside. In the police report, Tejada stated she saw Machado push Redondo into the bathroom and lock the door behind her. However, it is not credible that Tejada could have seen what was done inside the bathroom. The testimony was that Machado punched Redondo right away so it seems unlikely that Machado would have had a chance to lock the door prior to punching Redondo.

In the police report, Tejada stated that Machado was assisted by DJ Bigness and he would not let her in the bathroom and neither would the bouncer. Redondo told the police that Tejada had been blocked by DJ Bigness from entering the bathroom. At hearing, DJ Bigness testified that he never blocked the door but that he stopped Tejada from going into the bathroom as she was screaming that she was going to beat up Machado. He theorized that was why Tejada claimed she had been blocked from going into the door. He testified that he and Machado got Gary, the bouncer. Tejada's testimony differed from her report to the police in that she testified that no one was blocking the door but that it was crowded and hard to get into the space. She testified that she got a female bouncer to help and denied knowing DJ Bigness. At hearing, Tejada denied saying what was in the police report.

Tejada's testimony was at odds over what she had told the police. She also testified that they drove to the emergency room but Redondo testified that they walked. Her testimony was

that she did not understand why the police would want to speak to her despite the fact that she was a witness to an assault. Her testimony and others testimony conflict as to what happened after the fight. Redondo testified that a waitress was in back with her. Lama testified that she, DJ Bigness, and Bosh were with Redondo at various times after the fight. Redondo's testimony and others agree that after the fight, Redondo wanted to find her purse and did not ask for an ambulance to be called.

All the testimony supports a finding that Redondo was coherent and ambulatory after the assault. Her testimony was that she wanted to walk to the emergency room. Certainly, if an establishment has a patron who is unconscious, has been shot or stabbed, or is incoherent, etc., one would assume that an ambulance would be called by a licensee. Here, Redondo or her friends could have called or asked for an ambulance. Civility would expect that a licensee would offer; though; Marrocco testified that he did. Marroco's testimony was that the police were not called because the situation was under control. However, in this situation, one would expect a licensee to report a crime that was witnessed by its staff and associates.

Based on the conflicting testimony and changing stories, it cannot be concluded that the bathroom door was purposely blocked by DJ Bigness or security. Nor in this situation was the Appellant responsible for calling an ambulance. However, Redondo was assaulted on the premises and the Appellant did not notify the police of the assault.

b. Public Smoking - Hookah

There was testimony by police officers that on various evenings, they saw hookah smoking at Appellant's. There is no dispute that the Appellant offers hookah smoking.

c. Entertainment

There was undisputed testimony that on July 25, 2014, August 1, 2, and 3, 2014 music could be heard outside of the Appellant's building. There was testimony that Appellant did not have a disc jockey but used an Ipod to play music through wall speakers.

E. Sanctions Prior to August 2, 2014

The Appellant was licensed on July 18, 2011. On June 5, 2014, an administrative penalty of $2,400 was imposed on its License which included $1,000 entertainment without license, $500 for City code violations, and $900 for six (6) counts of smoking. On March 26, 2014, an administrative penalty of $1,750 was imposed for various violations. On July 31, 2013, an administrative penalty of $300 was imposed for violating seasonal expansion. On June 21, 2012, an administrative penalty of $1,000 was imposed for violating operating hours. On February 23, 2012 an administrative penalty of $1,000 was imposed for entertainment without license and a consent order signed. On October 19, 2011, an administrative penalty of $750 was imposed on its License for violating condition of licensing and operating hours. On October 6, 2011, an administrative penalty of $250 was imposed for failing to cease outside expansion at 11:00 p.m.

F. When License Sanctions are Justified for Disorderly Conduct

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

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

In revoking or suspending a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. Rather, the Rhode Island Supreme Court held in *Cesaroni* at 295-296 as follows:

> [T]he legislature, in enacting the pertinent provision of the statute, intended to impose upon such licensee the obligation to maintain an efficient and affirmative supervision over the conduct of his patrons in his place to such an extent as is necessary to maintain order therein. It is our opinion that as a practical matter a licensee assumes an obligation to affirmatively supervise the conduct of his patrons so as to preclude the generation therefrom of conditions in the neighborhood of like character to conditions that would result from maintenance of a nuisance therein.
>
> It is to be conceded that this imposes upon a licensee an onerous burden in the management of the licensed premises. It is, however, within the authority of the legislature, the liquor traffic being peculiarly within the police power of the state.

Furthermore, the Court found that "disorderly" as contemplated in the statute meant as follows:

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

Thus, a liquor licensee has the "responsibility to control the conduct of its patrons both within and without the premises in a manner so that the laws and regulations to which the license is subject will not be violated." *Schillers, Inc. v. Pastore*, 419 A. 2d 859, 859 (R.I. 1980).

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

within the meaning of the statute is established by evidence showing a toleration or acquiescence in such conduct by the licensee." *Cesaroni*, at 296. See also *AJC Enterprises*; *Schillers;* and *Furtado v. Sarkas*, 118 R.I. 218 (1977).

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. If revocation is not warranted, the Department supports the imposition of progressive discipline.[7]

G. What Sanction is Justified

a. <u>August 2, 2014 Fight</u>

It is undisputed that Machado punched Redondo in the bathroom. Redondo was injured and needed medical attention. There was not enough evidence to conclude that the door to the bathroom was purposely blocked by DJ Bigness or staff. However, it would have behooved the Appellant to have called the police about a potential crime of which its staff was aware. The Appellant cannot be held responsible for not calling an ambulance in these circumstances.

The Board imposed a 60 day sanction upon finding that the door was purposely blocked as well as because of the assault and the failure to call an ambulance and the police. Since there cannot be a finding that the door was purposely blocked or that an ambulance should have been called, the sanction should be reduced to 30 days. The reduction is based on giving equal weight to the assault and the blocking of the door and equal weight to the failure to call the police and ambulance resulting in half the suspension no longer being supported by the evidence. In addition, the Appellant's prior discipline does not include any disorderly conduct resulting in suspensions.

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

b. Public Smoking – Hookah

R.I. Gen. Laws § 23-20.10-6[8] excludes from the prohibition on public smoking, any "smoking bar" as defined by R.I. Gen. Laws § 23-20-10(15). R.I. Gen. Laws § 23-20.10-2(15) defines a smoking bar as follows:

> (a) "Smoking bar" means an establishment whose business is primarily devoted to the serving of tobacco products for consumption on the premises, in which the annual revenues generated by tobacco sales are greater than fifty percent (50%) of the total revenue for the establishment and the serving of food or alcohol is only incidental to the consumption of such tobacco products. The establishment must annually demonstrate that revenue generated from the serving of tobacco products is greater than the total combined revenue generated by the serving of beverages and food. The division of taxation in the department of administration shall be responsible for the determination under this section and shall promulgate any rules or forms necessary for the implementation of this section.
>
> (b) Smoking bars shall only allow consumption of food and beverages sold by the establishment on the premises and the establishment shall have public access only from the street.
>
> (c) Any smoking bar as defined herein, is required to provide a proper ventilation system which will prevent the migration of smoke into the street.

R.I. Gen. Laws § 23-20.10-9 provides that Health shall promulgate rules regarding the mandates of this chapter as well as providing Health with an enforcement mechanism for violations of R.I. Gen. Laws § 23-20.10-1 *et seq*. Health has promulgated such rules, *Rules and Regulations Pertaining to Smoke-Free Public Places and Workplaces* ("Health Regulation"), which defines smoking bar by its statutory definition. The Health Regulation provides in part as follows:

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[8] R.I. Gen. Laws § 23-20.10-6 provides in part as follows:

> Where smoking not regulated. – (a) Notwithstanding any other provision of this chapter to the contrary, the following areas shall be exempt from the provisions of this chapter:
>
> ***
>
> (6) Any smoking bar as defined in § 23-20.10-2(15).

Section 1.0 Definitions

***

1.3 "Bar" means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, including, but not limited to, taverns, nightclubs, cocktail lounges and cabarets.

***

1.19 "Smoking" means inhaling, exhaling, burning or carrying any lighted cigar, cigarette, pipe, weed, plant, or other combustible substance in any manner or in any form; provided, however, that smoking shall not include burning during a religious ceremony.

1.20 "Smoking bar" means an establishment whose business is primarily devoted to the serving of tobacco products for consumption on the premises, in which the annual revenues generated by tobacco sales are greater than fifty percent (50%) of the total revenue for the establishment and the serving of food or alcohol is only incidental to the consumption of such tobacco products.

***

Section 2.0 General Requirements

***

2.2 Smoking Bars

(a) A smoking bar shall only allow consumption of food and beverages sold by the establishment on the premises and the establishment shall have public access only from the street. The establishment shall annually demonstrate that revenue generated from the serving of tobacco products is greater than the total combined revenue generated by the serving of beverages and food.[1].

(b) A smoking bar is required to provide a proper ventilation system which will prevent the migration of smoke into the street or areas where smoking is prohibited under the provisions of the Act or these Regulations.

(c) Compliance with Section 2.2(b) above shall be determined in accordance with ANSI/ASHRAE Standard 62-2001 *Ventilation for Acceptable Indoor Air Quality* [2,3]

[1] The Division of Taxation in the Department of Administration is responsible for determining compliance with this requirement and will promulgate any rules or forms necessary for the implementation.

[2] Obtainable from American Society of Heating, Refrigeration and Air-Conditioning Engineers Inc., 1791 Tullie Circle, NE, Atlanta, GA 30329.

[3] Environmental Tobacco Smoke (ETS) is a known carcinogen with no established minimum concentration. Therefore, ASHRAE Standard 62-2001 can neither determine nor prescribe a minimum ventilation rate. While a ventilation rate only slightly higher than the rate prescribed in Standard 62-2001-Table 2 for no-smoking spaces would technically result in compliance, the preponderance of scientific and medical evidence indicates that acceptable indoor air quality may not be achieved.

The Appellant argued that enforcement for violations of R.I. Gen. Laws § 23-20.10-1 *et seq.* vests in Health so that the Board cannot bring an action for violating the public smoking prohibition. Under the statute, when Health receives a complaint, it shall forward it to the offending party and then on receiving a second complaint regarding the offending party, Health shall forward the complaint to the city solicitor for prosecution. Health also has authority to file in Court for injunctive relief.

The statute does not allow for or grant a "license" for a smoking bar. Instead, it provides for smoking bars to be exempted from the prohibition on public smoking and distributes "enforcement" to Taxation in terms of the food and alcohol and tobacco revenue ratio and in terms of "standards" allows Health to set those standards. Thus, the Health Regulation defined a smoking bar pursuant to the statute and set standards and provided that Taxation has the authority pursuant to the statute of determining the revenue ratio.

There are apparently no Taxation regulations on smoking bars; however, Taxation requires those entities calling themselves smoking bars to file annual "smoking bar" affidavits and failure to do so will cause Taxation to notify the local solicitor.[9] The Appellant has submitted copies of affidavits filed for 2012, 2013, and 2014 declaring itself to Taxation to be a smoking bar in that its revenue for tobacco is more than food and beverage combined.[10] The Appellant has requested an audit from Taxation of its revenue but no audit has occurred.

Health has mandated that a smoking bar have certain ventilation systems. There was no evidence that the Appellant does or does not have the ventilation system as required by the

[9] The August 13, 2014 Board hearing accepted as City's Exhibit Eight (8), a June 11, 2014 letter from Taxation to the Providence city solicitor regarding the Appellant's failure to demonstrate that for 2013 its tobacco revenue was greater than the combined revenue for food and beverage. Subsequent to this date, the Appellant filed its 2013 affidavit on June 30, 2014. See City's certified record.

[10] The 2012 affidavit show that the combined revenue for food and beverage to be slightly greater than tobacco revenue but the 2013 and 2014 affidavits show the combined revenue for tobacco to be greater than the combined food and beverage revenue.

Health Regulation. R.I. Gen. Laws § 23-20.10-9(e)[11] 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 required ventilation. Certainly, 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 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. d/b/a La Cabana Night Club v. Town of Lincoln Board of License Commissioners*, DBR No. 08-L-0182 (11/26/08).

At its application hearing, the Appellant indicated it would be a "lounge with food, full menu. That's basically it at this point." See City's Exhibit One (1). The Appellant argued that it had been a smoking bar since its inception. The City argued that the Appellant had either changed its business plan or misrepresented it at the licensing hearing. In this matter, there is no evidence that if the Appellant had changed its business plan to a smoking bar that the change caused violent incidents like in *Tropics, Inc. d/b/a Club Tropics v. City of Warwick, Board of Public Safety*, LCA-WA-97-05 (2/28/97) (change from over 21 policy to over 14 years old caused numerous fights and assaults). The fight on August 2, 2014 was not predicated on the offering of hookah.[12]

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[11] R.I. Gen. Laws § 23-20.10-9(3) provides as follows:

> (e) The department of health, local fire department, or their designees shall, while an establishment is undergoing otherwise mandated inspections, inspect for compliance with this chapter.

[12] The Appellant argued there has been no change in its business plan since it has been a hookah bar since it opened even if it did not specify its plan at hearing. In terms of the City's concern regarding smoking bars, it could be that the City might want to ascertain from applicants either by the application or at hearing whether they plan to operate as a smoking bar. Indeed, a local licensing authority may pursuant to *Thompson v. East Greenwich*, 512 A.2d 837 (R.I. 1986) grant a liquor license upon conditions that promote the reasonable control of alcoholic beverages which could include not becoming a smoking bar. For a further discussion of the implication of a change in business plan, see *Ice Lounge, Inc. d/b/a Ice Lounge v. The City of Providence Board of Licenses*, DBR No.: 14LQ064 (2/27/15).

Understandably, local licensing authorities have an interest in establishments that offer hookah and other smoking since unless they are smoking bars, smoking inside would be illegal. Obviously, a locality does not want bars claiming to be smoking bars when they are not. However, under the statutory scheme for the provision of smoking bars, it is hard for a locality to confirm that a bar is "smoking bar" as the statute diffuses responsibility for smoking bars.

Based on the statute, if a liquor licensee claims to be a smoking bar but cannot produce affidavits, such a claim would fail and the offering of hookah would violate the prohibition of public smoking. In this matter, the Appellant's 2014 affidavit shows for 2014, its revenue for tobacco was greater than food and beverage combined. At hearing, there was no evidence regarding whether the Appellant had the required ventilation system to be a smoking bar.

The statute is not written in such a way as to require confirmation by any state agency or locality of a ventilation system before a smoking bar opens. As there is no "license" for a smoking bar, a smoking bar does not have to confirm its ventilation system prior to calling itself a smoking bar as it does not have to obtain a license. Rather the requirements of a smoking bar are ongoing – the revenue ratio and ventilation system – and fall under the jurisdiction of two (2) different agencies. The statute does not indicate what would happen to a smoking bar if its smoking bar affidavit fails to show the required revenue ratio.

If it is shown that a so-called smoking bar does not have the required ventilation system then it cannot be considered a smoking bar under the statute. In this matter, there cannot be a finding that the Appellant is a smoking bar because there has been no confirmation of the ventilation system. Since there has been no evidence that there is no ventilation system and the only evidence is that the Appellant is a smoking bar pursuant to its affidavits, the penalties should be dismissed.

c. **Entertainment**

The February 23, 2012 consent order provided that the Appellant shall play ambient or background music from a pre-determined and pre-organized playlist and that the maximum volume shall not permeate the exterior of the premises. The evidence was that the Appellant was using a pre-determined playlist. However, it was undisputed that on four (4) separate nights, the music volume could be heard outside of the exterior of the premises of the premises. The violation of a consent order is a violation of a condition of licensing pursuant to R.I. Gen. Laws § 3-5-21. 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 § 3-5-21(b) provides that a first offense by a liquor licensee shall be fined $500 with the fine for each subsequent offence not to exceed $1,000. R.I. Gen. Laws § 3-5-21 establishes minimum fines for violations. Thus, the first offense is for any offense of the liquor licensing law and the subsequent offense is for any subsequent offense of the liquor licensing laws rather than pinpointing whether the violation is the first or subsequent offence of a specific statutory or regulatory violation.

On September 11, 2014, the Board imposed a penalty of $2,000 on the License for entertainment without a license. 9/11/14 Tr. 17. Based on the forgoing, the $2,000 penalty represents four (4) different violations of the consent order. Based on the forgoing, the Appellant violated a condition of licensing by violating its consent order so it violated R.I. Gen. Laws § 3-5-21. Thus, the Board imposed a $2,000 penalty for four (4) violations of R.I. Gen. Laws § 3-5-21.

The Department reviews an administrative penalty in order to determine whether a monetary fine imposed on a licensee by a local liquor licensing board is within statewide limits set by statute. If the penalty is within such limits, the Department may dismiss a licensee's appeal. In this matter, the penalty is within the statewide limit for each violation so that appeal of the $2,000 should be dismissed.

VI. FINDINGS OF FACT

1. On or about September 11, 2014, the Board suspended the Appellant's License for 60 days and imposed an administrative penalty of $38,000.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the September 11, 2014 decision by the Board to the Director of the Department.

3. On or about June 5, 2014, the Appellant also had appealed the Board's decision to impose an administrative penalty of $2,400 on its License. The Appellant also appealed in April, 2014, the imposition of an administrative penalty of $1,750 on its License by the Board. The Appellant also appealed in 2012, the imposition of an administrative penalty of $1,000 on its License by the Board. By order dated October 22, 2014, these four (4) matters were consolidated.

3. A *de novo* hearing was held on February 25, 2015 before the undersigned sitting as a designee of the Director. At the hearing, the Appellant withdrew its April 2014, June 2014, and 2012 appeals. Further testimony was taken and oral argument was made at hearing with the parties resting on the record.

4. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-7-21 *et seq.*, R.I. Gen. Laws § 3-5-21, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. The April, 2014, June, 2014, and 2012 appeals were withdrawn.

3. In this *de novo* hearing, the evidence supports a finding reducing the 60 day suspension and dismissing the penalties for public smoking.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the September 11, 2014 decision of the Board be modified as follows:

1. The $2,000 penalty for violations of the consent order is upheld

2. The $36,000 penalty for allowing hookah (public smoking) is dimissed.

3. The 60 day suspension is reduced to a 30 day suspension.[13]

The Hearing Officer further recommends that the April, 2014, June, 2014, and 2012 appeals be dismissed.

Dated: March 18, 2015

Catherine R. Warren
Hearing Officer

[13] The parties represented that the Appellant has been closed since November 29, 2014 so that the suspension has been served. The suspension was stayed by order of this Department so that the Appellant could have remained open pending its appeal.

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:

X ADOPT
_____ REJECT
_____ MODIFY

Dated: 3/24/15

Macky McCleary
Director

NOTICE OF APPELLATE RIGHTS

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

CERTIFICATION

I hereby certify on this 25th day of March, 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.