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

334 South Water LLC d/b/a Penthouse, Appellant,	:	
v.	:	**DBR No.: 17LQ013**
City of Providence, Board of Licenses, Appellee.	:	

DECISION

I. INTRODUCTION

This matter arose from an appeal filed by 334 South Water LLC d/b/a Penthouse ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding a decision taken on November 2, 2017 by the Providence Board of Licenses ("Board") to revoke its Class BVX liquor license ("License"). A hearing was held on December 1 and 12, 2017 before the undersigned[1] with the parties resting on the record. The parties were represented by counsel.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-2-1 *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. ISSUE

Whether the revocation of Appellant's License should be upheld.

[1] Pursuant to a delegation of authority by the Director of the Department.

IV. APPELLANT'S LICENSING HISTORY

The Appellant held a liquor license for many years. The Appellant previously referred to its upstairs where it stayed open late at night after closing its downstairs restaurant as "the loft."[2]

The Appellant had a bottle service violation in October, 2015 for which a penalty of $500 was imposed. In January, 2016, a $1,000 penalty for a disorderly violation and a $500 penalty for a nuisance violation were imposed on the Appellant. In 2016, for two (2) more disorderly conduct violations, the Appellant received an administrative penalty of $4,000 as well as a five (5) day suspension of the License and 30 days of closing at midnight. See certified record and *334 South Water Street LLC d/b/a Matter of Mile & a Quarter*, 16LQ007 (8/4/16).

In April, 2017, the Board sought to revoke the Appellant's 2:00 a.m. license (the "X" of a Class BVX). At that time, the Appellant represented that it no longer wished to operate the upstairs "loft" part of its premises and only wanted to operate its downstairs restaurant but wanted its 2:00 a.m. license for special functions and would be willing to come before the Board to obtain permission for functions upstairs. The Board rejected that offer and instead revoked the 2:00 a.m. license. The Appellant appealed that revocation to the Department. On appeal to the Department, the Department remanded the matter to the Board to see if the parties could fashion a resolution as to the operation of the Appellant's establishment. *334 South Water Street LLC d/b/a Matter of Mile & a Quarter*, 17LQ006 (5/22/17). After the remand, the Board again did not resolve the matter so that the Department overturned the 2:00 a.m. license revocation in August, 2017 due to a lack of evidence. See *334 South Water Street LLC d/b/a Matter of Mile & a Quarter*, 17LQ006 (8/2/17). The Department did not appeal the August, 2017 decision to Superior Court.

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[2] *334 South Water Street LLC d/b/a Matter of Mile & a Quarter*, 16LQ007 (8/4/16), footnote two (2).

Despite representing to the Board that it no longer wished to operate upstairs, the Appellant apparently had a change of heart and "re-opened" at the end of September, 2017 calling itself "Penthouse" rather than "Loft." It received an entertainment license from the Board for the month of October, 2017.[3] In November, 2017 and December, 2017, the Appellant did not have an entertainment license.[4] Entertainment licenses do not fall under the Department's jurisdiction.

On November 2, 2017, the Board revoked all of the Appellant's licenses including its liquor license.[5] This revocation was not based on an allegations of disorderly conduct.[6] While there were allegations of disorderly conduct (a shooting) on October 28, 2017 raised against the Appellant, those allegations were not heard by the Board in October or November or December, 2017.[7] In fact, that

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[3] Minutes from the Board meeting on September 27, 2017 indicate that a DJ was approved for September 28, 29, and 30, 2017 with the following conditions:

> Approved with conditions including police detail for scheduled entertainment events, restriction of patrons entering the premises after 1am, manager will complete floor host training at a later date, functioning security camera system during entertainment events and manager will become familiar with adult entertainment laws and ordinances.
> https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=6086&Inline=True

On October 5, 2017, the Board approved a DJ for October 5, 6, 7, 8, 12, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28, 29, 2017 with the following condition, "[a]pproved. One license for establishment - no admittance for 1st or 2nd floor after 1AM."
https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=6119&Inline=True

[4] See recording of motion for stay hearing held on November 3, 2017 and transcripts of the full hearing held on December 1, 2017 at p. 7 and on December 12, 2017 at p. 82.

[5] The Board revoked the Appellant's other City licenses; however, the Department does not have jurisdiction over those licenses. Appeals to the Department can only relate to the liquor license held by the Appellant. See *El Nido v. Goldstein*, 626 A.2d 239 (R.I. 1993) (victualing license is a separate and distinct license from a liquor license).

[6] See Board's November 2, 2017 decision letter in certified record. See also transcript of Department's December 1, 2017 hearing at p. 6 as well as *334 South Water Street LLC d/b/a Penthouse*, 17LQ013 (11/7/17) (order granting stay pending full hearing).

[7] At the Department's full hearing held on December 1, 2017, the City confirmed that the Board had not heard any disorderly conduct (shooting) allegation as it was still under investigation and had not been heard. See transcript of Department's December 1, 2017 hearing at p. 6.

On October 31, 2017, the Board continued the scheduled hearing on the incident of October 28, 2017 to November 9, 2017. Thus, the Board did not hear any disorderly conduct allegations on October 31, 2017. Instead it only heard the allegations for which it revoked the License on November 2, 2017. See certified record for the transcript of October 31, 2017 Board hearing when the City requested the October 28, 2017 allegation be continued pending

October, 2017 allegation was eventually continued by the Board to January 3, 2018 and never heard by the Board.[8] As that disorderly conduct (shooting) never was heard by the Board, it never was appealed to and never was heard by the Department. The basis for the November 2, 2017 revocation by the Board was as follows: 1) people on the premises after 2:30 a.m.; 2) two (2) violations of the Anti-Nudity Ordinance; and 3) two (2) entries after 1:00 p.m.

The Appellant appealed the November, 2017 revocation to the Department. The Department issued a stay of the revocation pending a full hearing. See *334 South Water Street LLC d/b/a Penthouse*, 17LQ013 (11/7/17) (order granting stay pending full hearing). The City did not appeal the Department's stay order.[9] A full hearing on the appeal was held on December 1 and 12, 2017.

Pursuant to R.I. Gen. Laws § 3-5-8, the Appellant's Class BVX License expired on December 1, 2017. Apparently, the Appellant did not file a renewal application and the License expired. On January 3, 2018, the Board issued[10] a cease and desist order to the Appellant for operating with expired licenses. On January 24 and 25, 2017, the undersigned inquired to the parties' attorneys regarding the status of the License and the status of the appeal and whether the Appellant was withdrawing its appeal. Both parties requested a decision be issued.

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investigation. The October 28, 2017 incident was continued to November 9, 2017. See Board's minutes from October 31, 2017. https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=6165&Inline=True

At the Board's November 9, 2017 meeting, the October 28, 2017 disorderly conduct violation that had been scheduled to be heard was continued to December 5, 2017. See Board's minutes from November 9, 2017. https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=6197&Inline=True

The disorderly conduct allegation of October 28, 2017 was continued from December 5, 2017 to December 20, 2017 to January 3, 2018. On January 3, 2018, the hearing on the October 28, 2017 allegation was continued indefinitely. See Board's minutes from January 3, 2018. https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=6634&Inline=True

[8] See Board's minutes from January 3, 2018. https://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=6634&Inline=True

[9] See transcript of Department's December 1, 2017 hearing at p. 6.

[10] See footnote eight (8).

V. MATERIAL FACTS AND TESTIMONY

A. September 30, 2017: People on the Premises after 2:30 a.m.

Patrol Officer Louis Pelaez ("Pelaez"), Providence Police Department ("PPD"), testified on behalf of the City. He testified that on September 30, 2017, he worked as a detail officer at the Appellant. He testified that the club closed at 2:00 a.m. and he went inside at 2:10 a.m. and there were still patrons inside. He testified that he saw patrons on the first floor, sitting at the bar, ordering food, and drinking and some people were cleaning. He testified that there were about 30 people. He testified that there was a bartender wiping the bar down, but the majority of people were not cleaning. He testified that he told the first floor patrons that they needed to leave. He testified that some people left, but no one said that they were employees. He testified that security was there and security did not say there were employees there, but instead started to tell people to leave. He testified that at 2:30 a.m., he went upstairs where there were approximately 25 to 30 people. He testified that some were sitting or standing and about 10 people were cleaning. He testified that he started yelling that they should leave, and people started to leave. He testified that some individuals said they were waiting to get paid, but he did not see them get paid. He testified that he was inside for about 15 minutes. On cross-examination, he testified that for the people who said they were waiting to get paid, he did not tell them to leave.

Sergeant Charles David Vieira, PPD, testified on behalf of the City. He testified that on September 30, 2017, he was a supervisor of the district shift which includes where the Appellant is located. He testified that he responded to that location at around 2:00 a.m. He testified that there was a large number of people on the first floor and Pelaez went to clear the crowd out and he assisted Pelaez. He testified that between 2:10 and 2:15 a.m. people were sitting at the bar and a bartender was cleaning. He testified that he told security to get people out and security did not

say anything about employees being there. He testified that he exited to make sure people were leaving and went back in at 2:30 a.m. and the first floor was pretty cleared out, but there were still some people coming downstairs. He testified he went upstairs and there were about 25 people with some cleaning the bar and some security but others looked like patrons. He testified that the manager said that the whole group were employees including two (2) young women dressed in club clothing sitting down, but did not say that they had to be paid. He testified that he heard someone say, "everyone who is getting paid, go to the other side," but he did not see anyone get paid. He testified that he walked out around 2:45 a.m. and by that time, most everyone was gone. On cross-examination, he testified that there were about 25 people in the room, and he does not know how many went to the other side to get paid.

B. Violations of the Anti-Nudity Ordinance: October 8 and 22, 2017

Sergeant David Tejada ("Tejada") testified on behalf of the City regarding October 8 and 22, 2017. He testified that on both nights, he went to the Appellant and there were female dancers in thong type bottoms exposing their bare buttocks with no undergarments over their buttocks and they were performing on stage along with an entertainer (a DJ) playing music. See City's Exhibits One (1) (photograph from October 8, 2017) and Two (2) (video of dancers from October 22, 2017). There was no cross-examination. The Appellant did not deny the way the dancers were dressed, but rather disputed that such apparel violated the City's Anti-Nudity Ordinance.[11]

C. Entry after 1:00 p.m.: October 21 and 22, 2017

Pelaez testified that on October 21, 2017, he was at the Appellant as a detail officer. He testified that a condition had been placed on the entertainment license that after the doors closed at 1:00 am, no one was to enter. He testified that at 1:10 a.m., two (2) individuals approached the

[11] See transcript of Department's December 1, 2017 hearing at p. 43. See also transcript of Board's October 31, 2017 hearing at p. 37 in certified record.

door to enter, and he told them that they could not enter. He testified that the Appellant's owner came out and told him that they worked for her. He testified that the two (2) men had not told him that and were not wearing any uniforms and he had not seen them earlier. He testified that the owner did not tell him who they were, but he let them in. There was no cross-examination.

Stamatoula Mitrelis testified on behalf of the Appellant. She testified that her family company owns the real estate and the liquor license. She testified that on October 21, 2017, she was at the Appellant at 1:00 am. and went outside to smoke. She testified that she asked two (2) men who work at another family restaurant business to come to the Appellant and they were with her when she went to go back inside. On cross-examination, she testified that the two (2) men were not inside when she went outside, but were walking to the building. She testified that they had not been at the Appellant that night and she asked them to come over because it was busy and she thought it would be good to have some more staff. She testified that she did not bring the paystubs to the hearing for the two (2) men, but they work security and help out at the other business.

Peleaz testified that he did not remember the evening of October 22, 2017 but there is a police report. The police report indicated that a performer arrived with several people after 1:00 a.m. and the manager indicated the group was scheduled to appear. See certified record (police report for October 22, 2017). There was no cross-examination. Tejada testified that on October 22, 2017, he went to the Appellant after 1:00 a.m. as Peleaz had called to say guests had arrived after 1:00 a.m. and Peleaz was confirming no entry after 1:00 a.m. and said that a performer had arrived late who wanted entry. Neither witness testified at the Department hearing as to the number of people with the performer, but at the Board hearing, Tejada testified that apparently the performer was delayed on her way to Rhode Island and she had 12 to 13 people with her who were not allowed in. See transcript of Board's October 31, 2017 hearing in the certified record.

VI. DISCUSSION

A. Legislative Intent

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

B. The Appeal before the Department

The hearing 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) and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964). Thus, while there was not a new hearing before the Department, the proceeding before the Department is considered a *de novo* hearing. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision. Therefore, this appeal is not bound by the Board's reasons for revocation but whether the Board presented its case for revocation before the undersigned. The undersigned will make her findings on the basis of the evidence before her and determine whether that evidence justifies said revocation.

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 v. Department of Business Regulation*, 2002 WL 977812 (R.I. Super.) (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). See also *Scialo v. Smith*, 210 A.2d 595 (R.I. 1965). In civil proceedings, unless otherwise specified, the burden of proof generally needed for moving parties to prevail is a fair preponderance of the evidence. *Jackson Furniture Co. v Lieberman*, 14 A.2d 27 (R.I. 1940). See also *Parenti v. McConaghy*, 2006 WL 1314255 (R.I.Super.); and *Manny's Café, Inc. v. Tiverton Board of Commissioners*, LCA TI-97-16 (11/10/97) (Department decision discusses burden of proof for proceedings held pursuant to R.I. Gen. Laws § 3-7-21).

C. When Sanctions are Imposed

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.

A liquor licensee has the "responsibility to control the conduct of its patrons both within and without the premises in a manner so that the laws and regulations to which the license is subject will not be violated." *Schillers, Inc. v. Pastore*, 419 A. 2d 859, 859 (R.I. 1980). A liquor licensee is accountable for violations of law that occur on its premises and outside. *Vitali v. Smith*, 254 A.2d 766 (R.I. 1969). It is not a defense that a licensee is not aware of the violations or provided supervision to try to prevent violation. While such a responsibility may be onerous, a licensee is subject to such a burden by the legislature and accepted such conditions by becoming licensed. *Therault v. O'Dowd*, 223 A.2d 841 (R.I. 1966). See also *Schillers* and *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965).

Nonetheless, the revocation of a liquor license is a relatively rare event and is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety. See *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.) (disturbances and shooting on one night justified revocation) and *Pakse Market Corp. v. McConaghy,* 2003 WL 1880122 (R.I. Super.) (upheld revocation when had four (4) incidents of underage sales within three (3) years). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside justified revocation); *PAP Restaurant, Inc. v. d/b/a Tailgate's Grill and Bar v. Town of Smithfield, Board of License Commissioners*, DBR No.: 03-

L-0019 (5/8/03) (series of infractions justified revocation). The Department has a long line of cases regarding progressive discipline and upholding the same. The progressive discipline imposed on a licensee depends on the violations and the circumstances of a licensee's violation(s).

D. Arguments

The City argued that the establishment was closed for a few months and upon reopening on September 29, 2017 problems started right away and while the problems were not large scale violent ones, they showed a lack of fitness to run the establishment and the Appellant has a history of discipline and being unable to comply with licensing requirements.

The Appellant argued that the Anti-Nudity Ordinance is unconstitutional and the dancers did not violate the ordinance as written. The Appellant argued that the people there after hours were workers and there is no bar on workers being on premises after hours. The Appellant argued that at most there were two (2) after hour violations which does not rise to the level of revocation.

E. Whether there were Violations

1. September 30, 2017: People on the Premises after 2:30 a.m.

Rule 18 of the Department's *Commercial Licensing Regulation 8 – Liquor Control Administration* ("CLR8") provides in part as follows:

> Hours of Business - Retail
>
> (a) All patrons shall leave the licensed premises not later than 1:20 a.m. where the licensee is permitted to remain open until 1:00 a.m. Last call shall be at 12:45 a.m. Where licensee is permitted by local ordinance or permit to remain open until 2:00 a.m. all patrons must leave the licensed establishment by 2:00 am. All employees shall leave the licensed premises within one-half hour after the required closing time; provided the owner or employees may enter or be in a licensed establishment at any time for a legitimate business purpose with approval from the local police department. This paragraph shall not apply to a Class B-C license.
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> ***
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> (d) No one, other than the owner, employees, or law enforcement personnel, shall be admitted to the premises after the required closing time or before legal opening time.

The regulation requires that with a 2:00 a.m. closing, patrons exit by 2:00 a.m. While some of the people on premises on September 30, 2017 after 2:00 a.m. maybe have been workers, not all of them were. Indeed, all employees should have been out by 2:30 a.m. The evidence was that there were patrons still inside after 2:00 a.m. along with workers who were still there at 2:30 a.m. Therefore, the Appellant violated Rule 18 of CLR8.

2. Violations of the Anti-Nudity Ordinance: October 8 and 22, 2017

The Appellant argued that the City's Anti-Nudity Ordinance[12] is unconstitutional. However, a determination of unconstitutionality of a statute is a not an issue that is properly before an administrative agency. See *Easton's Point Association et al v. Coastal Resources Management Council et al.,* 522 A.2d 199 (R.I. 1987).

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

> Sec. 14-230. - Nudity on premises where alcoholic beverages are offered for sale.
>
> (a) It shall be unlawful for any person maintaining, owning, or operating any commercial eating and/or drinking establishment, whether or not entertainment is provided, and at which alcoholic beverages are offered for sale for consumption on the premises to suffer or permit:
>
> (1) Any female person, while on the premises of the commercial establishment, to expose to the public view that area of the human breast at or below the areola thereof.
>
> (2) Any female person, while on the premises of the commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in subsection (a)(1) above.
>
> (3) Any person, while on the premises of the commercial establishment, to expose to public view his or her genitals, pubic area, anus or anal cleft.
>
> (4) Any person while on the premises of the commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus or anal cleft.
>
> (b) If shall be unlawful for any female person, while on the premises of any commercial eating and/or drinking establishment, whether or not entertainment is provided, and which alcoholic beverages are offered for sale for consumption on the premises, to expose to the public view that area of the human female breast at or below the areola thereof, or to employ any device or covering which is intended to give the appearance of or simulate such areas of the female breast as described herein.
>
> (c) It shall be unlawful for any person, while on the premises of any commercial eating and/or drinking establishment, whether or not entertainment is provided, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view his or her genitals, pubic area, anus or anal cleft or buttocks, or to employ any device or covering which is intended to give the appearance or simulate the genitals, pubic area, buttocks, anus or anal cleft.
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> ***

The Appellant argued that the actions complained of did not fall under the Ordinance since the first section refers to commercial establishments and does not speak of exposing buttocks but rather simulation and the provision for individuals does not address the buttocks. The City argued that the Ordinance applied to what was happening at the Appellant and there is a violation even if being perpetrated by someone else. The undersigned inquired as to where the Appellant could have appealed the Board's finding that it violated said ordinance, and the attorneys were not aware of the actual appeal provisions.[13]

For the sake of this appeal which is solely concerned with whether there was a basis for revocation, it will be assumed that there were two (2) violations of the Anti-Nudity Ordinance as found by the Board.

3. Entry after 1:00 a.m.: October 21 and 22, 2017

The Board conditioned the entertainment license on no admittance after 1:00 a.m. The Appellant argued that condition was only for when there was actual entertainment. A review of the minutes show that entertainment was approved for October 21 and 22, 2017 and there was no caveat regarding on when entertainment was actually offered.[14] The Appellant contended that on October 21, 2017, the two (2) men seeking to enter were workers with the owner. While the owner, Ms. Mitrelis, was vague as to the workers and their names and they also were working that night elsewhere, they apparently were not patrons. On October 22, 2017, a performer appeared with other people. It is unclear if they were her friends or also performers. The testimony was that the additional guests were not let in, but the performer was let in. There was not enough evidence to show patrons were actually admitted after 1:00 a.m. on the two (2) nights in question.

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[13] See transcript of full hearing on December 12, 2017 at pp. 63-64. It was suggested the Superior Court was the most likely avenue for appeal.

[14] See footnote three (3).

F. The Appropriate Sanctions

The Appellant violated Rule 18 of CLR8 by having patrons on the premises after 2:00 a.m. The Board's concern over admissions after 1:00 a.m. on nights with entertainment and the Appellant's violation of the Anti-Nudity Ordinance would have been easily addressed by the Board once there was no longer an entertainment license. The Department does not have jurisdiction over entertainment licenses, but presumably the Board only issues them on a monthly basis so it can frequently review an applicant's suitability and ensure that an applicant complies with all entertainment requirements and any conditions. Here, the City argued that violating a condition of an entertainment license and the Anti-Nudity Ordinance are violations of R.I. Gen. Laws § 3-5-21. That may be but any such violations are easily prevented by no longer allowing entertainment licenses.

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

The Appellant had progressive discipline for a 2015 violation and disorderly conduct violations in 2016. The Fall, 2017 violations include the CLR8 violation and the Anti-Nudity Ordinance. Even if the unproven entertainment concerns were included, none of the violations

were disorderly conduct violations but rather were violations of R.I. Gen. Laws § 3-5-21. Unlike *Pakse* which related to repeated underage drinking violations, the violations relate to entertainment and one (1) after hour violation. The conditions of entertainment licensing concerns also related to entertainment. The entertainment violations/concerns could not be repeated as the Appellant no longer had an entertainment license. The proven violations do not represent a series of infractions as detailed in *Pakse* that rise to the level of justifying revocation. If the Appellant was still open, the revocation would be reduced to a sanction of an administrative penalty and/or a short suspension and/or continued police detail that took into consideration the Appellant had previous discipline. Since the Appellant is closed, the only issue before the undersigned relates to the revocation and whether it was justified.

VII. FINDINGS OF FACT

1. On November 2, 2017, the Board revoked the Appellant's Class BVX license.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision. A hearing on this matter was held on December 1 and 12, 2017 with the parties resting on the record.

3. The License expired on December 1, 2017, but the parties requested a decision be issued.

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

VIII. CONCLUSIONS OF LAW

Based on the testimony and facts presented: the Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-2-1 *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.*

IX. RECOMMENDATION

Based on the foregoing, the Hearing Officer recommends that the Appellant's License revocation be overturned.

Dated: April 23, 2018

Catherine R. Warren, Esquire
Hearing Officer

ORDER

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

_____ ADOPT
_____ REJECT (see attached)
_____ MODIFY

Dated: 4/24/18

Elizabeth Tanner, Esquire
Director

NOTICE OF APPELLATE RIGHTS

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

CERTIFICATION

I hereby certify on this 27 day of April, 2018 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, R.I. 02904 and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, R.I. 02903 and by hand-delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

DIRECTOR'S ORDER

The Director rejects the recommendation in Section IX and hereby incorporates the following into the decision and order:

The Rhode Island Supreme Court long has recognized the need to confine judicial review to cases that present a ripe case or controversy. *City of Cranston v. Rhode Island Laborers' Dist. Council Local 1033*, 960 A.2d 529, 533 (R.I. 2008). With respect to its right to review a local board's decision under R.I. Gen. Laws § 3-7-21, the Department must first address the threshold issue of justiciability before entertaining the merits of the matter. " 'A case is moot if it raised a justiciable controversy at the time the complaint was filed but events occurring after the filing have deprived the litigant of an ongoing stake in the controversy.' " *Id.*, quoting *Siebert v. Clark*, 619 A.2d 1108, 1110 (R.I. 1993); see also *Hallsmith-Sysco Food Services, LLC v. Marques*, 970 A.2d 1211, 1213 (R.I. 2009).

Following the Board's revocation of the Appellant's Class BVX liquor license on November 2, 2017, the Appellant did not file a renewal application and its license expired on December 1, 2017. The Board issued a cease and desist order to the Appellant on January 3, 2018. The Appellant's license no longer exists and its business is closed. The violations at issue in this appeal include one after hour violation and two entertainment violations/concerns that could not be repeated since the Appellant no longer had an entertainment license after October 31, 2017. This case is not a matter of extreme public importance that might justify a narrow exception to the mootness doctrine. *City of Cranston*, 960 A.2d at 533-534.

Based upon the foregoing, the Appellant's appeal is dismissed as moot.