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

MDLL, LLC	:	
d/b/a Roxy	:	
Appellant,	:	
	:	
v.	:	**DBR No. 13LQ134**
	:	
The City of Providence Board of Licenses,	:	
Appellee.	:	

DECISION AND ORDER

I. INTRODUCTION

On October 23, 2013, the City of Providence Board of Licenses ("Board") rendered a decision imposing a three-day suspension of "all licenses" and a $7,000.00 fine against liquor licensee MDLL, LLC d/b/a Roxy ("Appellant") for alleged incidences occurring on September 1 and 12, 2013 ("Decision"). For September 1, the evidence centers on two incidences of patrons fighting outside of the establishment, against each other in one case and against a bouncer in another. For September 12, the evidence centers on conduct of a large number of people outside of the establishment, before any of them entered.

The Appellant timely appealed the Decision to the Department of Business Regulation ("Department") in accordance with R.I. Gen. Laws § 3-7-21. The Department granted a stay of the suspension pending resolution of this appeal pursuant to Rule 4(b) of the Department's

Commercial Licensing Regulation 8, Liquor Control Administration (CLR 8).[1] A full hearing on the merits of the case was held on December 4, 2013. At that time, the Board elected to rest its case in chief on the record from the Board proceeding, the transcript of which was accepted into the administrative record pursuant to § 3-7-21(c), without objection from the Appellant. Before the undersigned, the Appellant presented the testimony of Mr. Frank Manfredi, the general manager of the Appellant's establishment, who was subject to cross-examination by the Board.[2] The administrative record was closed on December 13, 2013.

II. JURISDICTION

The Department has jurisdiction to review local liquor licensing decisions under R.I. Gen. Laws § 3-7-21, subject to relevant provisions of the Rhode Island Administrative Procedures Act, § 42-35-1 *et seq*. The Department's jurisdiction clearly refers to liquor licenses issued under Title 3 ("Alcoholic Beverages"). *Chernov Enterprises, Inc. v. Scuncio*, 107 R.I. 439, 440 268 A.2d 424, 425 (R.I., 1970)("Title 3 is the legislation which pertains to alcoholic beverages.") The Department does not have jurisdiction over separate entertainment licenses issued under R.I. General Laws § 5-22-1, which provides "city councils may license, regulate, and in those cases specifically set forth in 5-22-5, may prohibit and suppress ... shows and performances in their respective towns, conforming to law." Neither does the Department have jurisdiction over separate victualing licenses that are issued pursuant to R.I. Gen. Laws § 5-24-1(a), which provides "[a]ny town or city council has the power to regulate, including the setting of hours of operation, the keeping of taverns, victualing houses, cookshops, oyster houses, and oyster cellars in the town or city, by granting licenses for those activities." *See* R.I. Gen. Laws §

[1] The Recommendation and Interim Order Granting Partial Stay was appealed to the Superior Court and the court upheld the Department's Order. C.A. No. PC-2013-5543.
[2] The Department considered Mr. Manfredi's in person testimony as well as the record of his testimony before the Board which can be found on pages 50-81.

42-14-1 (listing the chapters with which the Department is charged with enforcing to the exclusion of chapter 5-22 and 5-24). Chapters 5-22 and 5-24 provide no avenue for appeal to the Department.

However, it should be noted that the Department has jurisdiction over entertainment-related conditions imposed on a liquor license under R.I. Gen. Laws § 3-7-7.3. Accordingly, the Department has the power review violations of entertainment ordinance provisions when the penalty is specifically imposed on the liquor license. And, as the superlicensing authority over all liquor control matters, the Department also has the power to make final determinations as to whether provisions of Title III are violated if a municipality uses Title III provisions to penalize another license held by an appellant.

III. STANDARD OF REVIEW

The Department has the broad authority to "confirm or reverse the decision of the local board in whole or in part" under R.I. Gen. Laws § 3-7-21(a). Judicial interpretation of § 3-7-21 in light of the legislative intent to vest the Department with broad discretion as a "superlicensing authority," gives the Department the power of "de novo" review. *Hallene v. Smith*, 98 R.I. 360, 363 (R.I., 1964). *See also Jake & Ella's, Inc. v. Dep't of Bus.* Regulation, 2002 WL 977812 (R.I. Super., 2002)("the discretion given to the DBR goes as far as to vest the hearing officer with the authority to review the local board partially de novo and partially appellate if he/she sees fit.") In other words, the Department "independently exercises the licensing function" in reviewing the record of the municipal hearing and any additional evidence presented at the Department hearing. *Cesaroni v. Smith*, 98 R.I. 377, 379 (R.I., 1964).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board's Decision lists six (6) grounds for the imposition of the penalties against the Appellant in this case:

1. Inability to maintain supervision and efficient control of the premises on September 1st and September 12th
2. Failing to maintain order and permitting a disorderly house on September 1st and September 12th.
3. Causing a nuisance and disturbing the peace of the surrounding neighborhood on September 1st and September 12th,
4. Causing a public nuisance on September 1st and September 12th.
5. Permitting the laws of the state of RI to be violated in the neighborhood on September 1st and September 12th.
6. Material misrepresentation of an entertainment event on September 12th.

While the Decision does not cite the provisions of law that apply to each of the grounds, counsel for the Board asserted to the undersigned Hearing Officer that grounds numbered 2 pertains to the food (victualing) license (§5-24-4), grounds numbered 6 pertains to the entertainment license (Providence Code of Ordinances 14-200), and that grounds numbered 3 and 4 are nuisance violations under Providence Code 14-1 and 16-21. Said grounds are outside of the Department's Title III jurisdiction in this particular case.

Counsel for the Board explained that grounds numbered 5 is based on the victualing license violation (grounds numbered 2). R.I. Gen. Laws § 3-5-23 provides for disciplinary action on a liquor license if the licensee "permits any of the laws of this state to be violated in the neighborhood." However, the Department does not believe it was the legislature's intention to allow double punishment as occurred here. The Board has already taken disciplinary action against the victualing license; the Department does not view that violation as separate grounds for disciplinary action against the liquor license. As such, the Board's imposition of a $1,000 fine for "permitting the laws of the state of RI to be violated in the neighborhood" on September 1st and September 12th" should be overturned.

The three day suspension that was ordered by the Board is "of the licenses held by MDLL, LLC." The suspension is apparently of all the business licenses held by the Appellant and was arrived at as a punishment for all the listed grounds, considered cumulatively. With respect to the fines, grounds numbered 1 resulted in a $2000 fine for three counts, 2 for September 1, and 1 for September 12. Unfortunately, the Board did not break out how the $2,000 fine was applied to the three counts nor did the Board provide any rationale or explanation as to what weight and factors were given to derive the assessed penalty. Because the Department's jurisdiction is limited to the Title III liquor license violations, review will be narrowed to the question of whether the Board established that the Appellant violated § 3-5-23 through inability to maintain supervision and efficient control of the premises and whether suspending the privilege to sell liquor for three days with a $ 2000 fine is the appropriate penalty. This decision does not disturb the Board's imposition of suspension of the food or entertainment license or the remaining $4000 penalty. It is for the Appellant to determine if this decision has preclusive effect on any future action on the food or entertainment licenses in connection with these same incidences.

A. Standard under R.I. Gen. Laws § 3-5-23

Under R.I. Gen. Laws § 3-5-23(b), a licensee may be disciplined "if any licensed person permits the [premises] to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood." "[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." *Cesaroni v. Smith*, 202 A.2d 292, 295 (1964). "[T]he 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." Id. at 296. An incident is considered to have caused "disorder" if it "causes either directly or indirectly conditions in the neighborhood in annoyance of or disturbing to the residents thereof." Id.

In proving a liquor license violation, "[t]he burden is on the officer or board to prove the facts which constitute the cause which are alleged as grounds for the revocation or suspension of a license, and not on the licensee." 48 C.J.S. Intoxicating Liquors § 243. In other words, "[u]ntil the licensing authority gives substantial evidence of the violation of the liquor laws by a licensee, the licensee is not obliged to prove his or her innocence." Id. As such, the Department will uphold the Board's finding of a violation of § 3-5-23 if the Board produces adequate evidence that the Appellant engaged in some action that caused a disturbance that annoys or disturbs the neighborhood.

It is clear that the duty to supervise the licensee's establishment is at its height within the perimeter of the establishment. The obligation is not automatically cut off at the entrance or exit, however. The licensee may be subject to discipline when "disorderly incidents occurred just outside a licensee's premises and had their genesis within." *Edge-January, Inc. v. Pastore*, 430 A.2d 1063, 166 (R.I. 1981). The licensee will not be held liable for conduct entirely outside of the premises unless the Board presents evidence that gives rise to an inference of a causal link between conduct of the Appellant or something inside the Appellant's premises and the outside disturbance. *See* D'Liakos, Inc. d/b/a Monet v. City of Providence Board of Licenses, DBR No. 12LQ102 (11/20/12).

B. Altercations on September 1, 2013

The record establishes that on September 1, 2013, two male patrons were "kicked out" of the Appellant's establishment. Board Transcript at 7 (Testimony of Patrolman Robert Kells).

They were observed by police to be "fighting" and failing to disperse from the area. Id. These two patrons had an "altercation" with one officer and were arrested. Id. Later on that same evening, another individual was "fighting inside" and was "kicked out." Id. at 8. The patron was observed starting to fight with one of the Appellant's bouncers in the side alleyway of the establishment. Several officers responded to the alleyway, "apprehending" and "locking up" the patron. Id. at 8. The record reflects that the bouncer was defending himself and was not engaged in any wrongdoing.[3] Such "fighting" outside of an establishment is the type of patron conduct that causes an "annoyance" or "disturbance" within the neighborhood.

While it was elicited on cross-examination that the testifying officer did not personally witness any fighting inside the establishment, it can reasonably be inferred that some misconduct was occurring inside that emanated outside of the establishment through the fact that bouncers had ejected these patrons from the facility and that it appeared to the testifying officer that the individuals were "fighting" immediately upon exiting. *See* Board Transcript at 9-10 (Testimony of Patrolman Robert Kells)("I am assuming, and any reasonable person would believe, that a fight was in the club if the bouncer put their hands on them.) Such reasonable inferences will sustain a violation. *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d 269, 275 (R.I., 1984)("it can be reasonably inferred from the evidence that the incidents occurred outside a particular establishment and had their origins within"). The Appellant did not present any competent evidence to defend against the finding that these incidences occurred, instead emphasizing that the incidences were relatively minor, a proposition to be considered in the separate determination of the appropriateness of the penalty imposed.

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[3] One officer also testified that "there were small fights on and off throughout the night," but that for the most part those persons dispersed when told; that arrests resulted from the only two fights "that were of any substance." Board Transcript at 8 (Testimony of Patrolman Robert Kells). There is not enough evidence to indicate that any of these "small fights" amounted to a third count of violating § 3-5-23(b) on September 1.

C. Disorderly crowd on September 12, 2013

As pertains to September 12, 2013, the record establishes that a disorderly crowd gathered outside of the Appellant's establishment and that said crowd clearly caused an annoyance and disturbance in the neighborhood. However, the Board did not meet its burden of proof to show the requisite causal connection between conduct of the Appellant or conditions within the establishment and the outdoor disturbance.

On the night in question, the Appellant rented the venue out to All Axcess Tour LLC for an event entitled "I'm Smacked." The purpose underlying the event is for videographers to document college students "partying," as they do at various "I'm Smacked" events across the country. Ticket sales were done by All Axcess, not the Appellant. Typically, additional tickets are made available at the door, but they were not offered on the night in question.

The Appellant received the requisite entertainment license from the Board. The record reflects that the application described the event as a "dance party." Section 14-200 of the Code of Ordinances provides that an application for a "performance, show an exhibition" shall contain "the title of *or* a description of said performance, show or exhibition." On the Board's website, "Application Process" is described as follows: "The Board requires Entertainment License Applicants to complete applications containing applicant names, cell phone numbers, and entertainment venue addresses, dates, and times."[4] It appears the Appellant, as applicant, was not required to provide any additional detail.[5]

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[4] http://www.providenceri.com/license/entertainment.

[5] An application with the "Date(s)" of "September 2013" was provided to the undersigned. It only requires the applicant to check "live band," "DJ," "adult," or "other." Only if the applicant checks "other" are they required to fill out "If Other Explain." The Appellant checked both "DJ" and "live band," presumably indicating that both kinds of events were scheduled during the month of September. The Hearing Officer was never provided with a document that uses the term "dance party" but the parties both represented that that was the descriptor used on the entertainment license application.

The testimony indicates a genuine and reasonable belief that the description on the application was adequate and truthful. Mr. Manfredi explained that he used the descriptor "dance party" because several in-house DJs, the regular Thursday night DJs, served as the primary entertainment, with one DJ also provided by All Axcess. At the time of the application, he expected from 800 or 900 to 1000 patrons which is approximately the size of a normal Saturday night crowd, nothing out of the ordinary for the establishment in terms of crowd size. Mr. Manfredi also indicated that all events at the establishment are promoted, so he could not distinguish this event to not be a normal "dance party" on that basis. Yet another reason he did not perceive this event as not a normal "dance party" is that the purpose of the event is to video document "partying;" he regularly has his own videographer video the activity on the premises. The Board did not establish that a different descriptor was required for a house DJ event such as through rules or guidance provided to applicants for entertainment licenses. For example, there is no document that describes when the designation "dance party" may be used or when an event must be listed by its specific name.

In the future, the Board may find it appropriate to adjust its entertainment application documents and process to require licensees to provide more information to enable precautionary planning and hold licensees liable for failure to follow instructions in filing the application.[6] However, as the application process existed as of the date of this application, the Appellant cannot be said to have done anything wrong in filling out the entertainment application.

The problems arose when Platinum Entertainment, a business run by University of Rhode Island students to provide bus transportation services from colleges to various establishments,

[6] The appellant has indicated that in the future it will specifically indicate all ticketed events in future applications. Board Transcript at 53.

chartered approximately 16 buses of college students to the "I'm Smacked" event. Platinum Entertainment and the Appellant have no contractual or financial arrangement.

When initially contacted by Platinum Entertainment, the Appellant's manager, Mr. Manfredi, was told that there would be 8-10 buses. After learning that there may 12-14 buses and that the event had some issues in another location, Mr. Manfredi sought to have an increased police presence through a request for more detail officers and/or earlier detail officer shifts.[7] Specifically, on Tuesday, September 10, two days prior to the scheduled event, Mr. Manfredi texted and spoke with his detail officer contact person to make the request. The officer effectively denied the request stating that he was more concerned with additional police presence at the end of the night, when the patrons were being let out, apparently not anticipating any issues to occur prior to the start of the event.

After learning of additional ticket sales, Mr. Manfredi texted his detail contact at 10:50 a.m. on the day of the event: "Sgt I have a lot of tickets sold for tonight and will be close to capacity can I get extra detail or is it too late." The officer replied "we can try" to which Mr. Manfredi responded "I ha[ve] a last minute push on tickets I'd rather be safe then sorry 1250." Mr. Manfredi testified that he then also contacted another officer at the Providence Police Department whose duties he understood to be in charge of the downtown area. However, his request was again denied, this time on the basis that there was not enough notice to arrange for additional and/or earlier detail.

The Board did not establish that the Appellant did not follow proper protocol for contacting the police department to request additional and/or earlier detail. For example, there is no guidance document that would indicate that the Appellant contacted the wrong officer or that

[7] The record reflects that the Appellant viewed several videos of "I'm Schmacked" but that they video "partying" inside of a premises, not outside.

the Appellant was required to contact an officer further up the chain of command. Neither officer that was contacted suggested that he needed to contact another officer to have the request approved when they denied his initial requests. Nor could the Board point to any written policy or rule that would show the Appellant failed to contact the police department to request additional detail within a prescribed deadline.[8] In the future, it may be advisable for the City to provide licensees with more specific contact information and procedures for requesting additional detail officers. However, without such guidance, it appears that the Appellant's manager made its best efforts to make the request as reasonably seemed appropriate to him under the circumstances.

Additionally, to ensure the security of the inside of the premises, Mr. Manfredi, staffed 31 security guards. He testified that the rule of thumb in being certified in club security is 1 security guard per 50 patrons, so the Appellant adequately staffed for up to 1550 patrons. As of the morning of the event, 1250 tickets had been sold. Thus, Manfredi assured that he would be within guidelines even if 300 more tickets sold between 10:50 a.m. and the evening event.

Mr. Manfredi also testified that the Appellant has held events with more patrons than were admitted for this event, without incident, even where the event involved long lines of people outside awaiting entry. In light of the foregoing, the record reflects that the Appellant made its best efforts to avoid potential disturbances in the neighborhood, taking precautionary measures that were reasonable under the circumstances. Unfortunately, September 12th unfolded in a manner that the Appellant could not have prevented with any reasonable precautions.

[8] There is a document entitled Best Practices: Providence Nightlife put together by the City Police Department that has a section titled "Pre-Incident Law Enforcement Interaction;" however, all that section says is that establishments should maintain a list of all employees, vendors, and independent contractors who are present on any given night and maintain contact information in the event of an incident for post-incident investigations. There is nothing with respect to the proper way for the licensee to contact the Police Department pre-incident in the event that extra detail may be needed.

Patrolmen Robert Kells, Kenneth Demarco, and Sergeant Gregory Paolo testified before the Board that the people that had arrived in the buses organized by Platinum Entertainment appeared to be in a state of intoxication by alcohol and/or drugs upon arrival. The crowd was rowdy, blocking the streets, and at least five people were taken by ambulance for what appeared to be the effects of overconsumption of alcohol and/or drugs. *See* Board Transcript at 15-16. For example, Sargent Paolo was called upon to get assistance from young man who was vomiting profusely. He testified "after we observed him, he was highly intoxicated, at which time I summons for a rescue...Within minutes of that I was getting blind sided by people, someone saying someone is passed out over there, someone is over there, someone is throwing up over there." Board Transcript at 31. It is clear from the record that all of these observations were made of the crowd prior to admittance into the establishment. For example, Patrolman Kells stated "[t]here was some people highly intoxicated getting off of those buses...People were on drugs getting off those buses, no doubt pregaming before they came to the club." Board Transcript at 20. *See also* Board Transcript at 34 (Testimony of Sergeant Paolo)("I asked a couple where they had been drinking and they said down on the campus.")[9]

Faced with the unexpected crowd conditions, the Appellant demonstrated attempts to minimize additional problems. As observed by the police officers, the Appellant's employees were checking each person's identification at the door, one at a time. Board Transcript at 32 (Testimony of Patrolman Paolo). This demonstrates committed efforts to prevent unlawful underage drinking, avoiding further risks to public health and safety. Mr. Manfredi testified that the staff turned away people that appeared acutely intoxicated, again demonstrating efforts to

[9] It is disturbing that Platinum permitted these acutely intoxicated individuals to travel to downtown Providence in their uncontrollable state, putting both the City and the Appellant in the position of having to deal with this unruly crowd. Had Platinum exercised reasonable care in its operations, it is likely that this incident may have been prevented.

prevent alcohol and drug related altercations and/or emergencies. Mr. Manfredi further testified that he turned down the music, put on the lights, and closed the establishment at 12:30 a.m., before his legal closing hour. He explained he made this decision to allow more time for patrons to disperse and avoid problems the City has experienced when many establishments let their patrons out at the same time. Attributable at least in part to the Appellant's mitigating efforts, the dispersal of the crowd did not create any documented disturbance or public safety risks. In the words of Sergeant Steven Courville, "[m]ost of the folks at that point were pretty passive."[10]

All of the relevant case law that has been reviewed by the undersigned involves liability only where "it can be reasonably inferred from the evidence that the incidents occurred outside a particular establishment and had their origins within." *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d 269, 275 (R.I. 1984). The Board has presented no cases in which liability under § 3-5-23(b) was imposed for behavior of persons outside the establishment who have not entered the establishment.

For example, in *Manuel J. Furtado, Inc. v. Sarkas*, "the evidence and the reasonable inferences therefrom support[ed] the trial justice's finding that the[] disturbances commenced within the licensed premises and spilled out onto the sidewalk." 118 R.I. 218, 224 (R.I., 1977). The court relied on evidence that patrons with baseball bats were observed as they were exiting the establishment and immediately engaging in a brawl outside, literally "spilling" outside of the establishment. "During one disturbance...the police arrested seven people who came out from The Helm bearing baseball bats;" a second disturbance was evidenced by "the arrest outside The Helm of a disorderly person who had been inside the establishment that night." Id. at 224. In *Cesaroni v. Smith, supra*, multiple witnesses testified that patrons inside the establishment were

[10] Courville testified that one subject was arrested for disorderly conduct because he "was persistent about not clearing the area." However, it was not established that this isolated arrest resulted in a "disorderly" condition in the neighborhood.

"boys dancing with boys, kissing, embracing; girls dancing with girls, kissing and embracing" and then "at and after the closing hour on Friday and Saturday nights patrons leave the premises and gather in the street, brawling and quarreling among themselves and using bad language." 98 R.I. 377, 382. Finding a causal connection, the 1964 court came to a historically intolerant conclusion that "the association of such people in the circumstances" inside the establishment "set the stage" for the disorderly conduct of the patrons as they left the establishment. 98 R.I. 377, 382-384 (R.I. 1964).[11] Clearly, no such causation evidence was presented in this case.

Other cases finding establishments liable for conduct outside of the establishment are distinguishable from the instant case not only because they involve conduct of patrons that could be reasonably inferred to be causally connected to something inside of the establishment, but are also distinguishable because they do not involve a single, discrete event, but a chronic nuisance condition. In this case, the incident was an anomaly rather than representing any kind of chronic problem. For example, in *Edge-January, Inc. v. Pastore*, a "series of disorderly activities in the neighborhood generated from the establishments in question." 430 A.2d 1063, 1066 (R.I. 1981). The inference that the disorderly conduct generated from the establishment was supported by extensive evidence from neighbors describing a chronic nuisance in the residential neighborhood.[12] In, *A.J.C., supra,* because chronic nuisance "occurrences did not take place

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[11] The Superior Court case law also supports the decision to limit liability to instances where it can reasonably be inferred that patrons engaged in conduct inside the establishment that precipitates disorderly conditions outside the establishment. In *Stage Bands, Inc. v. Department of Business Regulations*, the Superior Court recognized that causation "can be reasonably inferred from the evidence that the incidents occurred outside a particular establishment and had their origins within." 2009 WL 3328508 (R.I. Super., 2009). Applying that standard, the court emphasized that the victim "engaged in an altercation *inside* the club and later, outside the club, engaged in another altercation" leading up to the outside shooting. Id. (*emphasis supplied*). Based on this evidence of the inside altercation, the court held that "it is more than reasonable for the DBR to conclude that the fights culminated inside [the establishment]." In *J. Aliosio Enterprises, Inc. v. Department of Business Regulation*, the outdoor shooting was found to have its "genesis within" the premises where two patrons witnessed the shooter push the victim twice inside of the establishment before later shooting the victim five times outside. 2001 WL 1005865 at 9 (R.I. Super., 2001).

[12] "Essentially, the neighbors testified that there was excessive noise in the area, that young people urinated on their property, that people drank beer in cars that were parked illegally in front of said property, and that people smashed

before Back Street opened," the court found it "reasonable to infer from the evidence that the undesirable activities that occurred outside and around Back Street had their origin within," "within" meaning inside the establishment. Id., 473 A.2d at 275.[13]

To emphasize the lack of precedent for imposing liability in this case, there is no case law to suggest that a scheduled indoor event itself, absent any act within the premises, can be considered a catalyst for entirely outdoor activity. The cases reflect the law that licensees may be held responsible for patrons as they are leaving the establishment, but nothing suggests liability for conduct of persons as they arrive before they have been admitted inside of an establishment. The Appellant did nothing to promote acute intoxication of arriving persons. In fact, the Appellant demonstrates its intolerance for such conduct by refusing entry those acutely intoxicated persons.

While it is true that the "licensee assumes an obligation to affirmatively supervise the conduct of his patrons," the breach of which makes the licensee "absolutely accountable,"[14] no case has gone to the extreme of making a licensee strictly liable for everything that occurs in the perimeter of its establishment. The Department will not make that leap in this case. As the Department has stated previously, "[a] standard requiring a licensee to control all persons all of the time is not compatible with a realistic view of human intercourse and therefore an unreasonable standard." *C/S Ventures Ltd. v. City of Providence, Board of Licenses*, LCA – PR - 13 (July 23, 2001). Based on the forgoing, the undersigned concludes that the Appellant did not violation any Title III provisions on September 12, 2013.

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bottles and generally littered the neighborhood. Some neighbors testified that they were often awakened by the loud yelling and the tooting of automobile horns that occurred around closing time at petitioner's establishments. All of the neighbors testified that the problems outlined had been going on for a number of years." *Edge-January* , id. at 1064.

[13] "Several witnesses testified that they watched people urinate on private property after leaving Back Street and that when the establishment closed at night there was a great deal of noise because people were yelling, screaming, slamming car doors, and revving engines." *A.J.C.*, id.

[14] *Cesaroni v. Smith*, 202 A.2d 292, 295-96 (1964).

D. Review of appropriateness of penalty

As noted above, the Appellant did not violate Title III on September 12, 2013 and therefore no penalty should be imposed for the occurrence on that date nor should any of those facts and circumstances be considered in crafting a penalty for other violations. Having found that the Board established two violations of R.I. Gen. Laws § 3-5-23, the two altercations that occurred on September 1, 2013, the analysis turns to the question of whether imposition of a three day suspension of the liquor license and a fine of $2000 was appropriate. "There are two components to an administrative decision – a determination of the merits of the case, and a determination of the sanction. While the former component is mainly factual, the latter involves not only an ascertainment of the factual circumstances, but also the application of administrative judgment and discretion." *Jake and Ella's, Inc. v. Department of Business Regulation*, 2002 WL 977812, *5 (R.I. Super., 2002).

Pursuant to R.I. Gen. Laws § 3-5-21(a), "[e]very license is subject to revocation or suspension and a licensee is subject to fine…for violation by the holder of the license of any rule or regulation applicable," including violation of R.I. Gen. Laws § 3-5-23. R.I. Gen. Laws § 3-5-21(b) limits fines to $500 for the first offense and $1,000 for each subsequent offense. It appears from the disciplinary history of the Appellant that these violations are "subsequent" ones.[15] As such, the Board has the authority to impose up to $2000 in monetary penalties and a suspension; provided that the disciplinary action is reasonable under the particular circumstances of the case. As previously noted , unfortunately, the Board did not break out how the $2,000 fine was applied to the three counts nor did the Board provide any rationale or explanation as to what weight and factors were given to derive the assessed penalty. Had the Board included within its decision a detailed rationale for imposing the statutory fines, giving specific consideration to the *Jake and*

[15] The record shows "inability to maintain supervision" on 10/08/12.

Ella's factors, the Department may have been able to defer to the Board's judgment. However, in absence of a well-reasoned explanation, the Department is compelled to make its own independent conclusion on the appropriateness of the fine. For the reasons discussed below, the undersigned finds that punishment to be excessive here.

In determining the appropriate penalties, the Department may consider a variety of factors of "aggravation and mitigation." *Santos v. Smith*, 99 R.I. 430, 433 (R.I., 1965). For example, the Department may consider "the number and frequency of the violations, the real and/or potential danger to the public posed by the violation, the nature of any violations and sanctions previously imposed, and any other facts deemed relevant in fashioning an effective and appropriate sanction." *Jake and Ella's*, id. at 6. The Department may also consider is the *mens rea* of the Appellant's management. For example, the R.I. Superior Court has expressed "great reservations about the ...imposition of the most severe penalty allowed by law" (revocation), where there is "reason to believe the violation was more the result of negligence rather than malicious intent." *Musone v. Pawtucket Bd. of License Com'rs*, 1984 WL 560365, *2 (R.I. Super., 1984).

In this case, the officers testified that in both situations, the subjects were ejected from the premises. Ejecting problem patrons from the premises is the responsible action to take in the situation. Thus, the lack of ill intent and the responsible response are mitigating circumstances. Moreover, Patrolman Robert Kells and Sergeant Steven Courville both stated on cross-examination before the Board that they find the Appellant to be cooperative with police. Board Transcript at 10 and 40, respectively. *See also* Board Transcript at 87 (counsel for the Appellant expressing Appellant's willingness to "work with the police").

The danger to the public of the two fights appears to be *de minimis*. No injuries were reported and no weapons were involved. The incidences were successfully handled by the detail officers and did not command the attention of additional police or rescues resources. The two fights were limited to the few individuals involved and did not result in a crowd riot or other dangerous circumstances. Simply put, these were nothing but ordinary bar fights that may be expected at drinking establishments.

In terms of the number and frequency of the violations and the nature of any those violations and sanctions, the Appellant's record is not so egregious as to justify a three day suspension and statutory maximum penalty [16] In reviewing the violation history, the Department should consider the "long line of Department cases regarding progressive discipline and upholding the same." *El Chapin Restaurant v. City of Central Falls Liquor Board*, DBR No. 08-L-0274 at 3.[17] Since transfer of the license to the Appellant in 2006, only one entry lists inability to supervise in October 2012 and a $1000 penalty was issued in that case; however, the undersigned was not provided with the details of that incident. It was explained at the Department's hearing that there was a two week suspension in April 2011when a stabbing occurred across the street from the establishment. The record does not show that the Appellant has had any other instances of patrons fighting outside the premises that were of a severity warranting any additional suspension or monetary fines.[18] Compared to the disciplinary records

[16] Under R.I. Gen. Laws 3-5-21, violations occurring three years ago are excluded in determining whether a subsequent violation is fined as a first or second offense. However, neither the statute nor interpreting case law prohibit the Department from considering violations occurring more than three years ago for purposes of evaluating the appropriate penalty within the statutory maximum that could be imposed.

[17] The progressive discipline policy is flexible; "[t]here is no hard and fast rule that states a licensing authority must abide by a three-stage process to revoke a license, proceeding to a suspension for a second offense after having levied a fine in the first instances." *Jake and Ella's v. City of Newport, Board of License Commissioners*, LCA NE-01-01 at 5 (September 24, 2001).

[18] The disciplinary history has, a warning for "flyers/handbills" in October 2007, a warning for underage drinking in September 2008, a $500 fine for bottle sales in April 2009, a warning under the "Type" "Multiple" (no descriptor) in January 2010, and a warning for excessive noise in January 2011.

of other establishments that the undersigned has had occasion to review, the Appellant generally appears to be a law-abiding licensee with only a few relevant violations in its history and none within the last two and a half years.

Based on the above factors, a three day suspension and the statutory maximum fine is not warranted. No cases were located or cited by the Board that would support imposing a suspension for two minor disturbances that were immediately quelled. For example, cases upholding suspensions have involved violations that were more serious than ordinary bar fights and/or involved deliberate acts by the licensees.[19] Imposing the statutory maximum of $1000 per fight is not appropriate when viewed in light of the mitigating factors discussed herein. Because of the lack of malicious intent or egregious history, a $250 fine per fight is appropriate without a suspension. A total $500 fine is the punishment that more appropriately fits the facts of this particular case. It is a reasonable step for "progressive discipline" to punish ordinary bar fights; the Appellant should understand that additional disturbances may result in progressively increased penalties by the Board and/or Department.

RECOMMENDATION

It is recommended that the Director order as follows:

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[19] *Hallene v. Smith*, 98 R.I. 360, 362, 201 A.2d 921, 923 (1964)(10 day suspension for "delivering intoxicating beverages to a minor on the licensed premises" on two occasions); *Cesaroni v. O'Dowd*, 94 R.I. 66 (1962)(suspending the liquor license for ten days for sale of liquor to one minor); *Silva v. Bristol Board of License Commissioners*, 2001 WL 506831(suspending the liquor license for seven days for sale of liquor to two minors); *Brown v. Rhode Island Department of Business Regulations*, 1981 WL 390901(suspending the liquor license for fifteen days for sale of liquor to three minors); *Thompson v. Town of E. Greenwich*, 512 A.2d 837, 843 (R.I. 1986)(14 day suspension for knowingly violating conditions on license relating to legal closing hour); *Lyons v. Liquor Control Adm'r*, 100 R.I. 573, 574, 218 A.2d 1, 2 (1966)(suspension of petitioner's license for sixty days for knowingly violating entertainment ordinances); *Cesaroni v. Smith*, 98 R.I. 377 (R.I., 1964)(6 month suspension where "witnesses who reside in the immediate vicinity of the licensed premises testified that at and after the closing hour on Friday and Saturday nights patrons leave the premises and gather in the street, brawling and quarreling"); *Scialo v. Smith*, 99 R.I. 738 (1965)(imposition of a two week suspension "on a finding that petitioner had permitted gambling on the licensed premises.").

The Board established two violations of R.I. Gen. Laws § 3-5-23 on September 1, 2013.

As a penalty, the Appellant shall pay a fine of $250 per violation ($500 total), without a suspension.

Date: 3/18/2014

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

ORDER

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

- ☑ Adopt
- ☐ Reject
- ☐ Modify

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

Date: 20 March 2014

Paul McGreevy
Director

Entered as an Administrative Order No.: 14-13 this 20th day of March, 2014.

NOTICE OF APPELLATE RIGHTS

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

CERTIFICATION

I hereby certify on this 20th day of March, 2014 that a copy of the within Decision and Order and Notice of Appellate Rights was sent by e-mail and first class mail, postage prepaid to -

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and by email to Maria D'Alessandro, Deputy Director, Securities, Commercial Licensing and Racing & Athletics