

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,

v.

City of Providence, Board of Licenses,
Appellee.

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DBR No.: 14LQ051

**RECOMMENDATION AND INTERIM ORDER GRANTING MOTION
FOR STAY WITH CONDITIONS AND NOTICE FOR DE NOVO HEARING**

I. INTRODUCTION

ATO, Inc. d/b/a Skarr Lounge (“Appellant”) seeks a stay of the City of Providence, Board of Licenses’ (“Board”) decision taken on September 11, 2014 to suspend its Class BX liquor license (“License”) for 60 days beginning September 19, 2014. The Board objected to the Appellant’s motion. This matter came before the undersigned on September 17, 2014 in her capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation (“Department”).

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. STATUTORY BASIS FOR SUSPENSION

R.I. Gen. Laws § 5-23-5 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.

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.

(b) Any fine imposed pursuant to this section shall not exceed five hundred dollars (\$500) for the first offense and shall not exceed one thousand dollars (\$1,000) for each subsequent offense. For the purposes of this section, any offense committed by a licensee three (3) years after a previous offense shall be considered a first offense.

IV. DISCUSSION OF CASES ON SUSPENSION OR REVOCATION

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 v. Smith*, 202 A.2d 292, 295-296 (R.I. 1964) 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 (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, 842-3 (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 v. Pastore*, 473 A.2d 269 (R.I. 1984); *Schillers*; and *Furtado v. Sarkas*, 118 R.I. 218 (1977).

V. THE ALLEGATIONS

A. The Night of August 2, 2014 – 60 Day Suspension

Prior to the stay hearing, the undersigned reviewed the transcripts of the hearing before the Board. Based on the testimony, it is undisputed that there was a fight in the ladies' room at the Appellant's. It is undisputed that Misty Machado ("Machado") was the aggressor toward Arlene Redondo ("Redondo") and Redondo suffered injuries. The testimony about what happened during the fight and the explanation for the fight differ. Redondo testified that there was no explanation for why Machado would attack her but other witnesses testified that Machado was mad that Redondo was now dating Machado's ex-boyfriend. Redondo testified that she was inside the ladies' room with Machado and her friend, Heidi Tejada ("Tejada"), was outside. Redondo and the police officer (Detective Carlos Sical) both testified that Tejada told them that the disc jockey, DJ BigNess ("BigNess"), blocked the ladies' room door so that Tejada could not enter and Redondo could not exit. Tejada testified that the door was not blocked by anyone but that the area was very crowded and she went and got security when she realized that Redondo was inside with Machado. BigNess testified that Tejada was screaming that she would get Machado but Tejada denied that in her testimony. Redondo testified that afterwards she saw the Appellant's owner, Gianfranco Marrocco ("Marrocco") and he ignored her. Marrocco's testimony was that he saw Redondo outside where she had been escorted by bar staff and that he offered to help, but did not call an ambulance because she did not want an ambulance. Marrocco also testified that he did not call the police because the situation was under control since the parties had been separated and escorted outside with one going to her car and he was also concerned about potential trouble with the Board. He testified that he would have called the police if a victim had been incoherent or stumbling. Gareth Wilson, the bouncer, testified that a

patron told him there was a fight in the bathroom and he went in and separated the two women and pushed out Redondo. He testified that Redondo was escorted out the back and Machado was escorted out the front and a female bouncer escorted her to her car.

B. Smoking Violations

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). The Appellant has other avenues of appeal for its other licenses. The Rhode Island Supreme Court has held that when a town council acts in a quasi-judicial manner and does not provide for a right of appeal, the proper avenue for appeal is *writ of certiorari* to the Rhode Island Supreme Court. *Cullen v. Town Council of Town of Lincoln*, 893 A.2d 239 (R.I. 2000); *Eastern Scrap Services, Inc. v. Harty*, 341 A.2d 718 (R.I. 1975).

Therefore, the appeal before the Department does not cover the appeal of the suspension of any other license except for liquor.¹ The Appellant has also been fined for providing hookah for smoking. At the stay hearing, the undersigned asked the parties if the smoking violations were related to the License as it was unclear from the record. The city solicitor stated that they were and the Appellant also believed that the smoking violations penalties related to the liquor license. Therefore, the penalties issued for the smoking apparently were issued for smoking in a public place and that such alleged violations were the basis for imposing administrative penalties on the License pursuant R.I. Gen. Laws § 3-5-21.

R.I. Gen. Laws § 23-20.10-6 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:

¹ Thus, this appeal does not cover the administrative penalty imposed for entertainment without a license or the suspension of any other licenses that the Appellant may hold.

(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 the Department of Health ("Health") shall promulgate rules regarding the mandates of this chapter. Health has promulgated such rules (*Rules and Regulations Pertaining to Smoke-Free Public Places and Workplaces*) which defines smoking bar by its statutory definition and states that the Division of Taxation ("Taxation") is responsible for determining compliance and will promulgate any rules or forms necessary for implementation. There are apparently no Taxation regulations on smoking bars. In terms of the smoking violations, the Appellant would have to prove that it is a smoking bar as defined by statute and by Health regulation in order to defend itself against the public smoking allegations.

VI. STANDARD FOR ISSUANCE OF A STAY

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976), a stay will not be issued unless the party seeking the stay makes a "strong showing" that "(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest." Despite the ruling in *Harsch*, the Supreme Court in *Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995) found that

Harsch was not necessarily applicable in all agency actions and the Court could maintain the *status quo* in its discretion when reviewing an administrative decision pursuant to R.I. Gen. Laws § 42-35-15(c). The issue before the undersigned is a motion to stay a Decision which is subject to a *de novo* appeal and does not fall under R.I. Gen. Laws § 42-35-15(c). Nonetheless, it is instructive to note that the *Department of Corrections* found it a matter of discretion to hold matters in *status quo* pending review of an agency decision on its merits.

VII. ARGUMENTS

The Appellant argued that there is conflicting testimony regarding the fight and what management did regarding fight but Redondo perjured herself in testifying that she had no idea why Tejada attacked her so that her testimony is suspect. The Appellant argued that at a minimum it would prevail on reducing the suspension. In addition, the Appellant argued that it is a smoking bar so that it is able to sell hookah so that the fines for the alleged hookah violations should be stayed.

The Board argued that the Appellant did not meet the requirements to grant a stay. The Board argued that there is no dispute that there was an altercation in the bar and the reason for such a fight is irrelevant. The Board also argued that the Appellant's management did nothing about the fight. The Board argued that there was no evidence that the Appellant is a smoking bar pursuant to the statute. The Board argued that there was a threat to public safety but if the stay is granted, it should be conditioned on a police detail.

VIII. DISCUSSION

In terms of the sanctions that are imposed, the Department has a long line of Department cases regarding progressive discipline and upholding the same. *Pakse Market Corp. v.*

McConaghy, 2003 WL 1880122 (R.I. Super.). The progressive discipline imposed on a licensee depends on the violations and the circumstances of a licensee's violation(s).

A. The Stay Request for Suspension

The Board's suspension apparently is based on the August 2, 2014 fight. On the basis of the evidence before the Board, there was a fight inside the Appellant's. In terms of that fight, an imposition of a suspension would be consistent with previous Department matters. In *DL Enterprises d/b/a East Bay Tavern v. East Providence City Council*, DBR No. 14LQ009 (4/28/14), the Department reduced a revocation to a 14 day suspension for fighting inside bar and failing to notify the police of the fight. In *JJAM Sports, Inc. d/b/a LaCabana Night Club Sports Bar and Grille, Inc. v. Lincoln Board of License Commissioners*, LCA-LI-99-05 (12/27/99), the Department uphold a two (2) day suspension for a fight inside the bar and a second fight outside in the parking lot with the patrons refusing to leave and police (including from the adjoining community) being called to clear the patrons and a police officer had a beer bottle thrown at him.

i. Substantial Likelihood of Success on the Merits

Applying the criteria from *Harsch*, a stay will not be issued if the party seeking the stay cannot make a strong showing that it will prevail on the merits of its appeal. There is no dispute that there was fighting on August 2, 2014. Liquor licensees are responsible for conduct that arises within their premises and for conduct that occurs off premises but can be reasonably inferred from the evidence had their origins inside. In suspending a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. The owner is responsible for that situation. The issue on appeal is to determine the extent and nature of the disturbance and what, if any, is the appropriate sanction for the August 2, 2014 incident.

ii. Irreparable Harm to the Appellant; Substantial Harm to Other Interested Parties; Public Interest

The Board (an interested party) has an interest in ensuring that liquor licensees – where the public gather - are compliant with their statutory obligations. In addition, there is a strong public protection interest. However, the Board did not believe that there was such a threat to public safety that it took emergency action against the Appellant. The Board requested a detail be ordered if a stay is granted.

B. The Stay Request for Smoking Violations

The Appellant raised the issue of the administrative penalties imposed by the Board. 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, et al.* CA No. PC 2011-5909 (7/22/13). 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.

R.I. Gen. Laws § 3-5-21 establishes minimum fines for violations. 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. In other words, the first offense of the liquor statute cannot be fined more than \$500 with each subsequent offense of the liquor licensing law not being

fined more than \$1,000 but if the licensee has no offenses for three (3) years, the clock is re-set and any violation would be considered a first offense.

IX. CONCLUSION

It cannot be determined without an appellate review/full hearing the length of suspension that should be imposed for the fight.² The Board did not close the Appellant during the Board hearing. Any concerns regarding public safety can be met by the imposition of conditions.

The Appellant apparently was fined \$500 per smoking violation which would fall within statutory minimum penalty. However, the total penalty for the alleged smoking violations is \$36,000 which is a high amount in the face of the unsettled nature of the smoking bar issue and the legal requirements for such.

X. RECOMMENDATION

Based on the forgoing, the undersigned recommends that the Appellant's motion for a stay of the suspension of License be granted on the basis of the following conditions.

1. A police detail will be maintained on Friday and Saturday nights when the Appellant is open.
2. The Appellant maintains at least three (3) security staff members on-duty while open.³
3. The police shall be immediately notified if there are any physical altercations in the Appellant's.

² The Appellant's licensing history submitted by the Board indicates that the Appellant has been licensed since July, 2011 and has never had its License suspended but has been fined at various times for public smoking, failure to keep order, and violating conditions of licensing, etc. The licensing history shows that the Appellant has had seven (7) "violations" excluding this matter but including another one on appeal to the Department for a total of \$7,450 in penalties.

³ The testimony at hearing was that there were three (3) security staff members on duty on the night in question.

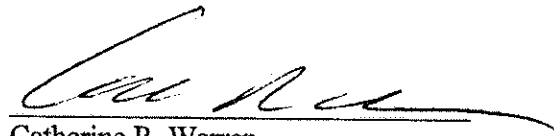
Based on the forgoing, the undersigned recommends that the Appellant's motion for a stay of the administrative penalties regarding the smoking allegations be granted.

The Board and Appellant may agree to modify the conditions of the stay if they choose.

Nothing in this order precludes the undersigned to revisit this order because of a change in circumstances.

A DE NOVO HEARING WILL BE HELD ON OCTOBER 1, 2014 at 9:30 a.m. AT THE DEPARTMENT OF BUSINESS REGULATION, PASTORE COMPLEX, 1511 PONTIAC AVENUE, CRANSTON, RI.⁴

Dated: 9/18/14

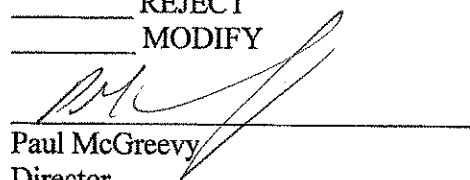

Catherine R. Warren
Hearing Officer

INTERIM ORDER

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

ADOPT
 REJECT
 MODIFY

Dated: 18 Sept 2014


Paul McGreevy
Director

Entered this day as Administrative Order Number 14- 54 on 18th of September, 2014.

⁴ If this date is inconvenient to a party(s), the party should contact the other party and the undersigned to schedule a mutually convenient date.

NOTICE OF APPELLATE RIGHTS

THIS ORDER IS REVIEWABLE BY THE SUPERIOR COURT PURSUANT TO R.I. GEN. LAWS § 42-35-15(a) 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 A PETITION DOES NOT STAY ENFORCEMENT OF THIS ORDER.

CERTIFICATION

I hereby certify on this 18th day of September, 2014 that a copy of the within Order was sent by email and first class mail, postage prepaid, to the following: Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904 and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI 02920.

