

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 Mile & A Quarter,
Appellant,

v.

City of Providence, Board of Licenses,
Appellee.

DBR No.: 16LQ007

RECOMMENDATION AND ORDER DENYING MOTION FOR STAY

I. INTRODUCTION

On Sunday, April 24, 2016, the Providence Board of Licenses (“Board”) held an emergency suspension hearing on 334 South Water LLC d/b/a Mile & A Quarter’s (“Appellant”) licenses including its Class BVX liquor license (“License”). Said emergency hearing was held pursuant to Providence Charter section 1102. The Board ordered the Appellant’s License be suspended for 72 hours and scheduled a full hearing for Wednesday, April 27, 2016. On April 25, 2016, the Appellant requested that the Board modify the suspension. The Board declined. The Appellant seeks a stay of the emergency suspension of its License. This matter came before the undersigned on April 26, 2016 in her capacity as Hearing Officer as the designee of the Director of the Department. By order dated April 27, 2016, the Department denied the request for stay. On April 28, 2016, the Superior Court issued an order limiting the Appellant’s License effective until May 4, 2016. The Board then continued those same conditions by order of the Board on May 4, 2016. The Board is scheduled to issue a decision on May 11, 2016. The Appellant seeks a stay of the Board’s order limiting the opening times for the liquor license as set forth below.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 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.*

A liquor appeal to the Department pursuant to R.I. Gen. Laws § 3-7-21 is considered a *de novo* hearing. The Department's jurisdiction is *de novo* and the Department independently exercises the licensing function. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964); and *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964). Because the Department's has such broad and comprehensive control over traffic in intoxicating liquor, its power has been referred to as a "super-licensing board." *Baginski v. Alcoholic Beverage Comm.*, 4 A.2d 265, 267 (R.I. 1939). See also *Board of Police Com'rs v. Reynolds*, 133 A.2d 737 (R.I. 1957). The purpose of this authority is to ensure the uniform and consistent regulation of liquor statewide. *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964).

III. MOTION TO STAY

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." *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976). 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). While appeals before the Department do not fall under R.I. Gen. Laws § 42-35-15(c), 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.

IV. STANDARDS FOR DISORDERLY CONDUCT

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

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

In revoking or suspending a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. Rather, the Rhode Island Supreme Court held in *Cesaroni 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; Schillers*; and *Furtado v. Sarkas*, 373 A.2d 169 (R.I. 1977).

A final decision has not been made by the Board. 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 a shooting on one night justified revocation). Thus, the Department will uphold a revocation where an incident is so egregious as to justify revocation without progressive discipline. However, the Department will decline to uphold a revocation where the violation is not so egregious or extreme and the local authority has not engaged in progressive discipline. *Infra*.

A licensee is responsible for disorderly conduct inside its premises and disorderly conduct outside its premises that can be directly or indirectly linked to activities inside the premises.

IV. DISCUSSION

The information received by the undersigned is based on representations of the parties. A transcript was not available. A hearing began before the Board on April 27, 2016 regarding an incidence on April 24, 2016. The Board previously had started a hearing on a February 20, 2016

allegation. The hearing on both allegations was concluded on May 4, 2016. The Board will make a decision on May 11, 2016.

The Parties agreed that on February 20, 2016, there was a fight outside the Appellant. They disagreed whether the responsibility for the fight could be inferred to the Appellant or not. The Parties agreed that on April 24, 2016, there was an inside disturbance and an outside disturbance. They did not disagree that the length of the fight inside was approximately 12 minutes and outside was approximately 30 minutes. They do disagree on the extent of the disorderly conduct.

On April 28, 2016, the parties agreed to a Superior Court order that allowed the food and liquor license be open until 11:00 p.m. and that order expired on May 4, 2016. On that date, the Board issued an order continuing the same conditions on the License and food license until May 11, 2016. On that date, the Board will make a decision regarding the February 20 and April 24 allegations. The Appellant is seeking to stay open until 1:00 a.m. during the week and 2:00 a.m. at the weekend under its Class BVX license. The entertainment license has been suspended and the Department does not have jurisdiction over that license.¹

The Appellant argued that there is no longer a public emergency as the disturbance related to the late night activities in the upstairs loft area where entertainment is held. The Appellant argued that they would like to be able to keep the restaurant open later than 11:00 p.m. to the full hours allowed by the liquor license. The Appellant would not open the upstairs area.

The Board argued that the testimony before the Board and representations to the Court had been that the restaurant closed between 10:00 p.m. and 11:00 p.m. but now the Appellant wants to stay open later, even though the testimony was that it usually is closed earlier. The Appellant's response was that on the weekends, it would close the restaurant at 10:00 p.m. for the upstairs

¹ 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). Even if the Department extends the liquor licensing time, the Appellant can only use the liquor license if the Class B license is operational.

entertainment, but now would like to just keep the restaurant open for anyone who would like to stay later. The City raised the objection that this was not the format that the Appellant has previously had so there is no way of knowing what would happen.

The Appellant argued that there has been no showing of a public danger. The City argued that there is a public safety issue because of the extent and nature of the fight on April 24. The Board argued that there is no irreparable harm to the licensee, as this condition would only be for less than (1) week, until the May 11, 2016 decision. The Board argued that the licensee now wants to change its format for less than seven (7) days and the City argued that there is no reason to.

The Board has not ruled on what the sanction should be.² The Department is merely being asked to stay the late night conditional suspension of the liquor license.

At the most the Board order will relate to five (5) days of licensing. The Appellant already has had its License suspended for three (3) total days. It has been opened on a limited basis for approximately seven (7) days. Allowing the limited basis continue to May 11, 2016 will bring the limited licensing to approximately 14 days. At that time, the Board will need to decide if the Appellant is responsible for the February 20, 2016 fight and if so, determine a sanction and the Board will need to determine the appropriate sanction for the April 24, 2016 disturbance. Presumably the Board will consider "time served" when fashioning its sanction.³ As the time prior to the Board hearing is very short, the Department will maintain the *status quo* similar to the Court order. However, if there is a further appeal after the final decision by the Board, any stay request obviously will consider public safety as well as the ability to review any sanction and whether to

² The Appellant has previously been sanctioned. The Licensee has a violation in January, 2016 of a penalty of \$500 for bottle service, and also in January, 2015 an imposition of a \$1,000 penalty for disorderly and a \$500 penalty for nuisance.

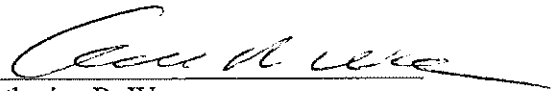
³ The City apparently requested that the Board issue a decision that for 30 days the licenses close at 11:00 p.m. and also a three (3) day weekend closure of all licenses. The Board will make a decision on May 11, 2016.

maintain the prior *status quo* during the pendency of an appeal. Often without a stay, an appeal of a final decision becomes moot.

VII. RECOMMENDATION

Based on the forgoing, the undersigned recommends that the Appellant's motion for a stay of limiting of the License prior to the Board's May 11, 2016 hearing be denied.

Dated: 5/6/16


Catherine R. Warren
Hearing Officer

If a stay is requested of the May 11, 2016 decision, a hearing on the stay is scheduled for May 12, 2016 at 11:15 a.m. at the Department of Administration, One Capitol Hill, Providence, RI in the fourth floor legal hearing room.⁴

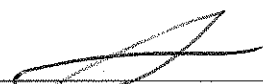
⁴ If the Appellant chooses not request a stay after that decision, the Appellant may notify the parties by email.

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: 5/6/16



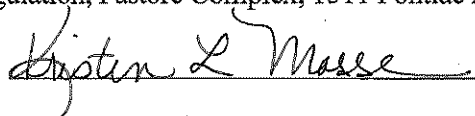
Macky McCleary
Director

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 6th day of May, 2016 that a copy of the within Decision was sent by first class mail, postage prepaid and by electronic mail to Gregory P. Piccirilli, Esquire, Sciacca & Piccirilli, 121 Phenix Avenue, Cranston, RI 02920, Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, RI 02889, and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and by hand delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.



Kristin L. Masse