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

Tel Aviv, LLC d/b/a Tel Aviv, **Appellant,**	:	
v.	:	**DBR No.: 16LQ015**
City of Providence, Board of Licenses, **Appellee.**	:	

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

I. INTRODUCTION

This matter arose from a motion for stay filed by Tel Aviv, LLC d/b/a Tel Aviv ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken by the City of Providence, Board of Licenses ("Board") to suspend its Class BVX liquor license ("License") for 30 days and impose a $2,000 administrative penalty. A hearing on the motion to stay was heard on October 4, 2016 before the undersigned who was delegated to hear this matter by the Director of the Department.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to 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. THE BASIS FOR SUSPENSION

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, or permits any gambling or unlawful gaming to be carried on in the neighborhood, or permits any of the laws of this state to be violated in the neighborhood, in addition to any punishment or penalties that may be prescribed by statute for that offense, 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. See *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964). The same statute also forbids a licensee from permitting any laws of Rhode Island from being violated. 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 a 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).

IV. 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.

V. PRIOR DISICIPLINE

The Appellant has no prior discipline.

VI. ARGUMENTS

It is undisputed that the Appellant's manager and a customer were arrested by the Providence Police when the police set up a controlled drug buy inside the Appellant.

The Appellant argued that the manager had experience managing other bars within Providence and that while seven (7) grams of cocaine were found on the manager, no drugs were found on its premises when searched by the police. The Appellant argued that there are no

standards in R.I. Gen. Laws § 3-5-21 and R.I. Gen. Laws § 3-5-23 and that *Cesaroni* speaks of the responsibility for actions resulting from the sale of liquor. The Appellant argued that there was no evidence that the drug sales had anything to do with the sale of liquor and were not the result of the sale of liquor. The Appellant argued that there is a due process issue as the standard applied is unclear. The Appellant further argued that it would suffer irreparable harm if has to close for 30 days because it would lose revenue, employees, and its reputation. The Appellant argued that without a stay of the suspension, it would not have a meaningful opportunity to be heard and that there is no risk to the public as the manager has been fired and the customer would not be allowed back in. The Appellant argued that this is a serious incident, but only occurred once and there was no evidence of a repeating pattern.

The City argued that it was undisputed that the police testified at the Board that activities indicating narcotics trafficking were observed at the Appellant and the police made controlled buys inside from the manager and a customer. The City argued that under the case law the Appellant has an affirmative duty to supervise its manager. The City relied on *Vitali v. Smith* to argue that what is important is the violation of the law and not whether a licensee was supervising its staff and that not being aware of a violation is not a defense. The City argued that pure monetary harm is not irreparable harm and that there is an issue of public safety due to narcotics trafficking.

VII. DISCUSSION

The information received by the undersigned is based on representations of the parties. The undersigned did not have a complete transcript of the Board hearing.[1]

[1] While the Appellant raised due process issues by the Board, the hearing before the Department is *de novo*. Thus, if there had been any due process issues that would be of no consequence because of the *de novo* appeal. *See A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) (as the hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence); and *Cesaroni v. Smith* (*de novo* hearing is unaffected by any error by local board).

Applying the stay criteria, 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. In this matter, the Appellant argued that it cannot be held responsible for the drug buys. The City argued otherwise. However, if a stay is not issued, the Appellant will not be able to have a meaningful hearing on the matter. In terms of public safety, the manager has been let go. Indeed, one would expect that if indeed drug buys had been occurring inside the Appellant – and there is no evidence before the undersigned of such a pattern – the investigation and arrests by the police would ensure that the Appellant would not be the future scene of such buys. There is no reason not to maintain the *status quo* pending the full hearing.

VIII. ADMINISTRATIVE PENALTIES

The Board imposed administrative penalties on the Appellant. 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.

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.

The Board has imposed an administrative penalty of $2,000 for violations of R.I. Gen. Laws § 3-5-21 and R.I. Gen. Laws § 3-5-23. The Board's decision found that the Appellant had no prior discipline; therefore, the penalty imposed of $1,000 per statutory violation is too high for a first offense.

IX. RECOMMENDATION

Based on the forgoing, the undersigned recommends that a stay be granted for the 30 day suspension and the administrative penalty of $2,000.

Dated: 10/5/16

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: 10/6/16

Maria D'Alessandro (for)
Macky McCleary
Director

A hearing will be held on October 19, 2016 at 9:30 a.m. at the Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I.[2]

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 6th day of October, 2016 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 George J. West, Esquire, One Turks Head Place, Suite 312, Providence, RI 02903 and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920.

[2] Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant is responsible for the stenographer. If this date is inconvenient with a party(ies), the party shall contact the other party and hearing office to reschedule.