

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

171 Chestnut Street LLC d/b/a Art Bar,
Appellant,

v.

City of Providence, Board of Licenses,
Appellee.

DBR No.: 18LQ025

ORDER RE: MOTION FOR STAY

I. INTRODUCTION

171 Chestnut Street LLC d/b/a Art Bar (“Appellant”) seeks a stay of the City of Providence, Board of Licenses’ (“Board”) decision taken on November 15, 2018 to impose a 30 day suspension on its Class BVX liquor 2:00 a.m. (extended hours) and Class N license (“License”) and to impose a \$3,500 administrative penalty and to impose certain conditions on the License.¹ The Board objected to the Appellant’s motion. This matter came before the undersigned on November 19, 2018 in her capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation (“Department”).²

¹ This liquor appeal to the Department is governed by R.I. Gen. Laws § 3-7-21 which provides in part as follows:

Appeals from the local boards to director. – (a) Upon the application of any petitioner for a license, or of any person authorized to protest against the granting of a license, including those persons granted standing pursuant to § 3-5-19, or upon the application of any licensee whose license has been revoked or suspended by any local board or authority, the director has the right to review the decision of any local board, and after hearing, to confirm or reverse the decision of the local board in whole or in part, and to make any decision or order he or she considers proper, but the application shall be made within ten (10) days after the making of the decision or order sought to be reviewed. Notice of the decision or order shall be given by the local or licensing board to the applicant within twenty-four (24) hours after the making of its decision or order and the decision or order shall not be suspended except by the order of the director.

² The Board also limited the Appellant’s entertainment license for 90 days so that any entertainment has to end at 1:00 a.m. However, appeals to the Department pursuant to R.I. Gen. Laws § 3-7-21 or pursuant to R.I. Gen. Laws § 3-2-2 only

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. 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

relate to the liquor licenses held by an appellant. See *El Nido v. Goldstein*, 626 A.2d 239 (R.I. 1993) (victimizing license is a separate and distinct license from a liquor license). Licenseholders have other avenues of appeal for their 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); and *Eastern Scrap Services, Inc. v. Harty*, 341 A.2d 718 (R.I. 1975).

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. 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).

V. DISCUSSION

The information received by the undersigned is based on representations of the parties. A transcript was not available; however, audio of the Board's hearing was available online and the undersigned listened to the November 3, 2018 hearing before the Board and November 15, 2018 hearing where the Board made its decision.³

It was undisputed that in the early hours of November 3, 2018 a patron inside the Appellant fired a gun at the ceiling. It was undisputed that no one was hurt. It was undisputed that the Appellant had door staff that checked patrons' identification ("ID") and had a policy of 25 plus for entry. The co-owner, Denise Valliant, testified that she noticed something going on at around 1:45 a.m. that was unusual and put her arm on a man and then he fired a gun into the ceiling. She testified that was so shocked and panicked that she ran into the ladies' room and did not have her cell phone to call the police. It was undisputed that a patron called the police. The testimony from the City's and the Appellant's witnesses was that the Appellant's patrons are mostly in their 40's and 50's.

The parties agreed that one of the co-owners has run the Appellant since 2006. The other co-owner has run the Appellant since 2012.⁴ It was agreed that since 2006, there have been no violations at the Appellant. It was undisputed that the 30 day suspension including time served would end on December 2, 2018 so would cover this weekend and next weekend.

³ The website provides a link to the audio for each Board meeting.
<https://providenceri.iqm2.com/Citizens/Calendar.aspx>

⁴ That co-owner inherited her share upon her mother's death in 2012.

The Appellant offered to implement security measures such as checking all ID's (not just those patrons that looked under 30), wandng of patrons prior to entry, and installing video cameras. The Appellant also represented it would consider hiring outside security.

A. Arguments

The Appellant argued that it has a long history without any violations and it cooperated with the police and the Board and offered to implement the conditions that the Board imposed on its License. The Appellant argued that without a stay, it will not be able to have a meaningful appeal on the appropriate sanction. The Appellant represented that new security cameras (front door, back door, inside) have been purchased and were to be installed that night (November 19, 2018). It represented that it was engaging a security company to handle the security at the door (pat downs, wandng).

The City argued that this matter was similar to *J. Acqua, Inc. d/b/a Acqua Lounge v. City of Providence Board of Licenses*, DBR No.: 16LQ014 (6/19/16) but in this matter there was a lesser sanction than *Acqua* because of the Appellant's long history of no violations and it being a first offense. The City argued that all the conditions imposed on the Appellant were based on the Appellant's testimony at hearing regarding what it was willing to do. The City argued that the Appellant needs time to implement the conditions of licensing so that granting a stay would be irresponsible without the conditions being in place.

The Board argued that revocation had been requested at hearing and there is an onerous burden on a liquor licensee to prevent disorderly conduct. The Board argued that in light of the circumstances – a gun going off – the sanction was more than fair, if not too light.

B. Discipline Prior to November 3, 2018

There had been no previous violations and sanctions imposed on the Appellant.

C. Liquor License

The Department has consistently followed progressive discipline barring an egregious act. In the context of a liquor licensing, the Superior Court has found that the purpose of progressive discipline by the local liquor licensing authority is to impose a reasonable sanction that will deter the licensee from repeatedly violating the law and when after the imposition of progressive discipline, the licensee fails to conform with the law, revocation is justified. See *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.).

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. There is no dispute there was disorderly conduct. The issue in this matter is what is the appropriate sanction for the disorderly conduct. In this matter, the Board issued a 30 day suspension of the License including time served. The suspension is to end on December 2, 2018 so what is at issue is whether the Appellant should serve approximately ten (10) more days of a suspension of License (which under its business plan of being opened only on Friday and Saturday would mean two (2) more weekends).

Applying progressive discipline to this matter is warranted and appropriate. Indeed, as noted by the Board at hearing this matter is similar to *J. Acqua, Inc. d/b/a Acqua Lounge v. City of Providence Board of Licenses*, DBR No.: 16LQ014 (6/19/16) except that *Acqua* involved a third disorderly conduct consisting of a shooting of a gun (into the ceiling) inside the establishment which warranted the revocation of the BVX license and 60 day suspension of a the BV license. This matter is a first disorderly conduct violation.

The Board imposed the following conditions upon the Appellant re-opening after its suspension.

1. Provide a security plan.
2. Install security cameras.
3. Implement metal detection policy on entry such as wandling.
4. Implement pat downs of patrons on entry.
5. Check all patron ID's upon entry.
6. Continue 25 plus entry policy.

Nonetheless, if a stay is not granted for the suspension, the Appellant will not have a meaningful appeal regarding the remainder of its suspension. Thus, pursuant to *Harsch*, in its discretion the Department recommends granting a stay regarding the 30 day suspension so that a meaningful appeal can be had. However, the Department will not grant a stay of the conditions of licensing. In addition, a stay of the remainder of the 30 day suspension will be conditioned on a police detail after 10:00 p.m. on Friday and Saturdays and any other day that the Class BX license is statutorily in effect prior to December 3, 2018 (and the Appellant is open).⁵

V. 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

⁵ It is noted that upon re-opening after its suspension, the Appellant only may have entertainment to 1:00 a.m. for 90 days and the Board will then visit whether it will need a police detail. Therefore, the Department is only ordering the police detail for the days represented by staying the suspension.

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 offense 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. In this matter, the Appellant has had an administrative penalty imposed of \$3,500. The Board found two (2) violations of state liquor law (R.I. Gen. Laws § 3-5-21 and R.I. Gen. Laws § 3-5-23) and three (3) violations of local ordinances. It ordered an administrative penalty of \$1,000 each for the two (2) state liquor law violations (the remaining amount represents \$500 per local ordinance violation). The penalties for the local ordinances are not before the Department. However, under state law, the penalty for first state liquor law offense only can be \$500 each.

The statutory requirement regarding first offenses was brought to the attention of the parties at the stay hearing and the Board stipulated that it would reduce the administrative penalty for the state liquor law violations to \$1,000 representing \$500 for each state liquor law violation. Therefore, there is no reason to grant a stay of the administrative penalties imposed on the liquor license.

VI. RECOMMENDATION

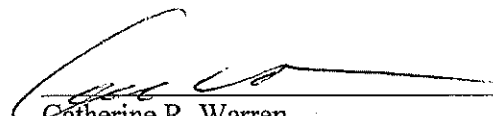
Based on the foregoing, the undersigned recommends that the Appellant's motion for a stay of the 30 day suspension of its liquor license be granted with the following condition: up to December 3, 2018 (representing the remaining period of suspension), a police detail is required on Friday and Saturdays and any other day that the Class BX license is statutorily in effect.⁶

However, no stay is granted on any of the conditions and those conditions must be in effect if the Appellant is open during the stay period:

1. Provide a security plan to the Board.
2. Install security cameras.
3. Implement metal detection policy on entry such as wandling.
4. Implement pat downs of patrons upon entry.
5. Check all patrons' ID's upon entry.
6. Continue 25 plus entry policy.

Furthermore, no stay is granted of the administrative penalty as explained above.

Dated: 11/20/18

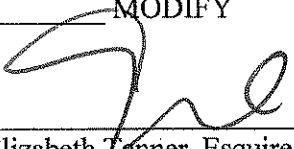

Catherine R. Warren
Hearing Officer

⁶ If the Appellant cannot obtain a police detail on a required night, it cannot serve liquor that night.

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



Elizabeth Lanner, Esquire
Director

Dated: 11/20/18

A hearing on the merits will be held on a date to be decided by the parties.⁷

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 20th day of November, 2018 that a copy of the within Order was sent by first class mail, postage prepaid and by electronic mail to Herbert F. DeSimone, Esquire, 76 Westminster St. #450, Providence, R.I. 02903, 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 Pamela Toro, Esquire Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.



⁷ The Appellant is advised that it is responsible for a stenographer for the hearing pursuant to R.I. Gen. Laws § 3-7-21. If this date is inconvenient, the parties shall notify the undersigned and a new mutually convenient date will be schedule.