

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

Pasha Lounge, Inc. d/b/a Pasha Hookah Bar,	:	
Appellant,	:	
	:	
v.	:	DBR No.: 15LQ007
	:	
City of Providence, Board of Licenses,	:	
Appellee.	:	

RECOMMENDATION FOR ORDER OF STAY

I. INTRODUCTION

This matter arose from a motion for stay filed by Pasha Lounge, Inc. d/b/a Pasha Hookah Bar (“Appellant”) regarding an order issued by the City of Providence, Board of Licenses (“Board”) on May 18, 2015 indefinitely suspending the Appellant’s Class B liquor license (“License”).¹ The parties agreed that on May 15, 2015, the Board, pursuant to Providence Charter section 1102,² properly noticed an emergency hearing for May 18, 2015 regarding the

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those persons granted standing pursuant to § 3-5-19, or upon the application of any licensee whose license has been revoked or suspended by any local board or authority, the director has the right to review the decision of any local board, and after hearing, to confirm or reverse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 Providence Charter section 1102(3) provides as follows:
Unless otherwise provided by state law, suspend, annul, rescind, cancel or revoke any license issued by the board of licenses for any reason which the board may deem to be in the public interest; provided, however, that no license shall be suspended for more than seventy-two (72) hours or annulled, rescinded, cancelled or revoked unless the licensee shall have been given at least three (3) days' written notice of the action proposed to be taken and of the grounds therefor and the time and place of the hearing. The said licensee shall also be notified of the right to be represented at said hearing by legal counsel.

Appellant and suspended the License for three (3) days. However, no hearing was held on May 18, 2015. Said emergency hearing was scheduled pursuant to section 1102 which provides that no license may be suspended for more than 72 hours unless the licensee has been given at least three (3) days written notice of action proposed to be taken. The parties agreed that at the scheduled Board hearing on May 18, 2015, the City's attorney indicated that the City was not ready to proceed to hearing as the matter related to a homicide which was still under investigation and requested a continuance. The parties agreed that no witnesses testified and no testimony was taken by the Board on May 18, 2015. The Appellant represented that the Board requested the City put on a witness about the Appellant being dangerous but the City could not do so at that time and the City indicated that it would return to the Board if the investigation showed a reason to do so. The parties agreed that the City requested that the Board allow the Appellant to re-open. The parties agreed that the Board instead chose to suspend the License indefinitely. The parties agreed that the Board did not set a date on to revisit the closure. The Appellant represented that the Board found it was "unacceptable" to the Board that the City would not move forward on a homicide. The Appellant seeks a stay of the closure. This matter came before the undersigned on May 19, 2015 in her capacity as Hearing Officer delegated by the Director of Department.

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).

In a denial of renewal matter,³ *A.J.C. Enterprises v. Pastore*, 473 A.2d 269, 275 (R.I. 1984) found in discussing the disorderly provisions that "[T]here need not be a direct causational link between incidents occurring outside or nearby a drinking establishment and its patrons. Such a link is established when it can be reasonably inferred from the evidence that the incidents occurred outside a particular establishment and had their origins within." In *Stage Bands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328508 (R.I. Super.), there were three (3) extreme disturbances in one night including a shooting. In citing to *A.J.C.*, the Superior Court in *Stage Bands* found that a reasonable inference could be made that the shooting outside was connected to events inside the club.

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.

³ In order to suspend or revoke a liquor license, there must be a showing that the holder has breached some applicable rule or regulation. R.I. Gen. Laws § 3-7-6 requires that a denial of a renewal must be "for cause." For cause has been interpreted to include (among other reasons) the violations of the disorderly provisions of R.I. Gen. Laws § 3-5-23. *Chernov Enterprises, Inc. v. Sarkas*, 284 A.2d 61 (R.I. 1971).

IV. DISCUSSION

The genesis for the requirement for some type of hearing on an action being taken by the government arises from due process requirements. The leading U.S. Supreme Court case for determining what type of property interest should be protected and what due process is necessary is *Matthews v. Eldridge*, 424 US 319 (1976).⁴ *Matthews* allows flexibility regarding due process requirements. Thus, the required procedures vary according to the interests at stake in a particular context but the fundamental requirement is the opportunity to be heard at a meaningful time and in a meaningful manner. See *Brock v. Roadway Express, Inc.*, 481 US 252 (1987). See also *Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1 (R.I. 2005). In certain situations, a post-deprivation hearing satisfies due process requirements. *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202 (R.I. 1997).

In this matter, the Board has ordered the Appellant to close with no control date for a further hearing. Based on the representations at hearing, the Board did not give a specific reason for the indefinite closure except for an apparent general concern with a homicide.⁵ Without a termination date or at the least a review date, the closing runs the risk of becoming indefinite or in other words a *de facto* suspension or revocation. The Appellant did not have a meaningful hearing before the Board. Indeed, the City indicated that it was not ready to have a hearing before the Board. Further, no hearing date or review has been set post-suspension.

⁴ *Matthews* sets forth three (3) factors to consider whether an individual has received due process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

⁵ As discussed earlier, in order for discipline to be imposed on the Appellant for the homicide (or other disorderly conduct), the City would need to demonstrate a direct or indirect link from the Appellant to the homicide (or other disorderly conduct). *Infra*. Presumably, the City asked for a continuance of the hearing in order to continue its investigation into the homicide and its circumstances. However, the Board heard no evidence of any link from the Appellant to the homicide nor did it hear any evidence regarding any safety concerns.

Section 1102(b) provides that if a License is to be suspended for more than 72 hours, there must be three (3) days written notice given of the action prepared to be taken and the grounds therefor and the time and place of hearing. The Appellant had proper notice of a hearing but no hearing was held and the City asked the Appellant be re-opened and the hearing be continued. The Board chose to indefinitely suspend the License after there had been a three (3) day suspension pursuant to Section 1102. It is possible that on May 18, 2015, the Board could have suspended the License again on a three (3) day emergency basis pending a full hearing or a hearing on any particular safety concerns regarding the Appellant to take place after the three (3) day period. However, the Board did not invoke its emergency powers but rather chose to suspend the License indefinitely.

V. CONCLUSION

Based on the forgoing, the suspension is stayed for the following reasons:

1. The suspension issued on May 15, 2015 was only for 72 hours and expired on May 18, 2015. Section 1102 only allows a 72 hour suspension unless the licensee shall have been given at least three (3) days written notice of the action proposed to be taken and of the grounds therefor and the time and place of the hearing. No hearing was held. By its terms, the suspension was over on May 18, 2015. At that time, the Board suspended the License indefinitely and did not invoke any emergency powers.
2. No evidence was presented at the Board hearing to support discipline.
3. The Board did not meet the requirements to oppose a stay request. There were no grounds for a suspension so that the City does not have a strong likelihood to prevail on the merits. There was no evidence regarding public safety.⁶

⁶ If the Board was to argue that the public safety caused the closure, it must make and base such a finding based on a record.

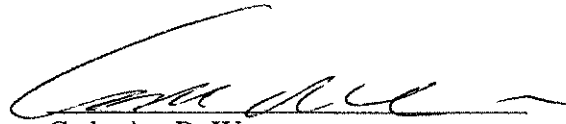
4. The suspension was indefinite and did not make provision for a full hearing or any kind of hearing after the suspension.

V. RECOMMENDATION

Based on the forgoing, the undersigned recommends the following:

The suspension is stayed.⁷

Dated: May 20, 2015



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 (See Attached)

Dated: 5/21/15


Macky McCleary
Director

Entered this day as Administrative Order Number 15-16 on 21st of May, 2015.

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.

⁷ The staying of this indefinite closure does not preclude the Board or City from moving forward with any action against the Appellant allowed by statute or the Providence City Charter.

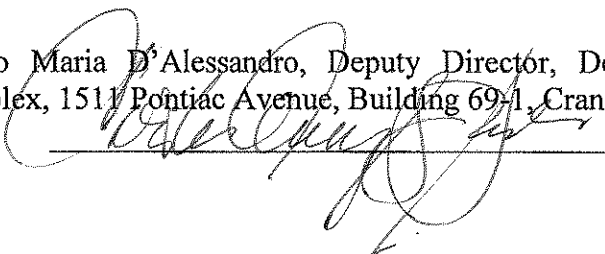
CERTIFICATION

I hereby certify on this 21st day of May, 2015 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
Mmartone@providenceri.com

Peter Petrarca, Esquire
Petrarca & Petrarca
330 Silver Spring Street
Providence, RI 02904
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and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 151st Pontiac Avenue, Building 69-1, Cranston, RI 02920



A handwritten signature in black ink, appearing to read 'Maria D'Alessandro', is written over a horizontal line. The signature is cursive and somewhat stylized.

DIRECTOR'S MODIFICATION OF RECOMMENDED DECISION

The Director hereby modifies the recommended Decision by rejecting Sections V and VI and replacing such Sections with the following:

Based upon the foregoing, the Appellant's request for a stay of the Board's suspension of the License is denied for the following reasons:

1. On May 15, 2015, following a homicide, the Board suspended the License and noticed an emergency hearing for May 18, 2015.¹ On May 18, 2015, the City's attorney indicated that the City was not ready to proceed to hearing because the homicide investigation was still ongoing. No testimony was taken. The Board suspended the License indefinitely and did not invoke any emergency powers. The Appellant seeks a stay of the indefinite suspension.

2. The Appellant has not satisfied the requirements for issuance of a stay. The Appellant has not shown that (a) it will prevail on the merits, (b) it will suffer irreparable harm if the stay is not granted, and (c) issuance of a stay will not harm the public interest.

Based upon the foregoing, the Appellant's request to stay the suspension of the License is denied. It is further ordered that, within seventy-two (72) hours of the issuance of this decision, the Board hold a hearing regarding the suspension of the License.

¹ Section 1102 provides that a license shall not be suspended for more than seventy-two (72) hours unless the licensee shall have been given at least three (3) days written notice of the action proposed to be taken and of the grounds therefor and the time and place of the hearing.