

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

Vibe Lounge and Hookah Bar, Inc.,
Appellant,

v.

City of Pawtucket, Board of Licenses,
Appellee.

DBR No. 21LQ004

ORDER RE: SECOND MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed on May 12, 2021 by Vibe Lounge and Hookah Bar, Inc. (“Appellant”) with the Department of Business Regulation (“Department”) pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on May 11, 2021 by the City of Pawtucket, Board of Licenses (“Board”) revoking the Appellant’s Class BV liquor license (“License”). A hearing on the motion to stay was heard on May 14, 2021 before the undersigned who was delegated to hear this matter by the Director of the Department. An order (“Stay Order”) providing for a conditional stay was issued on May 19, 2021. On May 27, 2021, the Appellant filed a motion requesting that the Stay Order be modified to which the Board objected. A hearing on this motion was heard on June 3 and 16, 2021.¹

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.*

¹ Due to the COVID19 pandemic, these hearings were held remotely.

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 REVOCATION

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.

R.I. Gen. Laws § 3-5-21 states in part as follows:

(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:

- (1) Breach by the holder of the license of the conditions on which it was issued;
- or
- (2) Violation by the holder of the license of any rule or regulation applicable;
- or
- ***
- (4) Breach of any provisions of this chapter.

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. *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964). The 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).

The Department reviews sanctions to ensure statewide consistency and appropriateness in the situation. It also supports progressive discipline barring the rare and extreme event where revocation may be warranted without prior discipline. It also accepts the principles of comity and deference to the local authorities and their desire to have control over their own town or city. At the same time, pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21, the Department ensures that tensions between local boards and licensees are settled in a consistent manner. Nonetheless, there is not a mechanical application of sanctions as each matter has its own sets of circumstances. See *C&L Lounge, Inc. d/b/a Gabby's Bar and Grille; Gabriel L. Lopes v. Town of North Providence*, LCA – NP-98-17 (4/30/99). At the same time, a sanction cannot be arbitrary and capricious. The unevenness of the application of a sanction does not render its application unwarranted in law but excessive variance would be evidence that an action was arbitrary and

capricious. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). See *Jake and Ella's v. Department of Business Regulation*, 2002 WL 977812 (R.I. Super.) (R.I. Super.) (overturning a revocation of a liquor license as arbitrary and capricious).

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) and *Pakse* (upholding revocation when had four (4) incidents of underage sales within three (3) years). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside with licensee failing to call the police justified revocation); and *PAP Restaurant, Inc. v. d/b/a Tailgate's Grill and Bar v. Town of Smithfield, Board of License Commissioners*, DBR No.: 03-L-0019 (5/8/03) (series of infractions 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*.

IV. STANDARD FOR ISSUANCE OF A STAY

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (R.I. 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. ARGUMENTS

The Appellant filed its second motion for stay requesting that the condition in the Stay Order to close at midnight be lifted so that it could close at 1:00 a.m. It argued that it was having a problem hiring a disc jockey. At the June 3, 2021 hearing, it was agreed to hold the second motion so that the Board could provide the Appellant and the undersigned with a copy of the relevant security videos (pursuant to a protective order). A second day of hearing was held on June 16, 2021 by which time all parties had copies of the videos.

At the June 16, 2021 hearing, the parties agreed the shooter exited the club by 11:05 p.m. on the night at issue and that the shooting occurred at 12:45 a.m. The Appellant represented that his client would testify that the shooter had a verbal altercation with another patron in the club and was ejected at about 11:00 p.m. The Board represented that on the video the shooter could be seen exchanging words with someone inside the club and that person was with the person later shot by the shooter.

The Appellant argued that in terms of the allegations that the club hindered the police that at 51 minutes on the second video, the bouncer came outside after the shooting and was on his cell phone, and the video showed the owner came out and spoke to the police when the police arrived. The Appellant argued that the EMT's could not park on the street because of the police cars parked,

and they were not hindered by club personnel. The Appellant argued that there was no video evidence that showed the area was chaotic after the shooting as alleged by the Board.

The Board argued it was not alleging physical impediment to the EMT's but the police had to arrest two (2) people outside after the shooting for disorderly conduct and the crowd would not disperse. The Board represented that it could not dispute the Appellant's representations of what the video showed because it did not recall all of the videos. However, the Board argued that when the police went inside the club, they were told that nothing happened and that the gun shots were from the music. In response, the Appellant argued that the video showed that when the police went inside the club there was no panic because the patrons had not heard the gun shots outside as they were on the other side of the club.

The parties represented that the club reopened on May 30, 2021. The Appellant argued that the club be allowed to open until 1:00 a.m. and that it would continue with a two-person police detail at night for any day that the Appellant is open during the pendency of the hearing.

VI. DISCUSSION

As discussed in the Stay Order on the stay request, the revocation is based on incidences on April 5, 11, 18, and 23. See Stay Order which is incorporated by reference regarding those other incidences.² The incidence of April 23, 2021 relates to a shooting outside the Appellant.

The parties agreed that the shooter exited the club by 11:05 p.m. on the night at issue and that the shooting occurred at 12:45 a.m. The Appellant represented that his client would testify that the shooter had a verbal altercation with another patron and was ejected at about 11:00 p.m.

² As noted in the first stay order, the Department has consistently followed progressive discipline barring an egregious act (*supra*) and the the incidences of April 5, 11, and 18 do not appear to rise to level of revocation. See *CAG Productions, LP d/b/a Euphoria v. City of Providence, Board of Licenses*, DBR No.: 16LQ022 (4/3/17); and *Ocean State Hospitality, Inc. d/b/a Fatt Squirrel v. Providence Board of Licenses*, DBR No.: 16LQ002 (3/31/16). Assuming those violations (e.g. after hours, disorderly) are proved, those violations could rise to the level of administrative penalties and/or a term of suspension (with the timing of violations impacting the type of penalty imposed).

The Board represented that the shooter could be seen inside the club on the video exchanging words with someone inside who was with the person later shot by the shooter.

The Stay Order indicated that the Stay Order would be revisited after 30 days. The Appellant filed its motion prior to the 30 day period due to the issue of the disc jockey (but 30 days have now passed). However, the parties did not have the benefit of the security videos at the first stay hearing.

A review of what has been referred to by the parties as the "second" video shows the shooter appearing on the lower left side of the video at about 50 minutes and 11 seconds and firing his first shot at approximately 50.12 minutes. He fired again at approximately 50.22 and 50.27 minutes. Between 50.39 and 50.57, two (2) people come from the club and walk up the street toward the area. At 51.03, a security staff member comes out and is on his cell phone. At 51.34 another security staff member comes outside. At 52.34, the owner comes out. At 53.54 and at 54.52, someone comes from the club with what looks like a towel (presumably for the victim). At 54.36, a police car appears on the right side of video at end of street. At 55.00, a police officer on foot approaches toward the victim. At 55.48, a police officer is in the street waving people back from approaching the victim. A club security staff member is also waving people back at the same time. At 57.20 and 58.40, a police officer is speaking to the first security staff member that came outside and the owner also is present. At 57.53, two (2) police cars are at the end of the street (right side of video) at what appears to be an intersection and the EMT's are walking through the parking lot to the street to access the victim. Thus, in less than a minute after the shooting, a club security member is outside and on a cell phone and in less than two (2) minutes, another security staff member is outside and in less than three (3) minutes, the owner is outside.

There will be an issue at hearing regarding whether the Appellant can be held directly or indirectly responsible for the shooting especially as it concerns what happened between the

ejection and the shooting. See *The Vault LLC v. City of Providence Board of Licenses*, 16LQ008 (9/14/16).³ Unlike *The Vault*, the shooter left the club and more than 100 minutes later apparently returned. The Board indicated there was a verbal exchange between the shooter and the victim's companion inside. The Board did not necessarily call it a fight or disturbance.

These facts could be found to be similar to *D. Liakos d/b/a Van Gogh v. City of Providence, Board of Licenses*, DBR No. 16LQ011 (10/31/16). In that matter, there was no evidence that there was any disturbance inside that club prior to the fights outside. The matter found as follows:

There is no dispute that the August 20, 2016 fights among the Appellant's patrons who had left the club resulted in serious injuries and involved dangerous behavior.

From *Cesaroni* in 1964 to *Schillers* in 1980 up until today, a liquor licensee is responsible for activities inside and outside its licensed premises. It does not matter how well a liquor licensee supervises such responsibilities since even the most responsible supervising licensee is still responsible for disorderly conduct. See *The Vault*. Under *Cesaroni* and *A.J.C. Enterprises*, the Appellant is directly or indirectly responsible for the actions of its patrons and for the actions arising inside or emanating from inside a liquor licensee.

In this matter, there was no evidence of any disturbance starting inside the bar and spilling outside where it culminated in the fight. See *Stage Bands* and *Cardio*. There was no evidence (whether eyewitness, on video, in a police report, etc.) entered at hearing that there was any disturbance whether oral or physical in the club that night. There was no testimony by patrons or police officers before the City or the Department regarding any disturbance within the club. In fact, in its closing, the City admitted there was no disturbance inside the Appellant. Additionally, the Board found in its decision that there had been no disturbance inside the club.

It is not enough that the people who fought outside were the Appellant's patrons to make the Appellant responsible for their actions. There is a very strict requirement that makes a licensee responsible for actions inside the bar and those outside activities that arise from inside the bar even if the licensee did not know of the actions or tried to supervise its patrons and prevent the activities. However, in order for the Appellant to

³ In that matter, a patron was escorted out of the establishment but did not leave and tried to get back inside and talked to the bouncer before shooting a gun 19 minutes after being escorted out. *Vault* found as follows:

If a patron leaves a Class B liquor licensee on his or her own steam without incident inside and then walks down the street for a coffee and then returns and fights with the bouncers, it would be hard to make a link that the licensee would be indirectly responsible for that fight and said patron would no longer have been a patron. Here, there is a lag time between the Appellant's ejection and the shooting which could raise the issue of when is a patron no longer a patron. However, here the shooter was patron who never left the outside of the premises and tried to get back in (more than once) after being ejected for fighting so that an indirect link can be made from his actions inside to his actions outside. *Id.* at 13.

be responsible there must be some kind of activity for which the bar is responsible for and from which it can be inferred the fighting arose. See *A.J. C. Enterprises and Cesaroni*. See also *Salacruz, LLC d/b/a Sky Lounge v. City of Providence Board of Licenses*, DBR No. 14LQ046 (11/25/14); and *El Tiburon Sports Bar, Inc. v. Providence Board of Licenses*, DBR No. 06-L-0087 (6/1/07) (victim had been a patron of that bar but was assaulted down the street and there was no link between the bar and the assault). *Id.* at 13-14.

At hearing, the Board will have to prove the shooter's actions are directly or indirectly related to something that happened inside the club. The Appellant was closed from April 24, 2021 (day after the shooting) to May 30, 2021 (when opened pursuant to the Stay Order). There are allegations by the Board regarding disorderly conduct on days other than April 23, 2021. For April 23, 2021, there is the shooting issue as well as whether the Appellant hindered the police and/or EMT's in any way.

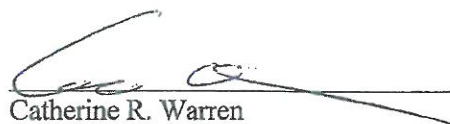
VII. RECOMMENDATION

It is discretionary to issue a stay in order to maintain the *status quo* pending an appeal. In this matter, it cannot be ascertained which party will prevail without a full hearing on what happened inside and then outside. However, in light of the stipulated facts (e.g. 100 minute gap) and the security videos and *The Vault* and *Van Gogh*, it appears that the Board will have a difficult burden to show the shooting was directly or indirectly linked to something that happened inside the club. The granting of a partial stay maintains the *status quo* pending the full hearing.

Based on the foregoing, the Stay Order entered on May 19, 2021 shall be modified so that the Appellant may close at 1:00 a.m. However, in order to address any issues of disorderly conduct or other potential violations, the Appellant will still be required to have a police detail (two-person) at night (approximately 10:00 p.m. to 1:30 a.m.) when the Appellant is open. The parties may

always reach their own agreement regarding the conditions of a stay (e.g. detail just at weekends, one person detail, time covered, opening hours etc.).⁴

Dated: June 22, 2021



Catherine R. Warren
Hearing Officer

INTERIM ORDER

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

ADOPT
 REJECT
 MODIFY

Dated: June 22, 2021


Elizabeth M. Tanner, Esquire
Director *by Designee Elizabeth Dwyer*

A hearing has been tentatively scheduled for July 13 and 14, 2021 at 10:30 a.m. at the Department of Administration, One Capitol Hill, Providence, R.I.⁵

NOTICE OF APPELLATE RIGHTS

THIS ORDER CONSTITUTES AN INTERLOCUTORY ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-15. 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

⁴ Or the parties may be able to resolve the matter.

⁵ Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant is responsible for the stenographer.

CERTIFICATION

I hereby certify on this 7th day of June, 2021 that a copy of the within Order was sent by first class mail, postage-prepaid and by electronic delivery to the following: Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, peter330350@gmail.com, and Frank Milos, Esquire, City Solicitor, 137 Roosevelt Avenue, Pawtucket, R.I. 02860, Fmilos@pawtucketri.com, and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

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