

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

Lovera VIP Inc. d/b/a Lovera VIP
Appellant,

v.

City of Providence, Board of Licenses,
Appellee.

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DBR No.: 18LQ023

ORDER RE: MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed by Lovera VIP, Inc. d/b/a Lovera VIP (“Appellant”) regarding an order issued by the City of Providence, Board of Licenses (“Board”) on November 8, 2018 revoking the Appellant’s Class BVX liquor license (“License”).¹ A stay hearing was held before the undersigned on November 9, 2018 in her capacity as Hearing Officer delegated by the Director of 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those persons granted standing pursuant to § 3-5-19, or upon the application of any licensee whose license has been revoked or suspended by any local board or authority, the director has the right to review the decision of any local board, and after hearing, to confirm or reverse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 This matter had previously come before the Department relating to an appeal of the Board’s interim order pending its hearing. See Department’s order of November 2, 2018.

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 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. STATUTORY BASIS FOR REVOCATION OR SUSPENSION

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

Revocation or suspension of licenses – Fines for violating conditions of license.
– (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 breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.

(b) Any fine imposed pursuant to this section shall not exceed five hundred dollars (\$500) for the first offense and shall not exceed one thousand dollars (\$1,000) for each subsequent offense. For the purposes of this section, any offense committed by a licensee three (3) years after a previous offense shall be considered a first offense.

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 Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (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 justified revocation); *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*.

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 5, 2018 hearing (the hearing was held on November 5, 2018 with the decision being made on November 8, 2018).³ The hearing was mostly testimony regarding the video being shown to the Board (so not reviewed by the undersigned) and how the police were called. The incident happened on October 20, 2018 at approximately 1:17 a.m.

This matter originally started because of a shooting (of a gun into the air) outside of the Appellant. The parties agreed that the shooting was not considered by the Board and was not part of the basis for the revocation. The parties agreed that the basis for the revocation was the physical altercation inside between security and patrons. It was agreed that not all issues raised at the initial *ex parte* emergency hearing where the Board heard testimony regarding the video but did not see the video of said altercation were raised at the full show cause hearing. The Board saw the video at the full hearing. It was agreed that the altercation stemmed from an unpaid bill by patrons.

The Board represented that it was concerned with the fact that security seemed to engage in "self help" regarding the unpaid bill. It was agreed that money exchanged hands that night but the Board did not believe there was a robbery and no charges were brought. Rather the Board characterized the actions as self help in terms of the collection an unpaid bill. It was not disputed that there was an unpaid bill. The Board did not make a finding of fact that the security staff took the patrons' money.

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

There was a dispute regarding the full nature of the altercation. The Appellant agreed that security staff members were wrong to punch the patrons but argued that there was provocation by the patrons (spitting, grabbing).

The parties agreed that at the time of the second stay hearing, the Appellant had been closed for 18 days.

The Board apparently made a finding that the head of security did not explain the inside altercation to the police when the police responded to reports of the shooting. The Appellant disputed that the police were misled. The head of security did tell the police about the inside altercation; it is just a matter of what was said in the explanation.

The Appellant fired its two (2) security employees who were involved in the altercation. In addition, they requested that the outside security firm provide it with a new head of security as it no longer wants that head of security from the security firm.

The Board's vote to revoke was 2-1 as two (2) members recused themselves. The parties represented that the dissenting vote felt that this matter was analogous to a recent Board decision (RocknRye) where a bouncer was involved in an altercation and apparently escalated it (with a resulting stabbing outside) and the licensee received a 12 day suspension.

The parties agreed that the current owner bought this establishment three (3) years ago and never has had a disorderly conduct violation and its only sanction in the last three (3) years has been a \$1,000 administrative penalty for bottle service.

A. Arguments

The Appellant argued that it has a substantial likelihood of success on the merits because the facts do not warrant revocation. It argued that it has already been closed for 18 days and is suffering irreparable harm because of lost income, lost money for paid entertainment that did not

occur, loss of patrons, and loss of staff. The Appellant further argued that if a stay is not granted then a hearing would be meaningless as it be out of business for so long. The Appellant also argued that the Board has not applied progressive discipline.

The Board chose not to address the issue of substantial likelihood of success on the merits but argued that while the Appellant would suffer harm it was monetary harm and not irreparable harm. The Board argued that an egregious event can raise to the level of revocation.

B. Discipline Prior to October, 2018

In the past three (3) years, there has been no disorderly conduct and one (1) imposition of an administrative penalty of \$1,000 for bottle service violation.

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*.

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. The issue in this matter is what is the appropriate sanction for the conduct. There is no dispute there was disorderly conduct; though, the exact nature is in dispute. Thus, it is undisputed that the Appellant had a disorderly conduct incident involving its security staff during which security most likely escalated. Those security staff members have been fired.

Applying progressive discipline to this matter is warranted and appropriate and based on the Appellant's prior disciplinary history and the nature of the altercation, the Appellant has a


strong likelihood that it will prevail on its appeal to reduce the revocation. Indeed, *Tropicana Restaurant and Bar v. City of Providence Board of Licenses*, DBR No.: 16LQ021 (5/1/17) imposed a 30 day suspension for three (3) disorderly conduct violations including one where a bouncer punched a patron. At the time of the stay hearing, the Appellant's License had already been suspended for 18 days.

Furthermore, if a stay is not granted for the revocation, the Appellant will not have a meaningful appeal. Thus, in its discretion the Department will maintain the *status quo* prior to the events of October 20, 2018 except that the stay 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.

VI. RECOMMENDATION

Based on the foregoing, the undersigned recommends that the Appellant's motion for a stay of the revocation of its liquor license be granted with the condition of the police detail as set forth above.⁴

Dated: November 13, 2018


Catherine R. Warren
Hearing Officer

⁴ 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

Dated: 4/13/18


Elizabeth Tanner, Esquire
Director

A hearing on the merits will be held on November 27, 2018 at 1:30 p.m. at the Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI.⁵

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 13th day of November, 2018 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; Nicholas Hemond, Esquire, DarrowEverett, LLP, 1 Turks Head Place, Suite 1200, Providence, RI nhemond@darroverett.com; Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, RI 02889 ldatty@gmail.com and by hand-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920



⁵ 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.