

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

**The Vault, LLC,
Appellant,**

v.

**City of Providence, Board of Licenses,
Appellee.**

DBR No.: 16LQ008

ORDER ON MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed by The Vault, LLC (“Appellant”) with the Department of Business Regulation (“Department”) pursuant to R.I. Gen. Laws § 3-7-21 regarding a decision taken by the City of Providence, Board of Licenses (“Board”) on July 21, 2016 suspending the Appellant’s Class BVX liquor license for ten (10) days and its Class BX for 60 days¹ and also imposing a mandatory police detail on Friday and Saturdays from 10:00 p.m. to 2:00 a.m. and imposing an administrative penalty of \$2,000. A hearing on the motion for stay was held on July 26, 2016 before the undersigned pursuant to a delegation of authority by the Director of the Department.

¹ The ten (10) day suspension includes five (5) days that were already served. The Board indicated that it would clarify how the 60 day suspension was being calculated, but it apparently is in addition to the ten (10) day suspension and apparently is a calendar suspension, e.g. July 22, 2016 to September 22, 2016 rather than 30 weekends. The parties agreed that the Appellant was shut early this past weekend so at least two (2) days of the 60 day late night suspension have been served.

It is noted that the ten (10) day suspension is due to begin on July 27, 2016 which is only six (6) days from the date of the Board hearing. A licensee has ten (10) days to appeal a decision by the Board so it would be fairer for a licensee in terms of deciding whether to file an appeal that - barring an emergency - any sanction imposed by the Board (or any licensing authority) begin after the running of the appeal period.

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. In a denial of renewal matter,² the Rhode Island Supreme Court found in discussing the disorderly provisions that “[T]here need not be a direct causal 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.” *A.J.C. Enterprises* at 275.³ See also *Schillers*; and *Furtado v. Sarkas*, 373 A.2d 169 (R.I. 1977).

² 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. *Chernov Enterprises, Inc. v. Sarkas*, 284 A.2d 61 (R.I. 1971).

³ In *El Tiburon Sports Bar, Inc. v. Providence Board of Licenses*, DBR No. 06-L-0087 (6/1/07), the Department found that the 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. In discussing *Cesaroni*, *El Tiburon* found that there was no evidence to show that the bar had not supervised its patrons so as to be linked to the assault.

V. 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.

VI. PRIOR DISCIPLINE

The Appellant has been licensed since 2013 and is a hookah bar. It previously had an administrative penalty imposed for violating hours of operations. On July 15, 2015, the Appellant had its License suspended for four (4) days and an administrative penalty of \$1,000 imposed for entertainment without a license and using an unlicensed promoter.

VII. DISCUSSION

The undersigned did not have a transcript of the Board hearing. Instead, the arguments were based on representations made by the parties. The parties agreed that the shooter at issue was initially denied entrance to the Appellant because he did not want to be patted down, but he was allowed in later when he was patted down. The shooter was ejected from the Appellant. The

parties agreed that after the shooter was ejected, he was outside for about 15 to 20 minutes before he went to his car and retrieved a gun and returned to outside the Appellant and fired the gun (injuring a person). The Board argued that the Appellant should have made sure the shooter left the area. The Appellant argued that it was not foreseeable that the shooter would get his gun and shoot it. The Appellant argued that while the patron was outside he walked around but was not visibly agitated. The Appellant argued that even if it had told the shooter to leave the area that would not necessarily have stopped shooter from retrieving the gun. The City argued that the licensee should have realized about the patron because he had initially been denied entrance because he refused a pat down. In addition to the issue of the shooter, the Appellant disputed whether its bouncer was told by someone in authority to tell the police that the shooter was not in the club.

The Appellant argued that it has a substantial likelihood of success on the merits once the video of the incident is reviewed and that the penalties imposed are excessive. The City argued that it has substantial likelihood of success on the merits and there is a public safety issue. Based on the representation of the parties, there is an issue over the Appellant's responsibility for the shooter (see case law above) and whether his actions can be linked directly or indirectly to the license holder. The Board imposed a police detail which the Appellant did not challenge. The Appellant argued that the *status quo* should be maintained. The Board argued that the penalties imposed were reasonable and that the Board imposed progressive discipline rather than a revocation. However, if a stay is not issued the Appellant will not have be able to have a full hearings on the disputed issues of the patron and what the bouncer told the police. The police detail addresses any potential safety issues.

VIII. ADMINISTRATIVE PENALTIES

The Appellant did not argue for a stay of the administrative penalties. 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. *Id.* at pp. 14-17.

IX. CONCLUSION

The Department has consistently followed progressive discipline barring an egregious act. 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. However, 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. If a stay is not granted for the ten (10) day and 2:00 a.m. BX suspensions, the Appellant will not have a meaningful appeal. Granting a partial stay maintains the *status quo* pending the full hearing.

X. RECOMMENDATION

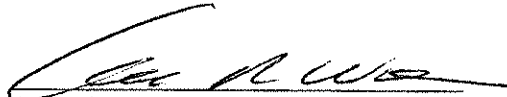
Based on the forgoing, the undersigned recommends that following order be made.

1. A stay of the ten (10) day and the Class BX 2:00 a.m. 60 day suspension be granted.
2. A stay of the administrative penalties be denied.
3. The police detail ordered by the Board remains.

Nothing in this order precludes the undersigned to revisit this order because of a change in circumstances. E.g. the violation of any of the conditions could warrant a review of the stay order.

The parties will schedule a mutually convenient date for a hearing on this appeal.

Dated: 7/26/16

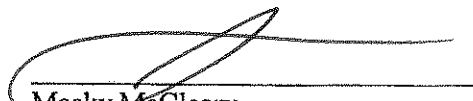

Catherine R. Warren
Hearing Officer

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: 7/27/14


Macky McCleary
Director

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 27th day of July, 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, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904, and Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, RI 02889 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

