

exercises the licensing function. *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 DISCIPLINE

R.I. Gen. Laws § 3-5-23 governs disorderly conduct. It 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 imposing a sanction on 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, 295-6 (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, 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 (R.I. 1966). See also *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965). See also *A.J.C. Enterprises; Schillers*; and *Furtado v. Sarkas*, 118 R.I. 218 (1977).

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).

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. PRIOR DISCIPLINE

The Appellant has previously been disciplined for various violations including for approximately 11 disorderly disturbances and underage service. It had its License suspended for four (4) days in 2021 and for four (4) days and also two (2) days in 2022.

VI. ARGUMENTS AND DISCUSSION

The information received by the undersigned is based on representations of the parties. The undersigned did not have a transcript of the Board hearing on August 3, 2023 when the decision was made and the audio was not available. However, the undersigned had a copy of the stipulated facts and the Board's written decision which was made based on the stipulated facts.

There was no dispute by the parties that the Appellant violated R.I. Gen. Laws § 3-5-23 on July 21, 2023 when there was a disturbance outside the Appellant in the parking lots used by its patrons (a Walmart's parking lot) where the patrons were loitering, playing music, smoking marijuana, and drinking. The crowd did not disperse, and there was a report of an assault and the crowd surrounded police officers and other district police officers had to be called in to disperse the crowd. There were several arrests made. While the parties did not stipulate to an incident inside [and apparently some patrons were ejected], it was not disputed that the Appellant was responsible for the outside disorderly conduct. See Board's record.

The parties agreed that the Appellant's Thursday night events which are 18 plus are an ongoing issue in terms of disorderly conduct. The July 21st incident was a Thursday (going into Friday) night, and the 2021 and 2022 disturbances were apparently on Thursday nights as well.

The discipline imposed by the Board was as follows: 1) day 1 to 30 is private events only, no general admission, no ticketed events; 2) day 31 to 45 is private and ticketed events, no tickets sold at the door, everything must be pre-sale; 3) day 1 to 90 must be over 25 except private events; 4) day 91 – forever 21 plus except private events. Thus, from day 31 to 45, events can be advertised by a promoter but must be 25 plus and tickets sold in advance. After day 91, events must be 21 plus. There was no requirement of a police detail. The discipline was imposed on the day of the decision, August 3, 2023. Thus, day 31 would be September 3, 2023.

The Appellant acknowledged that Thursdays were an issue and had offered to the Board close on Thursdays until September 7 in order to come up with a new format. It was also amenable to over 21 and police detail for the weekend. It argued that it has always cooperated with the Board and the issue really is Thursday nights and only having private events would be a big financial hit.

The Board and City argued that rather than just suspending the License for a period of time, the Board crafted a penalty that allowed the Appellant to stay open but avoid the pitfalls of conduct leading to disorderly disturbances. In addition, they represented that the Appellant had indicated that they had many private events so were accounting for those in the Board's discipline.

In this matter, the issue is what is the appropriate discipline for the Appellant's violations. These violations are not the first violations by the Appellant. Rather there have been many violations in the past two (2) years so that the Appellant is subject to progressive discipline.

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.

VII. RECOMMENDATION

If a stay is not granted for the penalties, the Appellant will not have a meaningful appeal. The granting of a partial stay maintains the *status quo* pending the full hearing. The stay will be conditioned on a 1:00 a.m. closing and police detail (two-person) at night (approximately 10:00 p.m. to 1:00 a.m.) on Fridays, Saturdays, and Sundays, and nights before state holidays.¹ The Appellant cannot open Thursday nights and all other nights must be 21 plus. The parties may agree to modify this stay order if they choose.

¹ If the Appellant cannot obtain a police detail, it cannot open past 10:00 p.m.

Dated: August 18, 2023


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: August 22, 2023

✓


Elizabeth Kelleher Dwyer, Esquire
Director

A hearing will be scheduled on a mutually convenient date to be determined by the parties.²

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

CERTIFICATION

I hereby certify on this 22nd day of August, 2023 that a copy of the within Order and Notice of Appellate Rights were 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, R.I. 02903, John C. Manni, Esquire, 1405 Plainfield Street, Johnston, R.I. 02919, and Louis A. DeSimone, Jr., Esquire, 1554 Cranston Street, Cranston, R.I. 02920 and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.


Megan Mihara

² Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant is responsible for the stenographer.