

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF BUSINESS REGULATION  
233 RICHMOND STREET  
PROVIDENCE, RHODE ISLAND 02903**

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<b>BHAV Liquors, Inc. d/b/a JR's Liquors, Appellant,</b>	:	
	:	
<b>v.</b>	:	<b>DBR No.: 05-L-0186</b>
	:	
<b>Pawtucket City Council in its capacity as the Board of License Commissioners, Appellee.</b>	:	
	:	
<b>and</b>	:	
	:	
<b>PLW-MA, Inc. d/b/a Blackstone Wine and and Spirits, Intervenor</b>	:	
	:	

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**DECISION**

**I. INTRODUCTION**

On or about September 7, 2005, the Pawtucket City Council sitting in its capacity as the Board of License Commissioners ("Board") granted the transfer of a Class A liquor license from Gary's Liquors ("Gary's") to PLW-MA Inc. d/b/a Blackstone Wine and Spirits ("Blackstone"). On or about September 14, 2005, BHAV Liquors, Inc. d/b/a JR's Liquors, Inc.<sup>1</sup> ("Appellant") filed an appeal of this transfer with the Department of Business Regulation ("Department"). On or about September 19, 2005, a hearing officer was appointed in this matter. On or about September 14, 2005, Appellant requested a stay of the transfer. On or about October 5, 2005 Blackstone moved for leave to intervene in this appeal and moved to dismiss the appeal.

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<sup>1</sup> The initial notice of appeal filed by Appellant referred to Appellant's name as BHAV Liquors, Inc. d/b/a JR's Liquors which is reflected on the case caption. Later filings refer to the Appellant as BYHAV Liquors, Inc. d/b/a JR's Liquors.

A hearing was held on October 6, 2005, on the three (3) motions. At that time, the motion to dismiss was denied because pursuant to R.I. Gen. Laws § 3-7-21 and R.I. Gen. Laws § 3-5-19, the Appellant had standing to file an appeal. At that hearing, the motion to stay was denied as the hearing officer did not find any evidence of imminent threat to public health, safety, and welfare.<sup>2</sup> A hearing was held on this matter on April 13, 2006 and a briefing schedule was established. Briefs were filed by September 6, 2006.

On or about June 14, 2007, the undersigned was appointed substitute hearing officer for the purpose of completing this matter. By letter dated June 15, 2007, the undersigned wrote to the parties requesting a status on this matter regarding whether the parties had resolved this matter or were still waiting for a decision to issue. The parties agreed that the undersigned would delay issuing a decision in order for the parties to attempt to resolve this matter. The parties agreed to advise the undersigned by August 6, 2007 as to the status of the matter. The parties further agreed to a delay of a decision being issued and agreed to provide the undersigned with a status report by October 31, 2007. Having not heard from the parties by October 31, 2007, the undersigned contacted the parties on November 19, 2007 requesting a status report.

At that time, Blackstone's counsel indicated that Blackstone was still being marketed for sale but that no sale's agreement had been entered into. At this time, the Appellant then requested that because of the extended passage of time, the hearing officer

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<sup>2</sup> Apparently no written orders memorializing the orders made at this hearing were entered by predecessor hearing officer. In reviewing the tape of the hearing, it does not appear that a ruling was made that day on Blackstone's motion to intervene. Nonetheless, the hearing proceeded as if the motion to intervene has been granted. Therefore, apparently the motion to intervene was either granted or agreed to. At that hearing, there was also an oral motion by Appellant to conduct discovery prior to a ruling on the motion to stay which was denied. Appellant's further motion to conduct discovery prior to hearing was also denied.

in her discretion issue a decision. Based on the information received from the parties, it does not appear this matter is being resolved so the undersigned enters this decision.

## **II. JURISDICTION**

The Department has jurisdiction over this matter pursuant R.I. Gen. Laws § 3-7-21 and R.I. Gen. Laws § 42-35-1 *et seq.*

## **III. ISSUES**

Whether to uphold or overturn the Board's decision to grant transfer of the License from Gary's to Blackstone.

## **IV. MATERIAL FACTS AND TESTIMONY**

Craig Power ("Power") testified on behalf of Appellant. He testified that he owns Blackstone. He testified that he has held a full time job with Wine and Spirits Retailers, Inc. ("W&S") since 1993. He testified that he is Vice-President of Operations. He testified that W&S is a consultant for the Douglas Wine and Spirits ("Douglas") and the People's Liquor Warehouse ("PLW") stores and Blackstone. He testified that there are eight (8) Douglas stores in Rhode Island and three (3) PLW stores in Rhode Island.

Power testified that the consulting services include giving advice on pricing, inventory control, product placement, dress code, and deals offered by wholesalers. He testified it is up to a store manager whether to follow a suggestion or not. He testified that W&S recommends vendors for plumbers, electricians, floors, and pickup dumpsters. He testified that there is a computer system at W&S that contains the pricing information of all liquor beverages for all Douglas stores and PLW stores and Blackstone. He testified that the computer system also monitors inventory, sales history, and product movement. See Appellant's Exhibit Three (3) (various emails from Power to Douglas

stores and PLW stores and Blackstone regarding topics such as a dress code, lighting service, gift certificates, inventory, purchasing). He testified that Blackstone isn't involved in the advertising done by W&S.

On cross examination, Power testified that Blackstone does not participate in any centralized or coordinated purchase of wholesale merchandise because it is against the law. He testified the store manager purchases products from vendors who deliver to Blackstone. He testified the store does not participate in common billing. He testified the interior of the Blackstone store is different from the Douglas stores and the points of purchase display are designed by the manager. He testified Blackstone uses computer software from a national company and it is the software that W&S advises its clients to purchase. He testified that there is a program which pulls information from the store software and transmits it to W&S so W&S can work with their client stores and help with the management of inventory, product pricing, and purchasing. He testified that all the stores (Douglas and PLW as well as Blackstone) have authorized W&S to obtain that information from their computer systems.

## **V. DISCUSSION**

### **A. Transfer of a Liquor License**

It is a matter of law that local licensing boards have broad discretion in deciding whether or not to grant a liquor license application. "The granting or denying of such licenses is in no sense an exercise of the judicial process. On the contrary it is purely administrative. In performing that function the board act (sic) as agents of the legislature in the exercise of the police power. . . . [I]t is a matter of discretion whether or not they shall grant the license and this court has no control over their decision." *Bd. of Police Comm'rs v.*

*Reynolds*, 86 R.I. 172, 176 (1975). The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.*, at 177. See also *Domenic J. Galluci, d/b/a Domenic's Log Cabin v. Westerly Town Council*, LCA –WE-00-04 (10/25/00); *Donald Kinniburgh d/b/a Skip's Place v. Cumberland Board of License Commissioners*, LCA–CU-98-02 (8/26/98).

R.I. Gen. Laws § 3-5-19 governs the transfer or relocation of a liquor license. The transfer of a liquor license pursuant to R.I. Gen. Laws § 5-3-19 is treated the same as a new application. *Ramsay v. Sarkas*, 110 R.I. 590 (1972). See also *Island Beverages v. Town of Jamestown*, DBR No. 03-L-0007 (3/13/03); *BDR v. City of Providence, Board of Licenses*, LCA-PR-00-07 (9/18/00). The application to transfer the License is to be treated as a new application for a Class A liquor license.

The Department will not substitute its opinion for that of the local town but rather will look,

for relevant material evidence rationally related to the decision at the local level. Arbitrary and capricious determinations, unsupported by record evidence, will be considered suspect. Since the consideration of the granting of a license application concerns the wisdom of creating a situation still non-existent, reasonable inferences as to the effect a license will have on a neighborhood must be logically and rationally drawn and related to the evidence presented. A decision by a local board or this Office need not be unassailable, in light of the broad discretion given to make the decision. *Kinniburgh*, at 17.

**B. R.I. Gen. Laws § 3-5-11 and its Applicability**

The Appellant argued that the Board should not have granted the transfer of License because Blackstone violated R.I. Gen. Laws § 3-5-11 which prohibits the

granting of a Class A liquor license to any "chain store organization." R.I. Gen. Laws § 3-5-11<sup>3</sup> states as follows:

Licensing of chain stores. – (a) Licenses, except retailer's Class E, Class B, Class B-H, Class B-L, Class B-M, and Class B-V licenses, authorized by this title shall not be granted, issued, or transferred to or for the use of any "chain store organization," which term shall consist of any chain of retail or wholesale business or business organizations, and more specifically defined herein, including, without limitation, grocery stores, markets, department stores, and convenience stores, as well as retailers of alcoholic beverages, and which include chains in which one or more stores are located outside of the state.

(b) The term "chain store organization" is defined to include, but not limited to:

(1) Any group of one or more holders of Class A liquor licenses who engage in one or more of the following practices with respect to the business conducted under such licenses, either directly or indirectly, or have any direct or indirect beneficial interest in the following practices:

(i) Common, group, centralized or coordinated purchases of wholesale merchandise.

(ii) Common billing or utilization of the services of the same person or the same entity in the management or operation of more than one liquor licensed business.

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<sup>3</sup> Another pertinent statute is R.I. Gen. Laws § 3-5-11.1 which states as follows:

Liquor franchises prohibited. – (a) To promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing. Class A liquor license authorized by this title shall not be granted, issued, renewed or transferred to or for the use of any liquor franchisor or franchisee. Class A liquor license holders are expressly prohibited from utilizing the provisions of the Franchise Investor Act, § 19-28-1 et seq.

(b) Any franchise agreements involving the retail sales of alcoholic beverages are hereby declared null and void and illegal as of the effective date of this section [April 1, 2005].

(c) Any franchise agreements involving the retail sales of alcoholic beverages shall be terminated by the franchisor or the franchisee within thirty (30) days of the effective date of this section.

(d) Upon finding of a violation of this section by either the franchisor or the licensee, the department shall be empowered to set a fine up to the amount of ten thousand dollars (\$10,000) per violating franchisor or licensee, revoke the license of the violator or suspend the license of the violator for a period of time to be determined by the department. Additionally, the department shall have the power to revoke or suspend the franchise registration in accordance with § 19-28.1-18 and to order it to cease and desist from all operations that are violative of the provisions of this section.

Notwithstanding anything contained in this chapter to the contrary, this act shall not be construed as to prevent the utilization of duly licensed professionals rendering services as independent contractors.

(iii) Participation in a coordinated or common advertisement with one or more liquor licensed business in any advertising media.

(iv) Coordinated or common planning or implementation of marketing strategies.

(v) Participation in agreed upon or common pricing of products.

(vi) Any term or name identified as a chain or common entity.

(2) Any group of one or more liquor license holders who share any of the following common features, either directly or indirectly or acquire any direct or indirect beneficial interest in the following practices:

(i) The same director of a corporation, member of a LLC, LLP, partner in a general or limited partnership, trustee or beneficiary of a trust.

(ii) The same individual or corporate owners.

(3) Any group of one or more license holders that is found to be a "chain store organization" as a factual matter by the department, as a result of an evidentiary hearing in connection with any application for the issuance, grant or transfer of a license, or upon the filing of a complaint by any member of the public.

(4) Upon a finding of violation of this section, the department shall be empowered to set a fine up to the amount of ten thousand dollars (\$10,000) per violating licensee, revoke the license of the violator, or suspend the license of the violator for a period of time to be determined by the department. Additionally, the department shall issue a cease and desist order against the violating chain store entity(s) and may further order the dissolution of the violating chain store entity(s).

Blackstone argued that the Department previously brought an action against the Douglas and PLW stores alleging those stores were in violation of R.I. Gen. Laws § 3-5-11 but the Department did not include Blackstone in that action. Appellant argued that Blackstone was in violation of R.I. Gen. Laws § 3-5-11.

It should be noted that the Department's decision in its action against the Douglas and PLW stores alleging violations of R.I. Gen. Laws § 3-5-11 was issued on May 24, 2006 which was after the hearing in this matter but prior to the final filings of briefs. The Superior Court upheld the Department's decision on May 21, 2007 which was after the final filing of briefs in this matter. See *Peoples (sic) Liquor Warehouse-Hopkinton et al. v. Department of Business Regulation*, Superior Court 2006-3223 (5/21/2007).

In addition to the Department's action regarding the Douglas and the PLW stores, there was concurrently Federal Court litigation regarding the constitutionality of R.I. Gen. Laws § 3-5-11. After the hearing in this matter but prior to the final filing of briefs in this matter, the District Court issued a bench decision on July 19, 2006 regarding the constitutionality of R.I. Gen. Laws § 3-5-11. The District Court found that W&S and the Douglas stores had been operating as a franchise and continued to act as a franchise even when the franchise agreements were replaced with consulting agreements. The District Court found that even under the consulting agreements, the different Douglas stores still had exclusive territories, similar names, and that W&S still negotiated prices on behalf of all W&S stores, still issued bulletins to stores regarding what products to carry, and prices were still entered centrally by W&S. See Appellant's brief for a copy of the Federal District Court decision: *Wine & Spirit Retailers, Inc. et al. v. Jeffrey Greer, et al.* Civil Action 04-418T (Dt. Ct. of R.I. 7/19/06).

The District Court decision was upheld by the First Circuit Court of Appeals subsequent to the filing of final briefs in this matter. See *Wine and Spirit Retailers v. Rhode Island et al.*, 481 F.3<sup>rd</sup> 1 (1<sup>st</sup> Cir. 2007). The First Circuit decision was decided on March 20, 2007 and a rehearing and rehearing in banc was denied on April 19, 2007. The First Circuit found that R.I. Gen. Laws § 3-5-11 was constitutional. W&S filed a *petition of certiorari* to the United States Supreme Court which was denied. See *Wine & Spirits Retailers, Inc. v. Rhode Island*, 128 S.Ct. 274 (2007).

Blackstone argued that the allegations regarding the operations of Blackstone were not issues before the Board because such arguments would relate to post-licensing operations and Appellant can't argue violations in anticipation of the granting of a



transfer of a license. Blackstone further argued that the connection between Blackstone and W&S was not a link that the Department made and the Department did not impose a revocation of license but rather imposed a ten (10) day suspension of license so that a revocation of the License for a violation of R.I. Gen. Laws § 3-5-11 would be disproportional. Blackstone argued that it was not part of the Federal Court litigation and Blackstone does not participate in the same marketing as the stores referenced in the District Court bench decision.

The Appellant argued Blackstone is clearly in violation of R.I. Gen. Laws § 3-5-11 based on the District Court bench decision.

While the Federal Court litigation relates to the constitutionality of R.I. Gen. Laws § 3-5-11, there are certain findings by the decisions on what constitutes a franchise and what is prohibited under R.I. Gen. Laws § 3-5-11.

At the time that the Board granted the transfer of the License, there was apparently no discussion regarding Power's relationship with W&S. However, it is not necessary to discuss whether the Board should or should not have reviewed the issue of whether Blackstone's operation would have violated R.I. Gen. Laws 3-5-11.<sup>4</sup> Since the grant of the transfer, there have been State and Federal cases regarding W&S's arrangement with the Douglas and the PLW stores. *Infra*. In light of the Superior Court and Federal Court cases and the evidence at hearing in this matter (obtained prior to decisions in the Superior Court and Federal Court), there is an issue of whether Blackstone complies with R.I. Gen. Laws § 3-5-11. The local licensing authority has

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<sup>4</sup> It should be noted that the transfer (and granting) of a liquor license is within the discretion of the local licensing authority and often involves determining whether an applicant – prior to opening - will be able to run an establishment that complies with its statutory obligations and does not cause any problems for the neighborhood. See *Kinniburgh*.

discretion to determine whether to grant or deny a transfer of license. In light of the various Court decisions issued subsequent to this hearing and briefs being filed, the Board should be allowed to exercise its discretionary authority regarding whether to grant a transfer a license.

Therefore, I recommend that this matter be remanded to the Board in order for it to consider whether or not Blackstone complies with R.I. Gen. Laws 3-5-11 in light of the Federal and State cases. The Board shall consider whether the transfer should be granted and if granted, whether Blackstone must abide by certain conditions to maintain compliance with R.I. Gen. Laws § 3-5-11. Pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21,<sup>5</sup> the Board shall also consider whether Blackstone's operations violate R.I. Gen. Laws § 3-5-11 and if so, what would be the appropriate penalty.

## **VI. FINDINGS OF FACT**

1. On or about September 7, 2005, the Board granted the transfer of a Class A liquor license from Gary's to Blackstone.
2. Pursuant to R.I. Gen. Laws § 3-7-21, Appellant appealed said decision by the Board to the Director of the Department.
3. On or about September 19, 2005, a hearing officer was appointed in this matter.
4. A *de novo* hearing was held on this matter on April 13, 2006 and a briefing schedule was established. Briefs were filed by September 6, 2006.

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<sup>5</sup> The Court has consistently recognized that the Department has broad and comprehensive state control over the traffic in intoxicating liquors. *Baginski v. Alcoholic Beverage Comm'n.*, 4 A.2d 265 (1939). Furthermore, *Baginski* found that consistent with the Department's wide powers of regulation and supervision, it is, in effect, a "state superlicensing board." *Id.* at 268. See also *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964); *Belconis v. Brewster*, 14 A.2d 701 (1940). As such the Department has the *sua sponte* authority to take independent action. See R.I. Gen. Laws § 3-2-2. R.I. Gen. Laws § 3-7-21 authorizes the Department "to make any decision or order he or she considers proper."

5. On or about June 14, 2007, the undersigned was appointed substitute hearing officer for the purpose of completing this matter.

6. By letter dated June 15, 2007, the undersigned wrote to the parties requesting a status on this matter regarding whether the parties had resolved this matter or were still waiting for a decision to issue.

7. The parties agreed that the undersigned would delay issuing a decision in order to facilitate a possible settlement. However, in November, 2007, the parties indicated that no settlement was forthcoming and the undersigned could issue a decision in her discretion.

8. The facts contained in Section IV and V are reincorporated by reference herein.

## **VII. CONCLUSIONS OF LAW**

Based on the testimony and facts presented:

1. 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.*

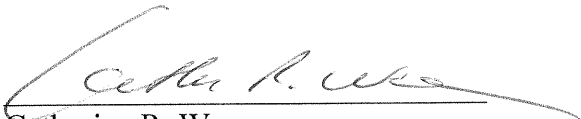
2. Because of the Federal and State decisions issued subsequent to the hearing and filing of briefs in this matter, this matter shall be remanded to the Board for further consideration consistent with the above discussion.

## **VIII. RECOMMENDATION**

Based on the above analysis, the undersigned recommends that due to the Federal and State decisions issued subsequent to the Departmental hearing and filing of briefs in

this matter, this matter be remanded to the Board for further consideration consistent with the above discussion.

Dated: January 17, 2007

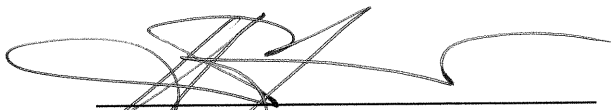
  
Catherine R. Warren  
Hearing Officer

**ORDER**

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

ADOPT  
 REJECT  
 MODIFY

Dated: 01-18-2008

  
A. Michael Marques  
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 22 day of January, 2008 that a copy of the within Order was sent by first class mail, postage prepaid to -

Robert M. Brady, Esquire  
One Grove Avenue  
East Providence, RI 02914

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and by hand-delivery to Maria D'Alessandra, Commercial Licensing and Regulation, Department of Business Regulation, 233 Richmond Street, Providence, RI 02903.

  
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