

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION**

J.J.A.M. Sport, Inc. d/b/a La Cabana Night Club
Appellant,

v.

Town of Lincoln Board of License Commissioners,
Appellee.

DBR No.: 08-L-0182

DECISION

Hearing Officer: Catherine R. Warren, Esquire

Hearing Held: October 3, 2008

Appearances:

For J.J.A.M. Sport, Inc.
d/b/a La Cabana Night Club: Frank J. Milos, Jr., Esquire

For Town of Lincoln Board of
License Commissioners: Anthony DeSisto, Esquire

I. INTRODUCTION

On or about September 16, 2008, the Town of Lincoln Board of License Commissioners (“Lincoln” or “Board”) revoked J.J.A.M. Sport, Inc. d/b/a La Cabana Night Club’s (“Appellant”) Class B liquor license (“License”). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision by the Board to the Director of the Department of Business Regulation (“Department”). A hearing on the Appellant’s motion to stay the revocation was heard on September 22, 2008 and an order granting a stay with conditions was entered by the Department on September 23, 2008. A *de novo* hearing was held on October 3, 2008 before the undersigned sitting as a designee of the Director. The parties agreed to a briefing schedule and timely filed briefs by October 27, 2008.

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.*

III. ISSUE

Whether to uphold or overturn Lincoln's decision to revoke Appellant's License.

IV. MATERIAL FACTS AND TESTIMONY

Officer Ryan LaBoissonniere ("LaBoissonniere"), Lincoln Police Department, testified on behalf of Lincoln. He testified that on July 26, 2008, he worked the 4 p.m. to midnight shift. He testified that he stopped at Appellant's because the parking lot was crowded and he knew the Board had restricted the Appellant's capacity so he went inside and asked Edgar Mazo ("Mazo"), one of Appellant's co-owners, if he knew the head count and Mazo did not. He testified he received a call for a disturbance so he was not able to immediately perform a head count but when he returned after responding to the call, there was a line outside of about fifteen (15) people. He testified that he and Officer Bousquet ("Bousquet") performed a head count. He testified that he counted 192 patrons and Bousquet counted 195. He testified he called his Lieutenant to report the findings.

Upon cross-examination, LaBoissonniere testified that he did not perform a head count when he first arrived because he received a call about some unruly males on a street which took priority over checking the Appellant's so had to leave. He testified that there were no advertisements for any events at Appellant's. He testified that the patrons were watching a televised boxing match which was the only entertainment there. He testified he did not take anyone into custody. He testified that he asked Mazo to close the

door which he did. He testified that he and Bousquet dispersed the patrons outside without incident. He testified that after Bousquet reported the head counts to the Lieutenant that neither he nor Bousquet were ordered to disperse the crowd and they did not disperse the crowd. He testified that the second time he went to the Appellant's, he was there for a total of 45 minutes.

On re-direct examination, LaBoissoneirre testified that he did not have a chance to perform a head count the first time he was at Appellant's because he was called away but the Appellant's was crowded enough that he thought a head count should be performed. He testified that he was called for a potential criminal act which takes priority over the overcapacity issue which would be a civil violation.

On re-cross examination, LaBoissoneirre testified that that since there were cars outside the Appellant's and the doors were open, he stopped there but there had been no dispatch to go there and no complaints by the neighbors.

Officer Richard Bousquet, Lincoln Police Department, testified on the Board's behalf. He testified he was on duty the night of July 26, 2008. He testified that he went to the Appellant's at approximately 11:30 p.m. and that the door was open with a line outside going into the street of about fifteen (15) to twenty (20) people. He testified he performed a head count of 195. He testified that he and LaBoissoneirre dispersed the line outside and asked Mazo to close the door because of the noise. He testified that that no arrests were made. He testified he called in the head counts and the Lieutenant said to get the bartender's name, exit the club, and make a report.

On cross-examination, Bousquet testified that he arrived at Appellant's at 11:30 p.m. and that he had previously been on a call with LaBoissonniere for the disorderly

males who had dispersed by the time they responded to the call. He testified that when they went to the Appellant's there was a boxing match on television. He testified that there was no advertising for the boxing match. He testified that the patrons were cheering the match and there was no disorderly conduct and no arrests made. He testified that he did not tell Mazo to clear out the patrons. He testified that they dispersed the outside patrons because they were in the street. He testified that if their Lieutenant had told them to reduce capacity they would have.

On re-direct examination, Bousquet testified that they cleared the scene by 12:15 a.m. and the Appellant closed at 1:00 a.m. and they do not have the authority to make arrests for violations of licensing conditions.

Jeremiah O'Grady ("O'Grady") testified on the Board's behalf. He testified that he is a member and president of Lincoln town council and also sits as a member of the Board. He testified that there was a full show cause hearing in this matter on September 16, 2008 before the Board because of the July 26, 2008 incident. He testified that the Board voted unanimously to revoke the Appellant's License. See Lincoln's Exhibit Four (4) (minutes of the September 16, 2008 meeting).

O'Grady testified that at a May 19, 2008 hearing, the Board and Appellant agreed to licensing conditions for the Appellant that included the following: 1) the downstairs would be closed until sprinklers were hooked up; 2) a capacity of 100 for upstairs; and 3) the Appellant would serve a thirty (30) day suspension. See Lincoln's Exhibit One (1) (minutes of the May 19, 2008 Board meeting).

O'Grady testified that there was a hearing in September 17, 2007 regarding Appellant's because of allegations that a glass bottle had been thrown inside the

establishment and the Board imposed a condition of no glass bottles in the lower level and a one (1) day suspension and for Appellant to close at 12:00 a.m. rather than 1:00 a.m. He testified that the Appellant appealed and the parties settled the matter by agreeing to reinstate the 1:00 a.m. closing time and the Appellant served a four (4) day suspension. See Lincoln's Exhibit Two (2) (minutes of the September 17, 2007 meeting).

O'Grady testified that there was a parking area disturbance in March, 2007 with a hearing being held in April, 2007. See Lincoln's Exhibit Three (3). O'Grady also testified that there was also a parking lot disturbance on December 28, 2005 and then in March, 2006, there was an incident with a drunk under aged security staff member assaulting a police officer. He testified that 2005 and 2006 incidences were resolved with what he remembered as a one (1) week suspension.

On cross-examination, O'Grady testified that the parking lot disturbance (April 16, 2007 hearing) happened after the club had closed.

Roger Pearce, Building Official for Lincoln, testified on the Board's behalf. He testified that if the Appellant has more than 100 patrons it would be a nightclub and would need to be fully sprinkled. He testified that the Appellant has a variance from the State Fire Board but none for the Building Code. On cross-examination, he testified that with a 100 patron limit, there is no need to tie in the sprinklers.¹

Alido Baldera ("Baldera") testified on behalf of the Appellant. He testified that he along with his brother Johnny and Edgar Mazo formed the Appellant's thirteen (13)

¹ David Almond, Chief, Saylesville Fire Department, also testified on behalf of Lincoln. He testified regarding the payments owed by Appellant to the Saylesville Fire Department for fire details provided by the Fire Department. However, that issue is separate and apart from the overcapacity issue that formed the basis for the sanction that was issued and is being appealed.

years ago. He testified that it has held Class B Liquor License for thirteen (13) years and provides a social club for the Latino community.

Baldera testified that he takes all the charges seriously. He testified that after the bottle throwing incident, glasses were replaced with paper cups. He testified that there hasn't been any other of those types of incidents since. He testified that after the August 5, 2007 incident, the Appellant put cameras inside, increased security personnel to four (4) staff plus the two (2) police officer detail. He testified that the August 5, 2007 incident was on a hip-hop night and after that, they never had a hip-hop night because of the problems associated with it. He testified that on the night of the March 2007 assault on a patron, there were no owners there and the manager was let go.

Baldera testified on the July 26, 2008 incident he wasn't at the club but people were there for the boxing match between boxers from Puerto Rico and Mexico. He testified that the Appellant had not advertised the match. He testified that after the thirty (30) day suspension between May to June, 2008, business slacked off.

Under cross-examination, Baldera testified that he and his co-owners rotate each week that they work but on occasion they will go in during week they don't work. He testified that he worked about two (2) weeks after the June-July, 2008 suspension. On re-direct examination, Baldera testified that even though he doesn't work every week, he and the co-owners review their weekly receipts so he is aware of the state of the business.

Edgar Mazo testified on behalf of the Appellant. He testified he is one (1) of the three (3) co-owners of Appellant and was working the night of July 26, 2008. He testified the televised boxing match started at 11:00 p.m. He testified that he had opened the premises that day at noon since it was a Saturday. He testified that prior to the boxing

match at about 10:30 p.m. there were about 45 to 50 patrons inside. He testified that he did not take a head count and the match had not been advertised. He testified that he was surprised at the number of people that showed up for the match.

Mazo testified that at about 11:15 p.m. the police officers arrived for the second time which was during the second or third round of the fight and he testified that there were over a 100 patrons inside. He testified that he did not deny that there were over 100 patrons inside. He testified he had realized the place was full which is why he didn't allow anymore people in and there were patrons outside. He testified that the boxing match ended about midnight. He testified that the police officers performed a head count during the match and when the fight ended most people left so the count went back to about 45 or 50.

On cross-examination, Mazo testified that there are six (6) television sets upstairs which are typically tuned to sporting events. He testified that he was surprised at how many people showed up for the match. He testified that it is hard to tell for which sports people will show up. He testified he didn't perform a count that night but has taken counts other nights because of the capacity requirements. He testified that the club was quiet about 10:30 p.m. so he hadn't been taking a head count and then suddenly people showed up for the match and when he noticed the building was full he stopped people from coming in.

On re-direct examination, Mazo testified that after the head count, he closed the doors at the officers' request but the officers didn't tell him to clear the premises. He testified that the officers did not clear the premises. He testified that the crowd was back

to about 45 or 50 by about 12:15 a.m. and the club closes at 1:00 a.m. He testified that the crowd dispersed because the boxing match ended.

Based on the testimony and exhibits, the Appellant's discipline history is as follows:

1. May 19, 2008 Board hearing regarding fire and building code violations and an assault. The parties agreed to the following: 1) downstairs closed until compliant with fire code; 2) less than 100 capacity upstairs; 3) no low lighting; 4) no entertainment; 5) spot checks; and 6) thirty (30) day suspension. See Lincoln Exhibit One (1).

2. September 17, 2007 Board hearing on incident on August 5, 2007 (glass throwing). The Board imposed a one (1) day suspension and 12:00 a.m. closing rather than 1:00 a.m. closing. The issue was resolved between parties as a four (4) day suspension and the 1:00 a.m. closing was reinstated. See Lincoln Exhibit Two (2) and testimony above.

3. April 16, 2007 Board hearing on an unruly crowd not dispersing on March 2, 2007. Three (3) day suspension issued. See Lincoln's Exhibit Three (3) (minutes of April 16, 2007 hearing).

4. O'Grady testified that there was a one (1) week suspension in 2006 for an incident in 2005 and an incident in 2006 but no minutes were introduced regarding this sanction.

V. DISCUSSION

A. Relevant Statutes and Causes 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 . . . 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 a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. See *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964).² 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).

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.

Nonetheless, 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 *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation of license 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); *Sweet Home, Inc. d/b/a China Garden Restaurant v. North Providence Board of License*

² 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.

Commissioners, LCA-NP-99-06 (7/22/99) (incidents on two (2) nights involving severe infractions with crowds throwing bottles and fighting the police, where penalty was compatible with prior revocation cases); and *Tropics, Inc. d/b/a Club Tropics v. City of Warwick, Board of Public Safety*, LCA-WA-97-05 (2/28/97) (series of infractions justified revocation).

B. Whether the Revocation of License was Justified

At the local level, the Board issued the Appellant a citation to show cause alleging four (4) violations. In its brief, the Appellant acknowledged that it had violated the second allegation by the Board in that it had been at overcapacity on the night in question. See Lincoln's Exhibit Five (5) (citation).³ There is no dispute that the Appellant was overcapacity at the time of the incident.

As discussed above, a Licensee is responsible for the activities within (and outside) its premises. The capacity of a licensed establishment is a condition of licensing. Clearly, the Appellant violated R.I. Gen. Laws § 5-3-21 by failing to maintain its capacity as a capacity limit is a condition of licensing. While the citation alleged violations of R.I. Gen. Laws § 3-5-23, the evidence at hearing revolved around the overcapacity violation. Since the overcapacity violation has been admitted to and is clearly a violation of R.I. Gen. Laws § 3-5-21, there is no need to reach a determination regarding whether the overcapacity violation also falls under R.I. Gen. Laws § 3-5-23. What the parties do dispute is whether the revocation of the License is the appropriate sanction. Lincoln

³ The citation alleged that there was an issue with the Appellant's food license but that is not before the undersigned. The citation also alleged a violation of R.I. Gen. Laws § 3-5-23 and a violation of a local ordinance regarding violating a condition of licensing.

argued that the revocation of Appellant's License is justified and the Appellant has sought a sanction short of revocation.

The Department will uphold a revocation where an incident is so egregious as to justify revocation without progressive discipline. *Infra*. The Department has declined to uphold a revocation where the violation is not so egregious or extreme and the local authority has not engaged in progressive discipline. See *C and L Lounge, Inc. d/b/a Gabby's Bar and Grill; Gabriel L. Lopes, v. Town of North Providence, and the North Providence Town Council*, LCA-NP-17 (4/30/99). In that decision, the Department found that the revocation was inappropriate as there had not been progressive discipline and the acts complained of did not rise to a level of revocation.

In contrast to *Gabby's*, the Department has upheld revocations when there been a series of progressive discipline and there has been a finding that has such discipline has not prevented the Appellant from engaging in further violations See *Pakse Market*. In that matter, there had been four (4) underage violations within three (3) years with the first violation receiving a two (2) day suspension, the second a four (4) day suspension, the third a fifteen (15) day suspension, and the fourth a revocation. The local authority concluded that the licensee was unable to comply with statutory requirements and revoked the license which was upheld by the Department and Superior Court.

In contrast to *Pakse*, the Superior Court overturned a Department decision finding that a license revocation was arbitrary and extreme. See *Jake and Ella's v. the Department of Business Regulation*, 2002 WL 977812 (R.I.Super. 2002) In that matter, the licensee had two (2) after hour violations with the first violation receiving a monetary sanction and the second violation receiving a revocation. The Court found that the

Department ignored the concept of proportionality that was expected to be applied so that there was an abuse of discretion. In that matter, the local authority jumped from a monetary fine to a revocation for identical violations without a finding that the violations were egregious and extreme.

In this matter, there was testimony at hearing that there was a one (1) week suspension in 2006 although no Board minutes were introduced to support this testimony. However, the Appellant did not dispute that testimony.

Nonetheless, it is clear that since April, 2007, the Appellant has had the following discipline: 1) April 2007: three (3) day suspension for an unruly crowd; 2) September 2007, parties agreed to a four (4) day suspension for a glass throwing incident; and 3) May 2008, parties agreed to a thirty (30) day suspension and a 100 patron capacity regarding an assault, building and fire code violations. Approximately one (1) month after the thirty (30) day suspension ended, the Appellant violated R.I. Gen. Laws § 3-5-21 by being at overcapacity. Therefore, in the space of about a year and a half, the Appellant has had a three (3) day suspension, a four (4) day suspension, and a thirty (30) day suspension.

The Appellant argued that the overcapacity violation occurred for a very short time and was a surprise to the co-owner on duty and there were no allegations by Lincoln of fighting or assaults and no arrests were made.

The evidence was that at about 10:30 p.m., patrons came to the Appellant's to watch a televised boxing match that started at 11:00 p.m. Mazo testified that he stopped letting people in when he realized that it was crowded which was why there were people on line outside when the police officers arrived. The police officers testified that after

performing the head count they didn't clear the area and the testimony was the head count was completed about 12:15 a.m. at which time the boxing match had finished and the Appellant closed at 1:00 a.m.

While the Appellant is accurate in stating that there were no allegations of fighting or assaults or arrests that night, overcapacity is still a danger to the public. The Appellant argued that it could not be that much of a danger as the police officers responded to another call before returning to Appellant's to conduct a head count. However, the testimony demonstrated that the other call concerned possible criminal action which took priority over a possible civil violation. The fact that the police officers had to respond to another call does not change the fact that there was an overcapacity violation at Appellant's.

This violation happened approximately one (1) month after a thirty (30) day suspension. The Appellant has had three (3) suspensions in 1½ years for various disorderly violations. Such a record demonstrates that the Appellant has repeatedly demonstrated that it cannot operate within its statutory requirements. While the Appellant may have been surprised by the number of patrons on the night in question, the fact remains that it is a liquor licensee's obligation and duty to maintain compliance with its conditions of licensing and to implement and enforce such requirements regardless of the circumstances.

Based on the forgoing, because of the ongoing nature of the violations and the progressive discipline that has been imposed as described above, Lincoln had cause under R.I. Gen. Laws § 3-5-21 to revoke the License

VI. FINDINGS OF FACT

1. On or about September 16, 2008, the Board notified Appellant that its License had been revoked.

2. Pursuant to R.I. Gen. Laws § 3-7-21, Appellant appealed that decision by Lincoln to the Director of the Department.

3. A *de novo* hearing was held on October 3, 2008 before the undersigned sitting as a designee of the Director.

4. All briefs were filed by October 27, 2008.

5. 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. In this *de novo* hearing, no showing was made by Appellant that would warrant overturning the Board's decision to revoke its License.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board revoking Appellant's License be upheld.

Dated: November 24, 2008




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: 11-25-2008



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.

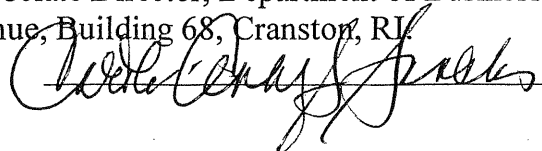
CERTIFICATION

I hereby certify on this 26th day of November, 2008 that a copy of the within Order was sent by first class mail, postage prepaid to -

Frank J. Milos, Jr., Esquire
Neary and Milos, LLP
103 Cottage Street
Pawtucket, RI 02860

Anthony DeSisto, Esquire
DeSisto & Feodoroff
One Turks Head Place, Suite 1010
Providence, RI 02903

and by hand-delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 68, Cranston, RI



Maria D'Alessandro
Associate Director