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

Ice Lounge, Inc. d/b/a Ice Lounge, Appellant,	:	
v.	:	**DBR No.: 14LQ064**
City of Providence, Board of Licenses, Appellee.	:	

RECOMMENDATION AND INTERIM ORDER GRANTING MOTION FOR STAY WITH CONDITIONS AND NOTICE FOR DE NOVO HEARING

I. INTRODUCTION

Ice Lounge, Inc. d/b/a Ice Lounge ("Appellant") seeks a stay of the City of Providence, Board of Licenses' ("Board") decision taken on December 8, 2014 to revoke its Class BVX liquor license ("License"). The Board objected to the Appellant's motion. This matter came before the undersigned on December 12, 2014 in her capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation ("Department").

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-1 *et seq.*, R.I. Gen. Laws § 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. STATUTORY BASIS 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.

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.

IV. DISCUSSION OF CASES ON REVOCATION

In revoking 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. See also *AJC Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Schillers;* and *Furtado v. Sarkas*, 118 R.I. 218 (1977).

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 *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). 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. 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. ARGUMENTS

The Appellant argued that the penalty is excessive in light of the fight and the Appellant's other violations. The Appellant argued that the testimony at hearing did not support the Board's

findings. The Appellant argued that the Board relied on a Department decision that had not been issued at the time of the fight. The Appellant argued that the testimony at hearing was then when there is a police call for assistance, all officers respond so that is not dispositive on the nature of the Fight to find that 20 officers responded. The Appellant acknowledged that it is not a smoking bar. The Appellant argued that the circumstances are not so egregious as to warrant revocation.

The Board argued that the Appellant did not meet the requirements to grant a stay. The Board argued that there is no dispute that there was a fight in the bar. The Appellant argued that irreparable harm does not include economic harm. The Appellant also raised the issue that the Appellant has changed its business plan significantly from its representations to the Board. The Board argued that the Appellant agreed to numerous violations including allowing public smoking, having entertainment without a license, and acting as a nightclub. The Board argued that there was no evidence that the Appellant is a smoking bar [pursuant to R.I. Gen. Laws § 23-20.10-1 *et seq.*]. The Board argued that the Appellant has continually ignored its statutory requirements by constantly violating the smoking and entertainment and other requirements as well as allowing the fight.

VII. DISCUSSION

Prior to the October 26, 2014 fight ("Fight") at Appellant's, the Board had been prosecuting the Appellant for a variety of infractions related to public smoking, entertainment without a license, allowing dances, etc. but was not seeking revocation. After the Fight, the Board proceeded to seek revocation and ordered the Appellant to close on an emergency basis. The Appellant and the Board agreed that the Appellant would close pending hearing. The License was revoked on December 8, 2014. The Appellant stipulated to a variety of violations

while at the Board level including public smoking, entertainment without a license, allowing dances.[1]

The Board argued that the Appellant was consistently ignoring the law by engaging in a series of violations regarding public smoking and entertainment without license which it had been sanctioned for previously. However, it was not until the Fight did the Board seek revocation. The Board also apparently based its revocation decision on a Department decision issued on October 31, 2014[2] which was after the date of the Fight so that the Appellant would have had no way to follow such said case, if applicable.

There is no dispute that the Fight occurred; however, the details of the Fight are in dispute. The Appellant's licensing history indicates that it has had no previous suspensions for any disorderly conduct. Instead, it has previously been fined for such violations as public smoking, entertainment without a license, hours of operations, and underage service. The Department has consistently followed progressive discipline barring an egregious act. Based on a review of the record, in terms of the Fight, an imposition of a suspension (rather than revocation) would most likely be consistent with previous Department matters. In *DL Enterprises d/b/a East Bay Tavern v. East Providence City Council*, DBR No. 14LQ009 (4/28/14), the Department reduced revocation to a 14 day suspension for fighting inside bar. In *JJAM Sports, Inc. d/b/a LaCabana Night Club Sports Bar and Grille, Inc. v. Lincoln Board of*

[1] The Appellant represented at hearing that upon learning of the Fight, the Board Chair sought to direct the Board to seek a revocation of License. See October 30, 2014 Board hearing transcript, pp. 5-6. Apparently due to concerns regarding possible violations of *Barbara Realty Company v. Zoning Board of Review*, 128 A.2d 342 (R.I. 1957) (zoning member expressed opinion on matter prior to hearing leading to the quashing of the decision) and *La Petite Auberge, Inc. v. R.I. Commission for Human Rights*, 419 A.2d 274 (R.I. 1980) (adjudicative and investigative roles of commission must be separate), the Appellant requested the Board Chair to recuse herself but she declined. The Appellant represented that it then agreed to the violations. However, the appeal is *de novo* so that such violations could be litigated despite the agreements below. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964).

[2] See *Gianco, Inc. d/b/a $3 Bar v. City of Providence, Board of Licenses*, 14LQ043 (10/31/14).

License Commissioners, LCA-LI-99-05 (12/27/99), the Department uphold a two (2) day suspension for a fight inside the bar and a second fight outside in the parking lot with the patrons refusing to leave and police (including from the adjoining community) being called to clear the patrons and a police officer had a beer bottle thrown at him. See also *C & L Lounge, Inc. d/b/a Gabby's Bar and Grill; Gabriel Lopes v. Town of North Providence*, LCA-NP-98-17 (4/30/99) (thirty (30) day suspension for severe disorderly conduct but not so severe as to merit revocation). The other violations could also warrant a suspension after a review.

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. There is no dispute that there was a Fight. Liquor licensees are responsible for conduct that arises within their premises and for conduct that occurs off premises but can be reasonably inferred from the evidence had their origins inside. In revoking a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. The owner is responsible for that situation. The issue on appeal is to determine the extent and nature of the disturbance and what, if any, is the appropriate sanction for said incident. The Appellant currently has been suspended (closed) for approximately 45 days. Additionally, the Board (an interested party) has an interest in ensuring that liquor licensees – where the public gather - are compliant with their statutory obligations. In addition, there is a public protection interest.

VIII. CONCLUSION

It cannot be determined without an appellate review/full hearing what the appropriate sanction should be for the Fight and other violations. The concerns regarding public safety can be met by the imposition of conditions.

IX. RECOMMENDATION

Based on the forgoing, the undersigned recommends that the Appellant's motion for a stay of the revocation of License be granted on the basis of the following conditions.

1. No public smoking;
2. No entertainment without a license;
3. No disc jockeys;
4. No acting as a nightclub;
5. Only ambient music; and
6. Two (2) police officer detail on Friday and Saturday and State holiday nights.[3]

The Board and Appellant may agree to modify the conditions of the stay if they choose.

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.

A *DE NOVO* HEARING WILL BE HELD ON JANUARY 15, 2015 at 9:30 a.m. AT THE DEPARTMENT OF BUSINESS REGULATION, PASTORE COMPLEX, 1511 PONTIAC AVENUE, CRANSTON, RI.[4]

Dated: 12/15/14

Catherine R. Warren
Hearing Officer

[3] This should include Christmas Eve and New Year's Eve as well as any other evenings that the extended license would be allowed to be used.

[4] If this date is inconvenient to a party(s), the party should contact the other party and the undersigned to schedule a mutually convenient date. The Appellant is advised that pursuant to R.I. Gen. Laws § 3-7-21, it is the Appellant's responsibility to provide a stenographer at hearing.

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: 16 Dec 2014

Paul McGreevy
Director

Entered this day as Administrative Order Number 14-71 on 16th of December, 2014.

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 16th day of December, 2014 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 and Nicholas Hemond, Esquire, DarrowEverett, LLP, 1 Turks Head Place, Suite 1200, Providence, RI 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