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

334 South Water LLC d/b/a Mile & A Quarter, Appellant,	
v.	**DBR No.: 16LQ007**
City of Providence, Board of Licenses, Appellee.	

DECISION

I. INTRODUCTION

On April 24, 2016, the Providence Board of Licenses ("Board") held an emergency suspension hearing on 334 South Water LLC d/b/a Mile & A Quarter's ("Appellant") licenses including its Class BVX liquor license ("License"). The Board ordered the Appellant's License be suspended for 72 hours and scheduled a full hearing for April 27, 2016. The Appellant requested that the Department stay the emergency suspension of its License. By order dated April 27, 2016, the Department denied the request for stay. On April 28, 2016, the Superior Court issued an order effective until May 4, 2016 limiting the Appellant's License. On May 4, 2016, the Board continued those same conditions. The Board was scheduled to issue a decision on May 11, 2016. The Appellant requested a stay and by order dated May 5, 2016, the Department denied the request for stay. On May 11, 2016, the Board imposed the following sanctions:

For the February 20, 2016 incident: Two (2) day suspension of License, administrative penalty of $2,500, police detail on Fridays and Saturdays, and monthly filing for entertainment.

For the April 24, 2016 incident: Three (3) day suspension of License (already served); administrative penalty of $2,500, 30 day suspension of entertainment license, and closure of premises at midnight for 30 days.

After the Board's May 11, 2016 decision, the Appellant sought a stay of the two (2) day License suspension, the 12:00 a.m. closing time for 30 days, and the 30 day entertainment license suspension. The stay hearing was held on May 12, 2016. By order of the Department dated May 13, 2016, the Department found that it did not have jurisdiction over the entertainment license, but stayed the 12:00 a.m. closing time for 30 days and the two (2) day suspension of License.

A hearing was held on June 7, 2016 for further testimony and oral argument on the record.[1] The parties were represented by counsel.

II. <u>JURISDICTION</u>

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-2, 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. <u>ISSUES</u>

Whether there was disorderly conduct pursuant to R.I. Gen. Laws § 3-5-23 at the Appellant's on February 20 and/or April 24, 2016 and if so, what sanction(s) should be imposed.

IV. <u>MATERIAL FACTS AND TESTIMONY</u>

For both incidences, the parties relied on the record from the Board regarding the February 20 and April 24, 2016 incidences except that the City presented further testimony at the Department regarding the video of the April incidence.

[1] The Department transcript was received on July 15, 2016

A. Testimony for February Incident

Before the Board, Officer Troy Lambert ("Lambert"), Providence Police Department ("PPD"), testified on behalf of the City. He testified that on February 20, 2016, he was on detail at the Appellant. He testified that the Appellant is located between South Water Street and South Main Street and the entrance where people enter is on South Water Street. He testified that the fight occurred on a platform between two (2) flights of stairs at Appellant's.[2] He testified that there were ten (10) to 15 people fighting and throwing punches. He testified that he announced himself as a police officer and told them to break it up, but they did not and he pulled people apart, but they kept fighting so he used his PPD issued pepper spray. He testified that Detective Silva ("Silva")[3] was with him trying to break up the fight and he did not see any security from the Appellant. He testified that the crowd was easy to disperse once he used pepper spray. He testified that Silva made the written report after the establishment was clear.

On cross-examination, Lambert testified that he did not see any security at the fight. He testified that when he was leaving, he spoke to the Appellant's security and told them there had been a disturbance that had to be broken up. He testified that it is a policy as a club detail that one informs the club owner there was a disturbance. On redirect examination, he testified that if more than one (1) officer responds to an incident, only one (1) officer will write it up. On questioning from the Board, he testified that he does not know if he interacted with the Appellant's owner or general manager and that he did not make any arrests because was he breaking up the fight.

[2] The parties represented that the alleged fight took place on a platform or slab that has steps leading to the restaurant (closed at that time) and not the stairs that lead to the upstairs ("the loft"). However, there is an exit there at which people from upstairs could end up; though they would most likely end up on South Water Street when exiting. June 7, 2016 Department transcript, pp. 18-19.

[3] Detective Ricardo Silva.

Before the Board, Silva, PPD, testified on behalf of the City. He testified that on February 20, 2016, he was on detail at the Appellant. He testified that there was a fight on the side of the Appellant near the stairs adjacent to the parking lot. He testified that a patron notified him that a fight was going on. He testified that there were about 15 people fighting, punching and kicking. He testified that he yelled at them to disperse, but they did not comply so he struck one (1) person with his ASP baton. He testified that Lambert used pepper spray and that everyone dispersed and they did not make any arrests because everyone left.

On cross-examination, Silva testified that the incident happened around 2:00 a.m. and the 2:28 a.m. time on the report is the time he was given when he called in for a report number after the fight had finished. He testified that the fight was going on for 20 to 30 seconds, maybe even a minute before they arrived. He testified that the fight would have ended shortly before 2:28 a.m. He testified that he did not recall if he notified security or the general manager about the fight. On redirect, he testified that there are no other establishments open at that time, but on re-cross examination, he testified that there are some clubs located much further down. On questioning from the Board, he testified that in his opinion, the people fighting were from the Appellant.

Michael Altieri, the Appellant's general manager, testified on behalf of the Appellant. He testified that he was the Appellant's on February 20, 2016 and he usually signs out detail officers about 2:15 a.m. or 2:20 a.m. He testified that on February 20, 2016, the officers did not tell him about the incident when he signed them out.[4] He testified that the doors would have been closed by 2:25 a.m. On cross-examination, he testified that the restaurant doors are closed by midnight and nobody should be coming out of those doors.

[4] He signed both officers' detail slips. See May 4, 2016 Board transcript.

B. Testimony for April Incident

Before the Board, Officer Andre Francis testified on behalf of the City. He testified that he was on a detail on April 23-24, 2016 and at about 1:30 a.m., he went upstairs and heard people say there was a fight and heard yelling, screaming, and people exiting. He testified that he could see directly into part of the club and there was a large group of people and he and his partner did not go in because of their firearms. He testified that they decided to wait for security to take control and remove the instigator. He testified that they could hear the fight and the instigator was not being removed. He testified that the fight went on for about ten (10) minutes and when back-up arrived, they went upstairs and the fight was ongoing, but they did not go inside because they got a call about fighting outside. He testified that he went outside and there were multiple subjects fighting in the middle of the street, punching, screaming, and pulling. He testified that several officers also responded and they started dealing with the groups of people. He testified that it took about 30 to 35 minutes to get the fight under control. After the crowd dispersed, he testified that they went inside to speak with the manager and the owner. He testified that inside the club he saw a broken window and broken glass that was being swept up. He testified that he spoke with the manager Altieri. He testified that they did not want to initially enter the large crowd because they had firearms and did not want to introduce any weapons to the club, and they were outnumbered so they called for back-up. On cross-examination, he testified that when the crowd dispersed, there were about seven (7) officers on the scene. On questioning from the Board, he testified there were about 250 people inside but not all were fighting and about 25 people outside.

Before the Board, Officer Jennifer Wade, PPD, testified on behalf of the City. She testified that on April 23-24, 2016, she was on detail at the Appellant. She testified when she was inside, she and Francis were on opposite ends. She testified that she saw people run down the stairs saying

there was fighting. She testified that she could only see a portion of the club but there were people fighting and yelling at each other and trying to rush out of the door. She testified that it was so crowded that they could not even go through the front doors if they wanted to and she did not want to introduce her weapon to the crowd. She testified that they called for back-up and she did not see the security. She testified that when the cars arrived, they went back up, and there was still fighting. She testified that about five (5) of them went back upstairs, and more people were coming down and there were fights outside so they had to go back out, because there were people all over the place, in the parking lots, and in the street. She testified that they gave verbal demands to disperse, but people were not listening and traffic was blocked. She testified that it felt like 30 minutes or more. She testified that people were grabbing each other, kicking, and yelling, and after they dispersed the crowd, they went upstairs to the manager. She testified that she saw blood, plastic cups, a broken window, and people trying to clean up. On cross-examination, she testified that they made a report about 3:00 or 3:30 a.m. She testified that the incident started about 1:30 a.m. and everyone was out by around 2:00 a.m.

Before the Board, Sergeant Andrew Scanlon, PPD, testified on behalf of the City. He testified that he is a district supervisor and on April 24, 2016, the Appellant's detail officers called for assistance. He testified that he saw three (3) police officers inside and nobody outside. He testified people were rushing out yelling and screaming and were fighting outside. He testified he called for more cars and about 15 cars with single officers showed up. He testified that when he receives enough responses, he calls off cars but he needed all the officers to break up the fighting. He testified that it took about a half-an-hour from the time he got there to disperse the crowd. On cross examination, he testified that he arrived around 1:45 a.m.

At the Board hearing and at the Department hearing, Detective Derek Shields testified on behalf of the City. He testified as to the various security videos taken on April 24, 2016 by the Appellant's video cameras. See City's Exhibit One (1) (various videos of April 24, 2016 fight inside the Appellant).[5] In looking at the video, there is continuous pushing and shoving inside for about ten (10) minutes with some people falling. One patron who kicked someone on the ground is still inside five (5) minutes later. A window was broken by the crowd pushing each other.

Before the Board, Natalia Foussekis testified on behalf of the Appellant. She testified that she is the Appellant's owner's granddaughter and she fired the security firm on April 24, 2016 and hired a new firm.

Before the Board, Wayne Fantasia testified on behalf of the Appellant. He testified that he owns Northeast Security Company and was hired after April 24, 2016 by the Appellant to perform security. He testified that he reviewed the April 24 video and that there was not enough security staffing and there were issues with handling the situation in that the old security firm was slow to remove patrons and separate them.

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative

[5] The video was shown and entered into exhibit at the Department hearing, but a copy was never forwarded to the undersigned.

enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131(R.I. 1998).

B. The Appeal before the Department

The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) (as the hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence). See also *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964). Thus, while there was not a totally new hearing before the Department, the proceeding before the Department is considered a *de novo* hearing. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision. Therefore, this appeal is not bound by the Board's reasons for suspension but whether the Board presented its case for suspension before the undersigned. The undersigned will make her findings on the basis of the evidence before her and determine whether that evidence justifies said suspension and penalty.

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).

An appeal proceeding held pursuant to R.I. Gen. Laws § 3-7-21 is considered a civil proceeding. See *Board of License Commissioners of Tiverton v. Pastore*, 463 A.2d 161 (R.I. 1983). See also *Scialo v. Smith*, 210 A.2d 595 (R.I. 1965). In civil proceedings, unless otherwise specified, the burden of proof generally needed for moving parties to prevail is a fair preponderance of the evidence. *Jackson Furniture Co. v Lieberman*, 14 A.2d 27 (R.I. 1940). See also *Parenti v. McConaghy*, 2006 WL 1314255 (R.I.Super.); and *Manny's Café, Inc. v. Tiverton Board of Commissioners*, LCA TI-97-16 (11/10/97) (Department decision discusses burden of proof for proceedings held pursuant to R.I. Gen. Laws § 3-7-21).

C. Arguments

The Appellant filed a motion to dismiss the February allegations. The Appellant argued that it was only notified of the February 20, 2016 allegations five (5) weeks after the incident so the video tape had been erased because it is on a 30 day cycle which is unfair and prejudicial. The Appellant argued that the officers testified that the February incident was less than a minute, but contradicted each other in describing the crowd with one talking about a tough crowd and gang

colors and the other testifying that he did not see such things.[6] The Appellant argued that it voluntarily turned over the April 24th video which it was unable to do for the February incident as it was notified too late about the allegations. Finally, the Appellant argued that the officers did not inform the Appellant about the fight.

In response, the Board argued that there is no requirement that a Class BV licensee have video so whether video was shown or not, that is not a due process issue. The Board argued that even if the fight was of a short duration, the police had to use pepper spray and a baton to disperse the patrons and the police testified as to the incident and while, there may have been inconsistent testimony that is an issue of credibility and not a reason to dismiss the allegations.

In closing regarding the April incident, the Appellant argued that ordering a further 30 day closing at midnight is excessive as the Appellant has already been closed prior to midnight for 14 days. The Appellant argued that entertainment is intertwined with the Class BV license. The Appellant argued that it has hired a new security team so that it has mitigated the issue so that the midnight closing is harsh.[7]

In closing regarding the April incident, the Board argued that this is an escalation of disorderly conduct in that the inside fight lasted 12 minutes. The Board argued that its penalty addressed the issue of the upstairs but does not hinder the operation of the restaurant as the licenses are closed at midnight for 30 days. The Board argued it has the authority to order early closing and the penalty was a reasonable response to the issue.

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[6] Lambert testified that it was a tough crowd and patrons were wearing gang colors. Silva testified that he was not aware of any gang activity.

[7] The Appellant also argued that the Board does not treat licensees equally. *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.) discussed what needs to be proved to prevail on a claim of selective enforcement. There was no evidence in the record about other clubs nor was there any evidence to support a selective enforcement claim (if being made).

D. Sanctions Prior to February 20, 2016

The Appellant had a bottle service violation in October, 2015 for which a penalty of $500 was imposed. In January, 2016, a $1,000 penalty for a disorderly violation and a $500 penalty for a nuisance violation were imposed on the Appellant. See certified record.

E. The Violations

a. February 20, 2016

The fact that the Appellant was unable to access the February video does not mean the fight did not happen or that the Appellant's due process rights were violated. The Appellant was noticed of the Board's intent to sanction it for the alleged fight. The Board had a hearing on the February allegations and then after the Board's decision, the Appellant exercised its right to appeal to the Department. The fact that there was video for the April incident and not the February incident just makes it that the decision for the February incident has to rely only on oral testimony rather than oral and video testimony.

Lambert and Silva's testimony did not always agree. For example, each officer had different reasons not to arrest the patrons. They both testified to different times regarding the fight; though, both put the fight between 2:00 a.m. and 2:28 a.m. One officer testified that there were gang colors that night, but the other testified that he did not see any gang colors. Despite the varying nature of the officers' testimony, it does not mean that some kind of disturbance did not occur after closing on February 20, 2016.

The testimony and incident report made on February 20, 2016 stated that Silva used his ASP baton and Lambert his pepper spray to disperse the fight. See certified record (report attached to the Board's order to show cause). One officer testified that he told security about the fight. The other officer testified that he did not remember if he told anyone about the fight. The general

manager signed both officers' detail slips. See May 4, 2016 Board transcript. The testimony was that the detail is to inform the owner of any disturbance during the detail.

While it seems illogical that neither officer told the general manager or licensee about the fight that night given the testimony over the baton and pepper spray usage, there was evidence there was some kind of disturbance on the Appellant's stairs. While there are other nightspots in the vicinity, they are not near the Appellant and it is unlikely their patrons would go on the Appellant's platform for a fight. Instead, the fight occurred between 2:00 a.m. and 2:28 a.m. so after patrons would be exiting from the Appellant as it has a BVX license so would have closed at 2:00 a.m. The detail was called over in the midst of the fight on the Appellant's platform which implies the fight arose as patrons were exiting. Therefore, an inference can be made that the fight was between the Appellant's patrons as they were exiting.

b. <u>April 24, 2016</u>

It is undisputed that there was a long – at least ten (10) minutes – fight inside the premises with patrons shoving and pushing and in some cases kicking other patrons. It is undisputed that the fight spilled outside and there was fighting outside in the street and on the sidewalk. The testimony was that all police officers (at least 15) that responded were needed to disperse the fight.

F. When Sanctions are Imposed

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 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.
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> 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 has a long line of Department cases regarding progressive discipline and upholding the same. *Pakse Market Corp.* The progressive discipline imposed on a licensee depends on the violations and the circumstances of a licensee's violation(s). The sanctions imposed for R.I. Gen. Laws § 3-5-23 vary depending on the type of disorderly conduct. Very serious and egregious violations that involve weapons and/or serious assaults could result in a revocation of license. E.g. *Cardio Enterprises d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (license revoked for murder that arose at bar). A long suspension may be imposed for severe disorderly conduct. E.g. *C & L Lounge, Inc.* (30 day suspension for severe disorderly conduct but not so severe as to merit revocation).

G. What Sanctions are Justified

From *Cesaroni* in 1964 to *Schillers* in 1980 up until today, a liquor licensee is responsible for activities inside and outside its licensed premises. It does not matter how well a liquor licensee supervises such responsibilities since even the most responsible supervising licensee is still responsible for disorderly conduct. See *Therault.* As discussed above, the sanctions imposed for R.I. Gen. Laws § 3-5-23 vary depending on the type of disorderly conduct.

In *JJAM Sports, Inc. d/b/a LaCabana Night Club Sports Bar and Grille, Inc. v. Lincoln Board of License Commissioners*, LCA-LI-99-05 (12/27/99), the Department upheld 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. More recently, in *DL Enterprises d/b/a East Bay Tavern v. East Providence City Council*, DBR No. 14LQ009 (4/28/14), the Department reduced a revocation to a 14 day suspension for fighting inside the bar where there was a physical altercation and a stabbing but no positive identification of a weapon. In *Moe's*

Place, Inc. d/b/a D'Noche v. City of Providence, Board of Licenses, DBR No. 14LQ022 (6/24/14), the licensee received a two (2) day suspension for disorderly conduct when two (2) drunk patrons that had fought inside (but not physically) were escorted outside where they were belligerent but not physical. That licensee had recently had a five (5) day suspension for nuisance and a seven (7) day suspension for various violations such as overcapacity and drinks advertising and a disturbance so that a two (2) day suspension was imposed for the disorderly conduct despite it not being physical. In *Curbside, Inc. v. Cumberland Town Council*, DBR No. 09-L-0086 (9/17/09), a two (2) day suspension was imposed on a disturbance where a patron was thrown out after being verbally loud inside and then outside pushed and shoved other patrons.

In this matter, the Board imposed a two (2) day License suspension for a fight that took place right after closing time that can be indirectly linked to Appellant. There was no reason shown to vary the Board's suspension as it is consistent with discipline imposed for this kind of disorderly conduct.

Two (2) months later, the Appellant had another disorderly conduct matter that took place inside and outside. Inside the Appellant, the fighting continued for at least ten (10) minutes and security was unable to control the fight. Outside there was fighting in the street, parking lot, and sidewalk. In terms of progressive discipline, the Board imposed a three (3) day suspension of License and an additional 30 day closing at midnight.

Under *Thompson v. East Greenwich*, 512 A.2d 837 (R.I. 1986), a town may grant a liquor license upon conditions that promote the reasonable control of alcoholic beverages. *Thompson* found that R.I. Gen. Laws § 3-5-21[8] allows municipalities to impose conditions on liquor licensees

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[8] 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.

in accordance with R.I. Gen. Laws § 3-1-5[9] which restricts such conditions to be in the reasonable control of alcoholic beverages. Such a condition may be an individual condition[10] on the grant of a license or may be conditions (e.g. an ordinance) applicable to all liquor licensees.[11] Thus, localities may impose conditions on liquor licensees other than provided for in the State statute as long as such conditions promote the control of alcoholic beverages. See *Amico's Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002).

The Board did not include the 14 days that the Appellant had already closed at 11:00 p.m. as part of its 30 days midnight closing sanction. In light of the Appellant's new security team and the fact that there is a mandatory weekend detail, it is more appropriate to include the "time served" within the 30 day closing so that the Appellant should only be closed at midnight for an additional 16 days. However, the three (3) day suspension (already served) is consistent with similar matters and there is no reason to vary that suspension.

H. Administrative Penalties

The Appellant raised the issue of the administrative penalties imposed by the Board. 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.*

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[9] R.I. Gen. Laws § 3-1-5 states as follows:

> Liberal construction of title. – This title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages.

[10] E.g. *Newport Checkers Pizza, Inc. d/b/a Scooby's Neighborhood Grille v. Town of Middletown*, LCA-MI-00-10 (12/7/00) (Department upheld Town's condition of an early closing of 11:00 p.m. as reasonable under *Thompson* to balance interests of neighbors and licensee).

[11] *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228 (R.I. 2000) upheld a locality's anti-nude dancing ordinance when it found that a 1997 statutory amendment, R.I. Gen. Laws § 3-7-7.3, specifically endowing localities with the power to restrict or prohibit entertainment in Class B licensees only clarified what was already authorized in R.I. Gen. Laws § 3-5-15 and R.I. Gen. Laws § 3-5-21. See also *Casa DiMario, Inc. v. Richardson*, 763 A.2d 607 (R.I. 2000).

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.

R.I. Gen. Laws § 3-5-21(b)[12] provides that a first offense by a liquor licensee shall be fined $500 with the fine for each subsequent offence not to exceed $1,000. R.I. Gen. Laws § 3-5-21 establishes minimum fines for violations. Thus, the first offense is for any offense of the liquor licensing law and the subsequent offense is for any subsequent offense of the liquor licensing laws rather than pinpointing whether the violation is the first or subsequent offence of a specific statutory or regulatory violation. This interpretation is supported by the fact that the statute provides for a clean slate for <u>all</u> offenses if the licensee has not had <u>any</u> offenses for three (3) years. In other words, the first offense of the liquor statute cannot be fined more than $500 with each subsequent offense of the liquor licensing law not being fined more than $1,000 but if the licensee has no offenses for three (3) years, the clock is re-set and any violation would be considered a first offense.

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[12] 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.

In this matter, the City imposed for the February 12, 2016 violation, $1,000 each for a violation of R.I. Gen. Laws § 3-5-21[13] and R.I. Gen. Laws § 3-5-23.[14] The same administrative penalties were imposed for the April 24, 2016. See May 11, 2016 transcript and May 11, 2016 Board letters.

The Appellant already had administrative penalties imposed within three (3) years prior to these violations so that an administrative penalty of $1,000 per violation is appropriate. In this matter, the Appellant violated R.I. Gen. Laws § 3-5-21 (violate conditions of licensing) and R.I. Gen. Laws § 3-5-23 (disorderly) for each incident. Therefore, the administrative penalty of $4,000 ($1,000 for each violation for each incident) is upheld as being within the statutory mandates for penalties.

I. Entertainment License

The Appellant argued that entertainment is intertwined with the hours of operation and the Class BV license. Appeals to the Department pursuant to R.I. Gen. Laws § 3-7-21 only relate to the liquor licenses held by an appellant. See *El Nido v. Goldstein*, 626 A.2d 239 (R.I. 1993) (victualing license is a separate and distinct license from a liquor license). The Appellant has other avenues of appeal for its other licenses. The Rhode Island Supreme Court has held that when a town council acts in a quasi-judicial manner and does not provide for a right of appeal, the proper avenue for appeal is *writ of certiorari* to the Rhode Island Supreme Court. *Cullen v. Town Council of Town of Lincoln*, 893 A.2d 239 (R.I. 2000); and *Eastern Scrap Services, Inc. v. Harty*, 341 A.2d 718 (R.I. 1975). The Department does not have jurisdiction over the Appellant's entertainment license.

[13] *Id.*

[14] There was also a $500 penalty imposed for a violation of a City ordinance that does not fall under the Department's jurisdiction.

VI. FINDINGS OF FACT

1. On or about May 11, 2016, the Board issued its final decision in relation to allegations of disorderly conduct on February 20 and April 24, 2016 at the Appellant's premises.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision and requested a stay.

3. By order dated May 13, 2016, a partial stay was issued by the Department in relation to the discipline imposed by the Board on the Appellant.

4. A hearing on this matter was held on June 7, 2016 with the parties resting on the record for February 20, 2016 incident and partially on the record for the April 24, 2016 incident. The parties made oral closings.

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. Based on the evidence, the February violations warrant a suspension of the License for two (2) days, a police detail on Friday and Saturday nights, and an administrative penalty of $2,000 ($1,000 for each violation of R.I. Gen. Laws § 3-5-21 and R.I. Gen. Laws § 3-5-23).

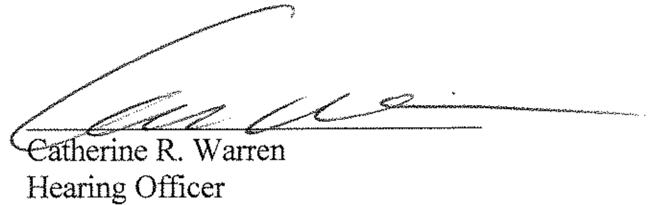
3. Based on the evidence, the April violations warrant a suspension of the License for three (3) days (already served); an administrative penalty of $2,000 ($1,000 for each violation of R.I. Gen. Laws § 3-5-21 and R.I. Gen. Laws § 3-5-23), and a 30 day closing at midnight with 14 days already credited.

4. The Department does not have jurisdiction over the Appellant's entertainment license.

VIII. RECOMMENDATION

Based on the forgoing, the Hearing Officer recommends that an administrative penalty of $4,000, a suspension of License for five (5) days, a police detail on Friday and Saturdays, and a 30 day closing of the License at midnight be imposed. As the Appellant has already had its License suspended for three (3) days, it shall serve the remaining two (2) day suspension of License beginning on the 31st day from the execution of this decision. As the Appellant already has closed at 11:00 p.m. for 14 days, it shall close at midnight for a further 16 days beginning the 33rd day (so after the serving of the two (2) day suspension) from the execution of this decision.[15] The police detail is already in place and shall continue.

Dated: August 1, 2016



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: 8/4/16

Macky McCleary
Director

[15] As the Appellant's $4,000 administrative penalty was not stayed, it should have been paid already. However, if for some reason, it has not been paid, it shall be due the 31st day after the execution of this decision.

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 17th day of August, 2016 that a copy of the within Decision was sent by first class mail, postage prepaid to Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904 and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, R.I. 02903 and by hand-delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI 02920.