

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

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**Club Heat, Inc. d/b/a Level II  
Appellant,**

**v.**

**Providence Board of Licenses,  
Board/Appellee.**

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**DBR No.: 08-L-0291**

**SECOND RECOMMENDATION AND INTERIM ORDER DENYING MOTION  
FOR STAY AND NOTICE FOR DE NOVO HEARING**

**I. INTRODUCTION**

Club Heat, Inc. d/b/a Level II (“Appellant”) renewed its motion for a stay of the City of Providence Board of Licenses (“Board” or “Providence”) December 18, 2008 order imposing a thirty (30) day suspension. The Board objected to Appellant’s renewed motion. The initial motion for a stay came before the undersigned on December 18, 2008 in her capacity as Hearing Officer as the designee of the Director by order dated October 31, 2006 in which the Director of the Department of Business Regulation (“Department”) delegated the authority to hear appeals of local liquor licensing boards’ decisions filed pursuant to R.I. Gen. Laws § 3-7-21 to the undersigned. On December 19, 2008, the Department denied the Appellant’s initial motion for stay. The parties have represented to the undersigned that the Appellant appealed the Department’s denial of the stay to Superior Court and that on December 23, 2008, the Superior Court denied the Appellant’s motion for stay. The December 19, 2008 order is hereby incorporated by reference.

## 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. DISCUSSION

The discussion contained in the December 19, 2008 order is hereby incorporated by reference. The hearing in this matter started on December 31, 2008. At the hearing, two (2) members of the Providence Police Department testified on behalf of the Board. On the basis of that testimony, the Appellant moved again to request a stay. The Appellant argued that the testimony so far demonstrated that on the night in question there were no punches thrown, no rescue vehicles called, no injuries, and the police officers that responded were already outside the Appellant's premises.

The Board argued that the Appellant had already requested a stay from Superior Court and the Court had declined to issue a stay despite the fact that the Court used a lower standard than the Department to determine whether a stay should be issued.

In response, the Appellant argued that the Court did not have the benefit of evidence. The Appellant further offered that it would accept a stay on conditions. The Board declined.

So far, there has only been a limited amount of testimony. The Board has argued that there were injuries that resulted from the night in question but no evidence has been heard regarding those allegations. The Appellant argued that there were no injuries because so far the testimony is that there were no injuries seen inside the Appellant's premises.

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.

There is no dispute that there have been prior incidents at Appellant’s and that the Appellant has had its License suspended once (though on appeal). The current basis for the suspension is for disorderly conditions inside the Appellant’s. The Department has a long line of Department cases regarding progressive discipline and upholding the same. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.). In addition, 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. *The Edge-January, Inc. v. Pastore*, 430 A.2d 1063 (1981); *Manuel J. Furtado, Inc. v. Sarkas*, 373 A.2d 169 (R.I. 1977).

Applying the criteria from *Harsch*, 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. In the present case, the parties have not had an opportunity to fully support their respective positions because of time constraints. However, testimony has begun in the hearing.

The parties agreed that discipline has been previously imposed and agreed that the police had to clear the patrons from inside Appellant's on the night in question. The parties dispute what the meaning is of the fact that nine (9) police officers were involved in clearing out a club at closing time. The evidence at hearing so far is that nine (9) officers had to clear the club and the testimony so far is that the Appellant's staff requested police help. The fact that security called for assistance from the police detail and the police detail called for back-up indicates that the crowd was not exiting in an appropriate or successful manner; however, the extent of the problems that caused nine (9) officers to have to clear the crowd have not been fully established. One (1) arrest was made of a patron. Despite the facts not being fully litigated, based on the representation of the parties and the testimony so far, clearly conditions were such that Appellant's security called the police detail for assistance in clearing the patrons.

**A. Substantial Likelihood of Success on the Merits**

There is no dispute that within the space of several months, there has been at least three (3) violations (underage, overcapacity) by the Appellant and a one (1) day suspension (though on appeal). While the full facts regarding the night in question have not been litigated, the fact remains that a crowd inside the Appellant's was not exiting properly which necessitated security calling for police assistance and nine (9) officers had to clear out the patrons from inside the club. In addition, one (1) arrest was made. It is hard on these facts to find that the Appellant has a substantial likelihood of success on the merits in demonstrating that there was not disorderly conduct within the Appellant's premises because the Appellant as the holder of a liquor license is responsible for actions within and outside its premises.

**B. Irreparable Harm to the Appellant; Substantial Harm to Other Interested Parties; Public Interest**

The Appellant argued in its filing that it will suffer irreparable harm if it is forced to close. However, the Board (an interested party) has an interest in ensuring that liquor licensees – where the public gathers - are compliant with their statutory obligations. In addition, there is a strong public protection interest. Not only does the public have an interest in ensuring that public spaces are safe, granting a stay raises issues of public safety and public protection since seven (7) officers were called in off the streets to assist the two (2) officer detail to clear the crowd. A licensee is responsible for the actions of its patrons.

While the undersigned is mindful of the discretion of a hearing officer or Court to maintain the *status quo* while an appeal is pending, there is a strong public safety consideration in that a liquor licensee is responsible for actions of its patrons. In this matter, there is no dispute that a large number of police officers were required to disperse patrons from inside the club during which one (1) patron was arrested.

Therefore, pursuant to *Harsch*, the Appellant has not made the strong showing necessary for the issuance of a stay.

**V. RECOMMENDATION**

Based on the forgoing, the undersigned recommends that Appellant's second motion for a stay be denied.

Nothing in this order precludes the Appellant from petitioning the undersigned to revisit this order because of a change in circumstances.

Dated: January 2, 2009




Catherine R. Warren  
Hearing Officer

**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

  
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 A. Michael Marques  
 Director

Dated: 01-09-2009

Entered this day as Administrative Order Number 09-27 on 9th of January, 2009.

**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 \_\_\_\_\_ day of January, 2009 that a copy of the within Order was sent by facsimile and first class mail, postage prepaid, to the following:

Kevin McHugh, Esquire  
City of Providence Law Department  
275 Westminster Street  
Providence, RI 02903  
Fax. 401-351-7596

John J. DeSimone, Esquire  
DeSimone & DeSimone  
735 Smith Street  
Providence, RI 02903  
Fax 401-454-1402

and by hand-delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920

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