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

Gianco, Inc. d/b/a $3 Bar, **Appellant,**	:	
v.	:	**DBR No.: 14LQ043**
City of Providence, Board of Licenses, **Appellee.**	:	

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

I. INTRODUCTION

Gianco, Inc. d/b/a $3 Bar ("Appellant") seeks a stay of the City of Providence, Board of Licenses' ("Board") decision taken on August 7, 2014 to revoke its Class BX liquor license ("License"). The Board objected to the Appellant's motion. This matter came before the undersigned on August 12, 2014 in her capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation ("Department"). This matter initially arose from a motion for stay filed by the Appellant with the Department regarding an order issued by the Board on July 30, 2014 to indefinitely close Appellant. A hearing was held on that stay request on August 4, 2014 and the matter remanded to the Board on August 5, 2014 for a further decision. On August 7, 2014, the Board held a hearing and revoked the License.

The Board's July 30, 2014 decision was based on the incidents on July 26, 2014. The Board's August 7, 2014 decision was taken based on the incidents of July 23 and July 26, 2014. A hearing had been held previously (on July 30, 2014) before the Board on the July 26, 2014 incident. An emergency hearing was held before the Board on the July 27, 2014 regarding the

July 23, 2014 incident. On the remand hearing on August 7, 2014, the Board heard testimony on the July 23, 2014 incident with notice to Appellant given one (1) hour before the meeting of its intention to hear testimony regarding July 23, 2014.

The Board treated the August 7, 2014 hearing as an emergency hearing[1] for the July 23, 2014 incident but made a final decision to revoke all licenses.[2] It would have been more appropriate for the Board on August 7, 2014 to consider the remand regarding the July 26, 2014 incident and then used its emergency powers for the July 23, 2014 incident and noticed the July 23, 2014 incident for a full hearing. In other words, the Board could have invoked its emergency powers to shut the Appellant for three (3) days on August 7, 2014 (for the July 23, 2014 incident)[3] and noticed a full hearing for the July 23, 2014 matter. The Board's power for emergency hearings is limited by Providence Charter section 1102 which provides that the City cannot revoke a license without three (3) days written notice given of its intended action.[4] Instead, the process leading up to the Board's revocation was based on a full hearing before the

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[1] Page 9 of the transcript of the August 7, 2014 Board hearing shows the Board made and passed a motion to act in an emergency capacity. The parties also agreed to this fact at the August 12, 2014 hearing before the Department.

[2] This appeal only relates to the liquor license held by the Appellant. The Department does not have jurisdiction over the revocation of a victualing license, etc. 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 is concerned that if the Department reinstates the Appellant's Class B liquor license – which must be held in conjunction with a victualing license – that the Board will refuse to reinstate the victualing license which will result in an end-run around the Department's jurisdiction. 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); *Eastern Scrap Services, Inc. v. Harty*, 341 A.2d 718 (R.I. 1975). Thus, the Appellant has other avenues of appeal for its other licenses.

[3] If it chose, it could have imposed a separate sanction for the July 26, 2014 incident.

[4] Providence Charter section 1102(3) provides as follows:

> Unless otherwise provided by state law, suspend, annul, rescind, cancel or revoke any license issued by the board of licenses for any reason which the board may deem to be in the public interest; provided, however, that no license shall be suspended for more than seventy-two (72) hours or annulled, rescinded, cancelled or revoked unless the licensee shall have been given at least three (3) days' written notice of the action proposed to be taken and of the grounds therefor and the time and place of the hearing. The said licensee shall also be notified of the right to be represented at said hearing by legal counsel.

Board for July 26, 2014 incident and an emergency hearing held on July 27, 2014 and August 7, 2014 before the Board for July 23, 2014 incident.[5] At the Department stay hearing on August 12, 2014, the Board confirmed that the revocation is a final decision of the Board.

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 § 5-23-5 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.

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

[5] At the Department hearing on August 12, 2014, the Board/City counsel acknowledged that neither the Appellant nor his lawyer were at the July 27, 2014 emergency hearing. Counsel also agreed that the Appellant had less than one (1) hour notice of the intention of the Board on August 7, 2014 to hear the July 23, 2014 matter.

> 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 Board argued that the Appellant could not point to any evidence that it had a strong likelihood of success on the merits since it had not put on any evidence regarding July 23, 2014. The Board argued that there would be harm to the public if the stay was granted since the Appellant poses a public safety threat due to the fighting and ensuing murder. It also argued that financial loss is not irreparable harm as irreparable harm only exists where a legal remedy is inadequate.

The Appellant argued that it would suffer irreparable harm if shut down and that the Board has not demonstrated any public safety issue.

VII. DISCUSSION

The Board's revocation is based on the July 26, 2014 fighting and the July 23, 2014 parking lot death. On the basis of the evidence before the Board regarding July 26, 2014, there was a fight outside of the Appellant's.[6] In terms of that fight, an imposition of a suspension (rather than revocation) would 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 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

[6] There is no dispute that there was a fight outside the Appellant's but the duration of the fight, the number of participants, the number of on-lookers, and whether it spilled out of the Appellant's is in dispute. The evidence at the Board hearing was that Appellant's staff was involved in trying to control participants so it could be inferred that some of the participants were indeed inside the bar.

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.

In terms of the July 23, 2014 incident, the Appellant disputes that the parking lot killing had its origins inside with arguing among patrons who then fought in the parking lot behind it. The Appellant disputes the assertion that its staff knew of the fight and failed to intervene or contact police. The Appellant argued that it cannot be held responsible for the murder.

A. Substantial Likelihood of Success on the Merits

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 Appellant was unable to put on evidence before the Board over the July 23, 2014 allegations because of the short notice. However, there is no dispute that there was fighting on July 26, 2014. 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 suspending a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. However, even if the fighting is not as extensive as the Board alleges on July 26, 2014, the fact remains there was fighting outside for which the license holder is responsible (security staff involvement). Either way, 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 the July 26, 2014 incident.

If the Board can prove its case as set forth before the Board in terms of July 23, 2014, the matter could be similar to *Stagebands* or *Cardio*. On the other hand, if the Board is unable to make the direct or indirect link between conduct on-premises and the parking lot death, the matter could be similar to *El Tiburon Sports Bar, Inc. v. Providence Board of Licenses*, DBR No.

06-L-0087 (6/1/07) (no link between licensee and an assault down the street from licensee). However, the facts as alleged by the Board have not been fully litigated since the Appellant did not have a chance to be heard before the Board as it was only noticed as an emergency hearing.

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

The Appellant argued 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 gather - 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.

VIII. THE APPEAL BEFORE THE DEPARTMENT

The Rhode Island Supreme Court held *Hallene v. Smith*, 201 A.2d 921, 925 (R.I. 1964) as follows:

> We conclude then that § 3-7-21 contemplates not an appeal, but a proceeding to transfer or remove a cause from the jurisdiction of a local board to that of the state tribunal that may be invoked whenever a local board acts adversely to the license under consideration. When this provision is properly invoked, it transfers the jurisdiction of the cause from the local board to the administrator by operation of law, and the cause then pending before the administrator is entirely independent of and unrelated to the cause upon which the local board acted. Error of law or fact inhering in the latter proceeding is without legal consequence on the jurisdiction of the administrator. When it is pending before the administrator on a hearing de novo, the cause is precisely the same as when it stood before the local board prior to its removal. The issue therein is the same, and the posture of the parties remains the same as that in which they stood before the local board. In short, the cause, when removed to the jurisdiction of the administrator, stands as if no action thereon had been taken by the local board.

See also *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) and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (*de novo* hearing is unaffected by any error by local board).

Thus, the hearing before the undersigned will be a *de novo* hearing on the Board's decision to revoke the Appellant's License. The outcome of such appeal hearings can result in a decision to uphold, overturn, or modify a licensing board's decision. Thus, this full hearing will not bound by the Board's reasons for revocation but whether the Board presented its case for revocation before the undersigned.

While the Board apparently precipitously revoked the Appellant's License without notice and hearing as required by its own Ordinance, there is no reason to remand this matter again. Any error by the Board becomes moot upon appeal of the final decision to the Department and the matter is removed from the Board's jurisdiction to the Department's jurisdiction. While the Department could pursuant to R.I. Gen. Laws § 3-7-21 remand this matter again to be properly noticed for a hearing before the Board, such an order would only delay a hearing on this matter.

IX. CONCLUSION

The Appellant has not shown a strong likelihood of success on the merits in terms of the July 26, 2014 fights so far as some type of sanction (suspension) most likely would be imposed on that fight.

In terms of the July 23, 2014, there are serious safety concerns if the Board can prove its allegations. At this time, they are only allegations; though, the Public Safety Commissioner of Providence testified he had reviewed video of the incident and spoke to investigators of what is an on-going police investigation and that the victim was in the Appellant's arguing with others, went outside, went back in, and then went outside where the fight continued and the victim was struck with a two-by-four and eventually died. The testimony was also that the Appellant's staff

was aware of the fight and failed to intervene or call for assistance. The Appellant disputes this account.

It cannot be determined without a full hearing what happened either night especially on July 23, 2014. For now, in terms of public safety concerns, the Department will maintain the *status quo* by recommending the denial of the stay request.

X. RECOMMENDATION

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

Nothing in this order precludes the Appellant and the Board from agreeing to a stay.

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

The undersigned will notify the parties of the date of the *de novo* hearing.

Dated: August 13, 2014

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

Dated: 13 August 2014

Paul McGreevy
Director

Entered this day as Administrative Order Number 14-50 on 13th of August, 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 13th day of August, 2014 that a copy of the within Order was sent by email and first class mail, postage prepaid, to the following: Sergio Spaziano, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904 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.