



## 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. ISSUES

Whether to uphold or overturn the Board's decision to suspend the Appellant's License and impose an administrative penalty.

## IV. MATERIAL FACTS AND TESTIMONY

At the Board hearing on April 6, 2015, the Appellant stipulated to 19 counts of underage drinking between September and November, 2014. It was represented at the Board hearing that the current managers started working at the Appellant's in August, 2014 after which the Appellant had the 19 underage counts. At the Board hearing, a manager stated that when they realized that they were attracting an underage crowd, they changed their business plan by eliminating the bracelet system and no longer having college nights, but instead having 25 plus nights. Tr. 8, 14. The Appellant's attorneys represented that the Appellant stopped having college nights, changed advertising, and changed security staff. Tr. 9-10. A manager represented that since the change in business plan, the Appellant has not had any more complaints from the City which was confirmed by a police sergeant at the Board hearing. Tr. 14.

## V. DISCUSSION

### A. **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 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).

#### **B. Relevant Statutes and Causes for Suspension**

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.

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 *Schillers* and *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965).

### **C. Arguments**

The Appellant argued that it would not mind the imposition of the condition on the License of 21 years plus.<sup>5</sup> The Appellant admitted to the 19 violations but argued that the sanction should be reduced to a seven (7) day suspension and a \$7,000 administrative penalty.

The Board argued that progressive discipline supported upholding the Board's penalty of a 14 day suspension and \$14,250 administrative penalty.

### **D. Whether the Appellant Violated R.I. Gen. Laws § 3-5-21**

The Appellant admitted to 19 underage violations during September, October, and November, 2014.

### **E. Licensing History**

The Appellant was closed one (1) day in 2005 and 2006 for a public safety violation. It was also closed for one (1) day in 2006 and fined \$4,000 for unspecified violations. In 2007, it was closed for five (5) days and penalized \$1,000 for overcrowding and contempt and a police detail mandated. In 2008, it was penalized \$300 for a disturbance. In 2009, it was penalized \$500 and then \$1,000 for underage drinking. In 2010, it was penalized \$500 and \$750 for underage drinking. In 2011, it was penalized \$500 for multiple violations. In 2011, it was penalized \$1,000, \$800, and \$500 for underage drinking. In 2012, it was penalized \$1,500 which included an underage violation and was penalized \$1,750 for underage drinking and \$1,000 for failure to maintain supervision. In 2013, it was penalized \$1,000 for underage drinking, \$500 for disturbances, and \$200 for nuisances. See licensing history (Board certified record). The Appellant's most recent discipline (prior to the appeal) was a consent agreement that it entered into with the Department on February 12, 2014 in regard to underage violations. Said consent

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<sup>5</sup> A condition of the stay was that the Appellant be 25 years plus. At the Department hearing, the Appellant indicated that the Appellant had been 21 years plus prior to the stay; though, a review of the Board transcript indicated that the Appellant's manager told the Board it held 25 years plus nights.

agreement provided for an administrative penalty of \$11,750 with \$11,250 representing 15 counts of underage drinking so \$750 per violation. The consent agreement also provided for a three (3) day suspension as well mandating that the Appellant purchase ID scanning technology to verify patrons' ID's and provide a written report on operational controls to the Board.

**F. The Appropriate Sanction**

As discussed above, the Department has the power to reverse, uphold, or modify sanctions imposed by local licensing authorities. The Department has a long line of Department cases regarding progressive discipline and upholding the same. *Pakse*. The progressive discipline imposed on a licensee depends on the violations and the circumstances of a licensee's violation(s). The Department reviews sanctions issued at the local level to ensure they are just, reasonable, and consistent with prior sanctions. The Department does not expect that local authorities will apply a mechanical grid when imposing sanctions but expects that sanctions will be consistent with the reasons for the sanctions apparent to the public and licensee. Obviously, each matter has its own set of facts that need to be considered but sanctions should reflect reasons applied on a consistent basis. See *Café Renaissance v. City of Providence, Board of Licenses*, DBR No. LCA-PR-05-02 (1/4/07).

In this matter, progressive discipline calls for increase in sanctions from the 2014 consent agreement. The City requests its suspension of 14 days and \$14,250 penalty be upheld. The Appellant argued that it now has new managers and a new business plan so that the City's penalty should be cut in half. There certainly was scope for the parties to resolve this without hearing. However, the consent agreement was entered into in February of 2014 and by September of the same year, underage drinking violations were occurring again. The City agreed that violations have stopped since the new managers' new business plan. Previously the

Appellant had been holding college nights but apparently now are no longer allowing in underage patrons. However, a liquor licensee has the responsibility to control patrons' conduct inside and outside the premises in a manner so that the laws and regulations to which the license is subject will not be violated. There were 15 violations in a three (3) month period only seven (7) months after the consent agreement. While the current managers were not the managers in February, 2014, the Appellant by consent agreement agreed to hire operational consultants to advise on operational controls and protocols to prevent underage drinking. That report was due to the Board by March 14, 2015. The Appellant was well aware of its underage drinking problems and it should not have needed another 15 violations over three (3) months to discover the problem it had already agreed to rectify in February, 2014.

**F. Administrative Penalties**

The Appellant raised the issue of the fine 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. 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)<sup>6</sup> provides that a first offense by a liquor licensee shall be fined \$500 with the fine for each subsequent offense 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 offense of a specific statutory or regulatory violation. This interpretation is supported by the fact that the statute provides for a clean slate for all offenses if the licensee has not had any 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.

In this matter, the City seeks a \$750 penalty per underage violation within three (3) years of the last administrative penalty. The administrative penalty is within the statutory mandates.

#### G. **Conclusion**

In light of progressive discipline, there are no reasons to modify the Board's decision to impose a 14 day suspension and a \$14,250 administrative penalty. However, a condition of licensing will be imposed that Appellant's patrons must be 21 years old or over<sup>7</sup> so that the administrative penalty will be reduced to \$10,000.

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<sup>6</sup> R.I. Gen. Laws § 3-5-21(b) states as follows:

(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.

<sup>7</sup> 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. See *Sugar, Inc., and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/8/10).



## **VI. FINDINGS OF FACT**

1. On or about April 15, 2014, the Board notified the Appellant that its License had been suspended for 14 days and an administrative penalty of \$14,250 imposed.
2. Pursuant to R.I. Gen. Laws § 3-7-21 and R.I. Gen. Laws § 3-5-21, the Appellant appealed this decision to the Director of the Department.
3. Pursuant to R.I. Gen. Laws § 3-7-21(c), the parties agreed to base the appeal on the record before the Board.
4. Oral closings were held on May 6, 2015.
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. The Appellant violated R.I. Gen. Laws § 3-5-21.

## **VIII. RECOMMENDATION**

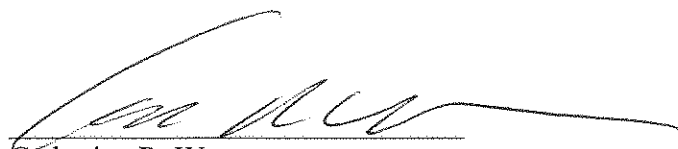
Based on the above analysis, the Hearing Officer recommends that the decision of the Board suspending the Appellant's License for 14 days be upheld but an administrative penalty of \$10,000 be imposed and a condition of licensing be imposed that the patrons be 21 years old or over. The suspension shall start on the 31<sup>st</sup> day after the execution of this decision<sup>8</sup> and the administrative penalty shall be paid on the 31<sup>st</sup> day after the execution of this decision.<sup>9</sup>

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<sup>8</sup> Unless the Board and Appellant agree otherwise.

<sup>9</sup> *Id.*

Dated: 5/26/15

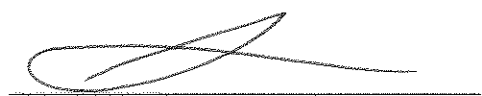
  
Catherine R. Warren  
Hearing Officer

**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  
 X  \_\_\_\_\_ MODIFY

Dated: 6/2/15

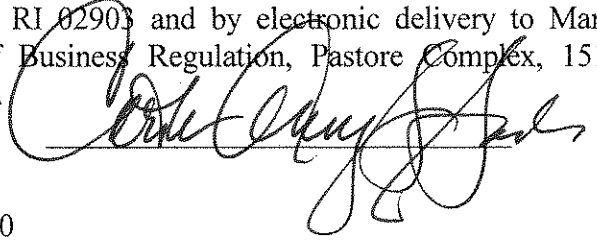
  
Macky McCleary  
Director

**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 3<sup>rd</sup> day of June, 2015 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, RI 02904 and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and by electronic delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.



## **DIRECTOR'S MODIFICATION OF RECOMMENDED DECISION**

The Director hereby modifies the recommended Decision by rejecting Subsection V(G) and Section VIII and replacing such Subsection and Section with the following:

Subsection V(G):

### **G. Conclusion**

In light of progressive discipline, there are no reasons to modify the Board's decision to impose a 14 day suspension and a \$14,250 administrative penalty.

Section VIII:

Based on the above analysis, the decision of the Board suspending the Appellant's License for 14 days and imposing a \$14,250 administrative penalty is upheld. The suspension shall start on the 31<sup>st</sup> day after the execution of this decision<sup>8</sup> and the administrative penalty shall be paid on the 31<sup>st</sup> day after execution of this decision.<sup>9</sup>

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<sup>8</sup> Unless the Board and Appellant agree otherwise.

<sup>9</sup> *Id.*