

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

Davinci Lounge and Restaurant Inc. and	:	
Davinci Cigar Bar, Inc.	:	
Appellants	:	
	:	
v.	:	DBR No.: 19LQ004
	:	
City of Providence, Board of Licenses,	:	
Appellee.	:	

DIRECTOR’S DECISION AND ORDER

The Director rejects the Hearing Officer’s recommendation and issues this decision and order with respect to the motion for stay filed by Davinci Lounge and Restaurant Inc. and Davinci Cigar Bar, Inc. (“Appellants”).

Copies of the following documents from the record are attached hereto and incorporated herein by reference: (a) print out of the licensees’ licensing history dated January 3, 2019, provided by the City at the stay hearing (the “Licensing History”), and (b) the decision dated February 1, 2019, issued by the City of Providence, Board of Licenses (“Board”) from which the Appellants have appealed (the “Board Decision”).

Sections I – VI, and Paragraphs 1-6 of Section VII of the Hearing Officer’s recommended decision attached hereto are hereby incorporated herein by reference. The following is hereby substituted in place of Paragraphs 7-11 of Section VII of the Hearing Officer’s recommended decision:

The December 23, 2108 overcapacity determination was made based on viewing the Appellants' security video which would not be viewed until a full Department hearing. It is unclear whether the Appellants would have a substantial likelihood of success on the merits in showing that the overcapacity allegations are inaccurate for December 23, 2018.

In terms of the December 1, 2018 overcapacity violations, the Board found there was overcapacity for both licensees; testimony was only about the upstairs with downstairs having no patrons in it. Additionally, it is unclear whether the upstairs' cigar bar would have a substantial likelihood of success on the merits in showing that the overcapacity allegations are inaccurate for December 1, 2018.

The circumstances are such - in terms of the liquor license - that they would fall under progressive discipline so that the Appellants can be reasonably sanctioned to deter repeated violations. See *Pakse*. The Board and City argued that the revocation and 60 day suspension was warranted because of the management ignoring capacity issues on December 1, 2018. However, the events of December 1, 2018 have not been fully heard by the Department and the alleged violation appears to only relate to the upstairs.¹

As part of the Board's sanctions, the Board imposed a reduction of hours that would take place after the 60 day suspension has ended.

Material public safety issues are presented in this matter. The Licensing History together with the Board Decision outline numerous and repeated violations by the Appellants and discipline over the years from November 2016 to the present. The Board Decision reflects that the Appellants provided no testimony during the proceeding. Further, the Appellants refused to comply with subpoenas issued by the Providence Board of Licenses.

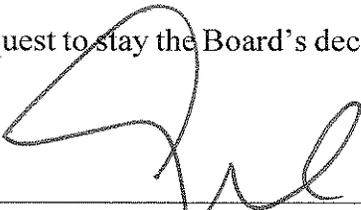
Although in considering a request for stay, the Department may determine to maintain the *status quo* in its discretion, the Department declines to do so here. The Appellants have not made the required strong showing that they will prevail on the merits of their appeal, will

¹ There is a separate issue regarding management's approach to overcapacity that the Board felt raised an issue fitness of management which manages both licensees.

suffer irreparable harm of the stay is not granted, and issuance of a stay will not harm the public interest.²

Based upon the forgoing, the Appellants' request to stay the Board's decision is denied.

Dated: February 6, 2019



Elizabeth Tanner
Director

A hearing will be scheduled on a mutually convenient date to be determined by the parties.³

² Consistent with progressive discipline, in other matters the Department has found sufficient basis to uphold a licensing board's discipline with respect to a liquor license where there have been repeated violations over several years and progressive discipline has not effected a change in the licensee's unlawful conduct, particularly where the licensee's behavior confirms its intention not to comply with the laws governing the operation of its business. *Ice Lounge, Inc. d/b/a Ice Lounge vs. Providence Board of Licenses*, DBR No. 15LQ008 (7/22/15).

³ Pursuant to R.I. Gen. Laws § 3-7-21, the Appellants are responsible for the stenographer.

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 APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 6th day of February, 2019, that a copy of the within Director's Decision and Order was sent by email and first class mail, postage prepaid to the following: Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 Mmartone@providenceri.com, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904, peter330350@gmail.com, and Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, RI 02889 ldatty@gmail.com and by hand-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.





City of Providence

Board of Licenses

Owner: Davinci Cigar Inc.

Class: BV

DBA: Davinci Cigar

BX **EDX** **N**

Address: 146 ACORN ST 2nd Floor

Entertainment:

Comment: issued new on 2/12/15

VIOLATION 1

Violation Date 11/27/2016 **Type** Entertainment without a lic **Counts** 1

Detail

Hearing Date 4/3/2017 **Type** Pre-Hearing Conferen

Action Fine Imposed **Fine** \$2,250.00 **Days Closed**

Detail Motion Comm Newton; sec Comm Rodriguez to impose \$1250 for Ent w/o License (3 counts) and \$1000 for Sale/Possession of alcohol to underage (3 counts ea)=\$2250; for 11/27/16; 1/12/17 & 2/4/17; vote 5-0

VIOLATION 2

Violation Date 1/12/2017 **Type** Multiple **Counts** 1

Detail Case Report 17-3776

Hearing Date 4/3/2017 **Type** Pre-hearing

Action See violation #1 **Fine** **Days Closed**

Detail

VIOLATION 3

Violation Date 2/4/2017 **Type** Multiple **Counts** 1

Detail Case Report 17-10840

Hearing Date 4/3/2017 **Type** Pre-hearing

Action See violation #1 **Fine** **Days Closed**

Detail

VIOLATION 4

Violation Date 5/7/2017 **Type** Entertainment without a lic **Counts** 1

Detail Case Report 17-42797

Hearing Date 6/7/2018 **Type** Show Cause

Action Violation found, no penalty impos **Fine** **Days Closed**

Detail

VIOLATION 5

Violation Date 10/21/2017 **Type** Other **Counts** 1
Detail Case Report 17-110253

Hearing Date 5/31/2018 **Type** Show Cause

Action Fine Imposed **Fine** \$1,000.00 **Days Closed**
Detail

VIOLATION 6

Violation Date 3/10/2018 **Type** Disturbances/Illegal Activit **Counts** 1
Detail Case Report 18-24786

Hearing Date 5/31/2018 **Type** Show Cause

Action Multiple **Fine** \$3,100.00 **Days Closed**
Detail Heard with 3/17/2018 & 4/7/2018 violations. No violation found on 3/17/2018. \$1000 per count (2 counts) RIGL3-5-23; \$50 per count (2 counts) for RIGL5-24-4; \$500 per count (2 counts) Ord 14-1 & revocation of valet lic effective 6/18/2018

VIOLATION 7

Violation Date 4/7/2018 **Type** Multiple **Counts** 1
Detail Case Report 18-34707 Disturbance

Hearing Date 5/31/2018 **Type** Show Cause

Action Fine Imposed **Fine** **Days Closed**
Detail See violation #6

VIOLATION 8

Violation Date 6/23/2018 **Type** Other **Counts** 1
Detail Case Report - 18-65418 Valet without a license

Hearing Date 6/1/2328 **Type** Show Cause

Action Given a Warning **Fine** **Days Closed**
Detail

POLICE DETAIL

Date Mandated	Num Officers		
Stipulations	Reason		
Comment			
Number of Violations:	Total Counts:	Total Fine Amount:	Total Days Closed:
8	8	\$6,350.00	



City of Providence

Board of Licenses

Owner: Davinci Lounge & Restaurant, Inc
DBA: Davinci Lounge & Restaurant
Address: 146 ACORN ST 1st Floor
Comment: Issued new on 2/12/15

Class: BV
BX **EDX** **N**
Entertainment:

VIOLATION 1

Violation Date 11/27/2016 **Type** Multiple **Counts** 1

Detail

Hearing Date 3/27/2017 **Type** Pre-Hearing Conferen

Action Multiple **Fine** \$1,250.00 **Days Closed** 0

Detail Motion Comm Rodriguez; 2nd Newton to impose \$1250 fine for ent w/o lic (3 counts); Warning - unlicensed floorhost (1 count); Sale of tobacco & Permitting smoking in public place (3 counts ea) for 11/27&29/16;12/1/16; 1/13/17

VIOLATION 2

Violation Date 11/29/2016 **Type** Multiple **Counts** 1

Detail Case report 16-119320 sale of tob w/o lic & prmt smk in public pl

Hearing Date 4/3/2017 **Type** Pre-hearing

Action Multiple **Fine** **Days Closed**

Detail See violation #1

VIOLATION 3

Violation Date 12/1/2016 **Type** Multiple **Counts** 1

Detail Case Report 16-119713 sale of tob w/o lic & prmt smk in public pl

Hearing Date 4/3/2017 **Type** Pre-hearing

Action **Fine** **Days Closed**

Detail See violation #1

VIOLATION 4

Violation Date 1/13/2017 **Type** Multiple **Counts** 1

Detail Case Report 17-3785 Sale of tob w/o lic; permitting smk in public place; ent w/o lic

Hearing Date 4/3/2017 **Type** Pre-Hearing Conferen

Action **Fine** **Days Closed**

Detail See violation #1

VIOLATION 5

Violation Date 6/8/2017 **Type** Entertainment w/o Licenc **Counts** 1
Detail Case report 17-65752
Hearing Date 5/31/2018 **Type** Show Cause
Action **Fine** **Days Closed**
Detail Violation found; no penalty imposed

VIOLATION 6

Violation Date 7/4/2017 **Type** Entertainment w/o Licenc **Counts** 1
Detail Case report 17-65742
Hearing Date 5/31/2018 **Type** Show Cause
Action **Fine** **Days Closed**
Detail Violation found; no penalty imposed

VIOLATION 7

Violation Date 2/10/2018 **Type** Multiple **Counts** 1
Detail Case report 18-4447 Disturbance, hours of operation; valet
Hearing Date 5/31/2018 **Type** Show Cause
Action Fine Imposed **Fine** \$1,000.00 **Days Closed**
Detail \$1000 for RIGL3-5-21, \$500 per count (2 counts) for Ord 14-287 and revocation of valet license

VIOLATION 8

Violation Date 2/11/2018 **Type** Multiple **Counts** 1
Detail Case report 18-5528 valet
Hearing Date 5/31/2018 **Type** Show Cause
Action **Fine** **Days Closed**
Detail See violation #7

VIOLATION 9

Violation Date 3/10/2018 **Type** Multiple **Counts** 1
Detail Case report 18-24786
Hearing Date 5/31/2018 **Type** Show Cause
Action Fine Imposed **Fine** **Days Closed**
Detail \$1000 per cunt (2 counts) for RIGL3-5-23; \$50 per count (2 counts) for Ord 14-1; revocation of valet license; heard with 3/17/2018 and 4/7/2018. No violation found for 3/17/2018

VIOLATION 10

Violation Date 4/7/2018 **Type** Disturbances/Illegal Activit **Counts** 1
Detail Case report 18-34707
Hearing Date 5/31/2018 **Type** Show Cause
Action **Fine** **Days Closed**
Detail See violation #9

POLICE DETAIL

Date Mandated	Num Officers
Stipulations	Reason
Comment	

Number of Violations:	Total Counts:	Total Fine Amount:	Total Days Closed:
10	10	\$2,250.00	0



CITY OF PROVIDENCE

Jorge O. Elorza, Mayor

February 1, 2019

DaVinci Cigar, Inc.
DaVinci Lounge & Restaurant, Inc.
146 Acorn Street
Providence, RI 02903

IN RE: DaVinci Cigar Inc and DaVinci Lounge & Restaurant LLC

Dear Licensee:

This matter was before the Board on January 31, 2019, for decision after a public hearing which was completed on January 14, 2019, on show cause petitions filed against DaVinci Lounge & Restaurant and DaVinci Cigar Bar, 146 Acorn Street for five incident dates occurring on:

- April 21, 2018;
- April 29, 2018;
- June 8, 2018;
- December 1, 2018; and
- December 23, 2018.

The Board heard testimony and viewed documentary, video and photographic evidence from the Providence Police and heard argument from both counsel. The licensee provided no testimony during the proceeding. The licensee refused to comply with subpoenas issued by the Providence Board of Licenses. The following facts have been established before the Board by date of incident:

1. For the incident date April 21, 2018:
 - a. PTLM McKenna responded to a disturbance at the premises at 146 Acorn Street. There was a large crowd blocking the street and personnel were trying to disburse patrons of the licensees. Subsequently, the officer discovered employees with a patron inside the establishment at approximately 2:30 AM. The patron was vomiting.
 - b. PTLM Johnson confirmed there was a fight outside the premises of the licensees and that Providence Police was on scene to quell the disturbance with security.
 - c. There was a large slightly unruly crowd outside the establishment, and the licensee was struggling to disperse patrons after 2:00 AM.
2. For the incident dated April 29, 2018:
 - a. DT Shields was present at the establishment and heard music outside coming from the second-floor premises. Upon entry, he confirmed the same amplified music being played inside the establishment. DT Shields also observed patrons smoking hookahs on both floors which were

BOARD OF LICENSES
PROVIDENCE CITY HALL / 25 DORRANCE STREET, ROOM 104
PROVIDENCE, RHODE ISLAND 02903
401 680-5000 / 401 272-2430 FAX
www.providenceri.com

- ignited by charcoal. He further observed a bottle of Hennessy and Malibu Rum on the bar near a patron.
- b. Photographs were submitted in corroboration of the observations.
 - c. There was a live singer present and performing.
3. For the incident dated June 8, 2018:
 - a. DT Shields was on the premises at the DaVinci Cigar Bar and using an underage operative. The underage operative was able to purchase a Corona beer without proper identification for the licensee.
 - b. The toxicology report confirmed the purchase to contain alcohol.
 4. For the incident dated December 1, 2018:
 - a. DT Petrocchi responded to the establishment. He observed a crowd outside and inside DaVinci Lounge & Restaurant. He could hear music outside of the establishment and observed a DJ on the first floor.
 - b. DT Shields was present and advised by security personnel that the licensee was over the capacity permitted by the fire marshal. A counter of the patrons read 361 and was photographed by DT Shields. Two DJ's were observed upstairs along with patrons dancing.
 - c. Louis Carabello was a security officer at the DaVinci Cigar bar on this date and in control of the counter for patrons entering the establishment. He testified that the counter monitoring entry read over 300 and the exiting counter read approximately 50 patrons. He believed there were more than 300 patrons on the second floor alone. Tables and chairs were present on the second floor. He was concerned with the staff's inability to traverse the establishment while holding lit hookah devices safely. He advised the management of the establishment that entry should be stopped due to capacity issues and was ignored. At that point, he was directed by his boss to contact the police. He understood capacity to be 149 on the second floor and 95 or 99 on the first floor.
 - d. The capacity at the establishment is 99 on the first floor and 98/149 on the second floor.
 5. For the incident dated December 23, 2018:
 - a. DT Petrocchi arrived at 146 Acorn Street and could hear loud music outside emanating from DaVinci Cigar Bar. Cars were obstructing traffic in the area. Upon entry, he observed a DJ and people dancing to the same music. He also observed a DJ on the premises of DaVinci Restaurant & Lounge. The facility was extremely busy and crowded. There were tables and chairs present.
 - b. DT Petrocchi testified that he sought to speak with the person he understood as the manager or owner of the establishment, Romeo Rouhana, to discuss the violations he observed. Over the course of this conversation with Mr. Rouhana, Mr. Rouhana shook DT Petrocchi's hand. When he did so, he placed a stack of cash in DT Petrocchi's hand. DT Petrocchi testified that at least two (2) of the bills on the top of the stack were one hundred dollar bills (\$100). DT Petrocchi refused the money, but Mr. Rouhana insisted and attempted to place the money in DT Petrocchi's pants pocket. DT Petrocchi refused the money and left the establishment to contact his superior officers. Photographic evidence was provided in this regard as well as video evidence including footage of Mr. Rouhana attempting to hand DT Petrocchi something that may be reasonably inferred to be a stack of cash.
 - c. The Board made no finding as to any possible criminal issues or charges alluded to in the complaint by the City.

Based upon the above facts contained in the record, the Board voted unanimously that the City established the following violations:

On April 21, 2018, concerning both DaVinci Lounge and DaVinci Cigar Bar:

1. Violation of RIGL 3-5-21 – a breach of the conditions upon which the license was granted for employees present after 2:30 AM;

2. Violation of RIGL 3-5-23 – disturbances related to a large unruly crowd surrounding the establishment after closing, for a disturbance inside the establishment, for blocking the street in front of the establishment, and for a patron vomiting inside the establishment after closing time; and
3. Violation of RIGL 3-7-7 – a violation of the hours of operation for employees and patrons inside the establishment after 2:30 AM.

On April 29, 2018, concerning both DaVinci Lounge and DaVinci Cigar Bar:

1. Violation of RIGL 3-5-21 – a breach of the conditions upon which the license was granted;
2. Violation of RIGL 23-20.10-3 – Smoking in a public place, impermissible use of hookah; and
3. Violation of Providence City Code 14-193, entertainment without a license.

On April 29, 2018, concerning DaVinci Cigar Bar:

1. Violation of RIGL 3-8-14 – bottle service.

On June 8, 2018, concerning DaVinci Cigar Bar:

1. Violation of RIGL 3-5-21 – a breach of the conditions upon which the license was granted; and
2. Violation of RIGL 3-8-1et seq. – sale of alcohol to underage.

On December 1, 2018, concerning both DaVinci Lounge and DaVinci Cigar Bar:

1. Violation of RIGL 3-5-21 – a breach of the conditions upon which the license was granted;
2. Violation of RIGL 23-28.6-5 – over capacity; and
3. Violation of Providence City Code 14-193, entertainment without a license.

On December 23, 2018, with regard to both DaVinci Lounge and DaVinci Cigar Bar:

1. Violation of RIGL 3-5-21 – a breach of the conditions upon which the license was granted;
2. Violation of RIGL 3-5-23 – disorderly, vehicles blocking street, disorderly numbers of patrons;
3. Violation of RIGL 23-28.6-5 – overcapacity, clear and visibly unambiguous over capacity given the presence of tables and chairs meaning a capacity of and testimony and video that there appeared to be shoulder to shoulder patrons inside; and
4. Violation of Providence City Code 14-193, entertainment without a license.

In determining the appropriate penalties in these matters, the Board was mindful of the outlined in the case of *Jake and Ella's Inc. v. Department of Business Regulation*. In considering the factors, the Board noted:

1. The incidents constituted a danger to the health, welfare, and quality of life of the public as a result of the failure of the licensee to adhere to the laws of the state, city and the mandates of the Board.
2. The harm to the community posed by the violation was severe given the number and continuing nature of the violations.
3. The continuing nature of the same violations, after contact with the police, was indicative of blatant disregard for the laws of the state, ordinances of the municipality.
4. The Board was mindful of the continued conduct of the licensee as probative of the intentional and willful nature of the violations and a total disregard for the laws of the state and city.
5. In particular, the conduct of the ownership indicated a lack of fitness for the responsibility and privilege of holding the licenses currently in operation at either venue.
6. The Board took administrative notice of the history of the licensee including but not limited to a sanction of \$3,000 imposed by the Department of Business Regulation on August 8, 2018, for two incidences of disorderly conduct and one incident of bottle service.

The Board voted unanimously to take administrative notice of the record of the licensee and the factors associated with the imposition of the penalties.

Based on the foregoing, the Board voted to impose the penalties as follows:

- For the April 21 and 29, 2018 incidents – a fine of \$500; and
- For the June 8, 2018 incident – a fine of \$250 for service to underage (DaVinci Cigar Inc)

For the remaining violations, in consideration of the total circumstances, the Board imposed the following against the licensees:

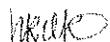
- A fine of \$2000 for incidents of entertainment without a license;
- Sixty (60) day suspension of all licenses held by licensees;
- Limitation of hours of operation to impose a daily closing requirement of 12:00 AM; and
- Revocation of the Class BX licenses for each licensee.

The Board further ordered that Romeo Rouhana be divested from any form of ownership, employment, or managerial relationship with either establishment and imposed a lifetime ban of any form of ownership, employment, or managerial relations with any establishment that has a license to sell alcohol in the City of Providence, including but not limited to Class A, C, BV, BX, or N licenses.

If this decision grieves the licensee, the licensee has ten (10) days from the date of decision to take an appeal to the Department of Business Regulation, State Liquor Control Administration for any and all matters of the liquor license at these establishments. Additional licenses including food, entertainment, and/or extensions of liquor service may require appeal through the State court system.

If you have any questions, you may contact this office.

Sincerely,



Heather Kilkeny
License Administrator

cc: Mario Mario, Esq.
Sgt. David Tejada, License Enforcement Unit
Louis DeSimone, Esq.
Peter Petrarca, Esq.

1, 2019 before the undersigned who was delegated to hear this matter by the Director of the Department.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to 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.*

A liquor appeal to the Department pursuant to R.I. Gen. Laws § 3-7-21 is considered a *de novo* hearing. The Department's jurisdiction is *de novo* and the Department independently exercises the licensing function. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964); and *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964). Because the Department's has such broad and comprehensive control over traffic in intoxicating liquor, its power has been referred to as a "super-licensing board." *Baginski v. Alcoholic Beverage Comm.*, 4 A.2d 265, 267 (R.I. 1939). See also *Board of Police Com'rs v. Reynolds*, 133 A.2d 737 (R.I. 1957). The purpose of this authority is to ensure the uniform and consistent regulation of liquor statewide. *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964).

III. THE BASIS FOR SUSPENSION AND REVOCATION

R.I. Gen. Laws § 3-5-23 states in part as follows:

(b) If any licensed person permits the house or place where he or she is licensed to sell beverages under the provisions of this title to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood, or permits any gambling or unlawful gaming to be carried on in the neighborhood, or permits any of the laws of this state to be violated in the neighborhood, in addition to any punishment or penalties that may be prescribed by statute for that offense, he or she may be summoned before the board, body, or official which issued his or her license and before the department, when he or she and the witnesses for and against him or her may be heard. If it appears to the satisfaction of the board, body, or official hearing the charges that the licensee has violated any of the provisions of this title or has permitted any of the things listed in this section, then the board, body, or official may suspend or revoke the license or enter another order.

R.I. Gen. Laws § 3-5-21 states in part as follows:

Revocation or suspension of licenses – Fines for violating conditions of license.

– (a) Every license is subject to revocation or suspension and a licensee is subject to fine by the board, body or official issuing the license, or by the department or by the division of taxation, on its own motion, for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.

(b) Any fine imposed pursuant to this section shall not exceed five hundred dollars (\$500) for the first offense and shall not exceed one thousand dollars (\$1,000) for each subsequent offense. For the purposes of this section, any offense committed by a licensee three (3) years after a previous offense shall be considered a first offense.

In revoking or suspending a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. See *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964). The same statute also forbids a licensee from permitting any laws of Rhode Island from being violated. 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 a 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).

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).

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) and *Pakse* (upholding revocation when had four (4) incidents of underage sales within three (3) years). 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 with licensee failing to call the police 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*.

IV. STANDARD FOR ISSUANCE OF A STAY

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (R.I. 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.

V. PRIOR DISCIPLINE

The cigar bar license was subject to a \$2,250 administrative penalty for violations occurring on November 27, 2016, January 12, 2017, and February 4, 2017. These violations were for three (3) counts of entertainment without a license and three (3) counts of sale/possession of alcohol to underage. In addition, on June 7, 2018, the Board found an entertainment without a license violation for May 7, 2017 but imposed no penalty.

The restaurant license was subject to a \$1,250 administrative penalty for violations occurring on November 27 and 29, 2016, December 1, 2016, and January 13, 2017. The violations were for three (3) counts of entertainment without a license, three (3) counts of sale of tobacco, and three (3) counts of permitting smoking in a public place. See City's Exhibit One (1) (certified record). At hearing on May 31, 2018, the Board found that the Appellant had entertainment without a license on June 8, 2017 and July 4, 2017 but imposed no penalties.

At hearing on May 31, 2018, the Board imposed administrative penalties on the Appellants for various violations. On appeal, the Department imposed a \$3,000 administrative penalty for three (3) violations: two (2) disorderly conduct (one incident of patrons exiting drunk and banging on windows and the other incident of patrons exiting screaming and yelling) and one (1) violation of bottle service. See *Davinci Lounge and Restaurant Inc. v. City of Providence, Board of Licenses*, DBR No. 18LQ012 (8/8/18). The Board did not distinguish between the two (2) licensees so that the penalties appear on both licensees' licensing history.⁴

VI. ARGUMENTS

The Appellants appealed the Board's decision regarding the incidences of December 1 and 23, 2018. The Board imposed an administrative penalty of \$2,000 for four (4) findings of entertainment without a license as both licensees has entertainment without a license on both nights. The Appellants did not challenge those findings. There was also a finding of disorderly conduct because of patrons being outside blocking the street.

The main issue in dispute are the two (2) findings of overcapacity. The parties agreed that the December 23, 2018 count of overcapacity was based on the Board viewing video of apparently the vestibule where patrons enter prior to either going into the restaurant or cigar bar.

⁴ At the stay hearing, the City provided the undersigned with a print out of both licensees' licensing history.

The Appellants argued that it had a substantial likelihood of success on the merits in terms of the findings of overcapacity for December 1, 2018 since the evidence did not support such a finding. It also argued that the *status quo* be maintained by the issuance of a stay and represented that it was amenable to have a police detail at the weekend.

The Board and the City argued that the testimony showed that management ignored the overcrowding on December 1, 2018. They further argued that the sanctions were imposed because of the seriousness of ignoring the overcapacity issue and that the Appellants have in one (1) year a series of violations such as entertainment without a license, hours of operation, bottle service violations, and smoking. The Board and the City argued that the Appellants presented themselves as a fine dining and cigar bar so that reducing the hours should not impact their business based on what was represented to the Board when licensed and will preclude them from acting as a nightclub without a license. The Board and the City argued that the sanctions were imposed since the Appellants have not been able to comply with the rules of licensing despite prior sanctions.

At hearing there was testimony that one owner tried to bribe or give money to a police officer. These charges apparently did not factor into the Board's sanctions regarding suspension, revocation, and reduction of hours. However, the Board did order that individual be divested of ownership and/or management and be barred for life from same in terms of a liquor license within Providence. The parties agreed that issue was not before the Department at the time of the stay hearing but most likely would be an issue at the full hearing.

VII. DISCUSSION

The information received by the undersigned is based on representations of the parties. The undersigned did not have a complete transcript of the Board hearing; however, an audio of the

Board's hearing for January 14, 2019 and its decision for January 31, 2019 was available online and the undersigned listened to both recordings.⁵

For December 23, 2018, it is unclear exactly what video the Board reviewed and whether it was just of the entry vestibule or was also of video inside one or both licensees. Thus, it is unclear whether the Appellants would have a substantial likelihood of success on the merits for the December 23, 2018 overcapacity finding.

The December 1, 2018 overcapacity count is based on testimony from a security staff member that the upstairs (cigar bar) was at overcapacity that night and he was ignored by management when he said so and sent home. The Appellants argued that the staff member testified that he took the clicker for the exiting patrons home and there was no evidence without that clicker that there was overcapacity since it was not produced at the Board hearing. The Board argued that even being generous when estimating the number of patrons exiting based on testimony at hearing, there was overcapacity that was ignored.

In relation to overcapacity, the Board cited to prior Department cases and its case of *Secreto LLC v. City of Providence, Board of Licenses*, 15LQ010 (8/15/15) which found as follows:

As the Department found in *City of Newport v. The Great American Pub d/b/a Thames Street Station*, LCA-NE-99-21 (3/23/00), overcrowding is "not a matter to be taken lightly." *Id.* 5. It is important that licensees maintain their appropriate capacity. There was a two (2) week suspension imposed in *Great American Pub* for overcapacity after a one (1) week suspension was imposed two (2) years prior for overcapacity. In *J.H. Enterprises d/b/a The Rhino Bar and Grill v. Newport City Council*, DBR No.: 07-L-0185 (11/8/07), there was a three (3) day suspension imposed for one (1) count of overcapacity.⁶ [footnote number different in original] The Board relied on *Club Heat d/b/a Level II v. Providence Board of Licenses*, 12LQ064 (12/21/12) to argue for revocation; however, that revocation was upheld for disorderly conduct and overcapacity

⁵ <http://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=11292&Format=Minutes>
<http://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=11298&Format=Minutes>

⁶ In that matter, the licensee had previously been suspended for another violation for three (3) days two (2) years prior and the prior year had a three (3) day suspension for a different violation.

after other progressive discipline.⁷ This year the Board imposed an administrative penalty of \$3,000 for one (1) count of overcapacity. That penalty had to be reduced to \$1,000 in order to comply with the statutory limit in R.I. Gen. Laws § 3-5-21 on the amount of an administrative penalty. See *Luna Night Club, Inc. [v. City of Providence, Board of Licenses]*, DBR No. 14LQ0045 (3/5/15)].

The Appellant was licensed in 2012 and until this year had no suspensions until the ten (10) day disorderly conduct suspension. The Board now tries to bring these violations that occurred prior to the disorderly conduct and argue that they justify revocation. However, that is disproportional to the actual violations and timings of the violations. Based on the forgoing (sic), in light of progressive discipline and proportionality of sanctions as well as weighing the type of violations, revocation is not justified. In reviewing prior cases, a suspension of 22 days is appropriate. This sanction reflects the following: a) 14 days for the two (2) counts of overcapacity;⁸ [footnote number different in original] b) five (5) days for three (3) instances of entertainment without a license;⁹ [footnote number different in original] c) one (1) day for violating hours of operation;¹⁰ [footnote number different in original] and d) two (2) days for advertising drinks special.¹¹ [footnote number different in original].

In *Pakse*, the Department and Superior Court upheld the progressive discipline imposed on said licensee for repeated underage violations. The Court found that the local authority was authorized to impose a reasonable sanction that would deter the licensee from repeatedly violating the law, and the Department found that the local authority's imposition of a two (2) day suspension for the first offence with progressively harsher sanctions for the second and third offense, and revocation for the fourth was not arbitrary and capricious because it was based on the premise that the licensee's continued (repeated) violations posed a danger to the community. Thus, the Court upheld the Department's conclusion that revocation represented a reasonable punishment after the logical progression of suspension sanctions related to repeated violations posing a public danger.

⁷ In that matter, the license was revoked by the Board and afterwards that licensee was evicted from its premises. The Board then issued a license to another entity which ran the risk of losing its license if the initial revocation was not upheld. However, that whole matter was actually moot as the licensee had been evicted from the premises so could not meet the conditions of licensing. *Baker v. Department of Business Regulation*, 2007 WL 1156116 (R.I.Super.). The situation surrounding Club Heat was very different from the matter before the Department.

⁸ This is consistent and proportional with prior statewide sanctions for overcapacity.

⁹ This suspension was imposed as there were three (3) different instances of entertainment without a license.

¹⁰ The Appellant was previously fined for violating hours of operation.

¹¹ D&L received a five (5) day suspension for such a violation right after a disorderly conduct suspension but this violation occurred prior to the Appellant's disorderly conduct.

In recently reviewing its cases regarding underage drinking (a violation of R.I. Gen. Laws § 3-5-23), the Department reiterated that it has consistently imposed progressive discipline except for egregious violations under the disorderly conduct statutory provisions such as in *Stagebands*.¹² For example, the Department imposed progressive discipline in *Eagle Social Club d/b/a Ava's Wrath v. Providence Board of Licenses*, DBR Nos. 14LQ021; 14LQ023 (7/29/14) ("Eagle I") where the local authority had revoked a liquor license without imposing progressive discipline. In that matter, the licensee previously had an eight (8) day suspension for four (4) different instances of underage drinking, and the Board imposed a revocation after more underage drinking violations. Instead of revocation, the Department in Eagle I reduced the revocation to 45 days and imposed a 60 day suspension for a further underage violation. In *Eagle Social Club d/b/a Ava's Wrath v. Providence Board of Licenses*, DBR No. 14LQ056 (12/23/14) ("Eagle II"), the Department upheld the revocation of the license after the fourth underage violation in one (1) year. As in *Pakse*, the Department and the local authority concluded in *Eagle II* that progressive discipline was ineffective as the licensee had continuous violations in one (1) year. The same analysis was used in *Dacosta Liquors, Inc. v. City of Providence, Board of Licenses*, DBR No. 14LQ038 (11/20/14), in which the licensee had various underage violations between 2012 and 2015 and received an administrative penalty, a three (3) day suspension, another administrative penalty, a 20 day suspension, another administrative penalty, and finally revocation. See also *Bourbon Street, Inc. d/b/a Senor Frogs v. Newport Board of License Commissioners*, 1999 WL 1335011 (R.I. Super).¹³

¹² The case is *In the Matter of: P.B. Management Inc. and Peter Buonanni d/b/a Cornerstone Pub*, DBR No.: 14LQ003 (6/1/16) which was a Departmental liquor prosecution; however, the issue of discipline and sanctions are the same as in a liquor licensing appeal

¹³ The Superior Court upheld the decision to revoke the liquor license after a series of progressive discipline over a year for serious overcrowding on different nights, 18 arrests for underage drinking, illegal drinks promotion, two (2) different disorderly conduct violations, and finally another three (3) incidents of underage drinking.

The December 23, 2108 overcapacity determination was made based on viewing the Appellants' security video which would not be viewed until a full Department hearing. While it is unclear whether the Appellants would have a substantial likelihood of success on the merits in showing that the overcapacity allegations are inaccurate for December 23, 2018, it has a substantial likelihood of success in terms of overturning the revocation of the BVX liquor license as well as reducing its suspension of the BV license.

In terms of the December 1, 2018 overcapacity violations, the Board found there was overcapacity for both licensees; however, testimony was only about the upstairs with downstairs having no patrons in it. Therefore, the downstairs restaurant has a substantial likelihood of success on the merits of overturning the finding it was at overcapacity on December 1, 2018. Additionally, while it is unclear whether the upstairs' cigar bar would have a substantial likelihood of success on the merits in showing that the overcapacity allegations are inaccurate for December 1, 2018, it has a substantial likelihood of success in terms of overturning the revocation of the BVX liquor license as well as reducing its suspension of the BV license. For the sake of the analysis regarding overturning the revocation of the BVX license and reducing the BV license suspension, the analysis assumes that a violation of law (overcapacity and entertainment without a license and disorderly) has been shown.

The evidence at the Board hearing did not demonstrate that the City had a substantial likelihood of success in showing that this matter included the types of circumstances that rise to an egregious event like *Stagebands* or *Cardio*. Rather the circumstances are such – in terms of the liquor license – that they would fall under progressive discipline so that the Appellants can be reasonably sanctioned to deter repeated violations. See *Pakse*. The Board and City argued that the revocation and 60 day suspension was warranted because of the management ignoring capacity

issues on December 1, 2018. However, the events of December 1, 2018 have not been fully heard by the Department and the alleged violation appears to only relate to the upstairs.¹⁴ Without a stay, the Appellants will not be able to have a meaningful appeal. Finally, case law allows a stay to be issued as a matter of discretion in order to maintain the *status quo* pending the full hearing.

As part of the Board's sanctions, the Board imposed a reduction of hours that would take place after the 60 day suspension has ended. However, there has been no determination of the whether there were any violations. Such a reduction of hours in this matter without a stay would mean that the Appellants would not be able to have a meaningful appeal. Therefore, since the reduction of hours are tied to a sanction regarding the Appellants' liquor license and such violations have not been determined and if determined, the appropriate sanction(s) has not been determined, the reduction of hours is stayed (though that was not to take place until 60 days from the Board's decision after the suspension).

In this situation, the *status quo* can be maintained and any public safety issues addressed by requiring a police detail on the weekends. In addition, the Appellants are ordered to have staff using a clicker for both entry and exit for both licensees every night (e.g. a total of four (4) clickers) with a written record be made periodically each night of the numbers on each clicker and that such written record shall be available on the premises for inspection by the Providence Police Department.

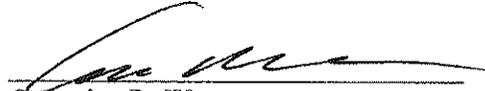
VIII. RECOMMENDATION

Based on the foregoing, the undersigned recommends that a stay be granted for revocation of the Class BVX and the suspension of the Class BV license and the reduction in hours to take place after the suspension of the Class BV license. The Appellants shall maintain a police detail on Friday

¹⁴ However, there is a separate issue regarding management's approach to overcapacity that the Board felt raised an issue fitness of management which manages both licensees.

and Saturday nights as well as any openings the night before a State holiday. Further, the Appellants are ordered to have staff use a clicker for both entry and exit for both licensees every night (e.g. a total of four (4) clickers) with a written record made periodically each night of the numbers on each clicker and that such written record shall be available on the premises for inspection by the Providence Police Department.

Dated: February 4, 2019


Catherine R. Warren
Hearing Officer

INTERIM ORDER

I have read the Hearing Officer's Recommended Order in this matter, and I hereby take the following action with regard to the Recommendation:

_____ ADOPT
_____ REJECT
_____ MODIFY

Dated: _____

Elizabeth Tanner, Director
Director

A hearing will be scheduled on a mutually convenient date to be determined by the parties.¹⁵

¹⁵ Pursuant to R.I. Gen. Laws § 3-7-21, the Appellants are responsible for the stenographer.

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 ____ day of February, 2019 that a copy of the within Order was sent by first class mail, postage prepaid to the following: Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, R.I. 02903 Mmartone@providenceri.com, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, peter330350@gmail.com, and Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, R.I. 02889 ldatty@gmail.com and by hand-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.
