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

WGIC d/b/a Beve, **Appellant,**	:	**DBR No. 19LQ008**
v.	:	
City of Providence, Board of Licenses, **Appellee.**	:	

ORDER RE: MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed on February 27, 2019 by WGIC d/b/a Beve ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on February 27, 2019 by the City of Providence, Board of Licenses ("Board") essentially revoking its Class BVX (extended hours) license and reducing hours of operation on all licenses for at least six (6) months to midnight and imposing various administrative penalties.[1] A hearing on the motion to stay was heard on March 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.*

[1] The Board ordered the Appellant to close at midnight for at least six (6) months at which time the Appellant could request a later closing time. At the Board hearing, the Board reduced the hours of operation for all City licenses, but the Department does not have jurisdiction over those licenses. Appeals to the Department can only relate to the liquor license held by the Appellant. See *El Nido v. Goldstein*, 626 A.2d 239 (R.I. 1993) (victualing license is a separate and distinct license from a liquor license).

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 § 3-5-21 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 DISICIPLINE

The parties agreed that this Appellant was initially licensed as a cigar shop. In 2011, it received a victualing and Class BVX license and began operating as a smoking bar. Its only prior discipline was a warning in 2018 (no administrative penalty) that its music was too loud.

VI. ARGUMENTS

The Appellant argued that it was playing incidental music which does not require an entertainment license since there was no disc jockey, no headphones, no live music, etc. See R.I. Gen. Laws § 5-22-1.1(7).[2] The Appellant argued that when it received its victualing and Class BVX license, it was to be a smoking bar so there was no material misrepresentation on its application. In addition, the Appellant argued that a licensee is allowed to change its format and does not need permission from a local licensing authority as the Department has previously held that a licensee can change its format at its own peril.

The Board argued that the Appellant has been acting as a *de facto* nightclub without a disc jockey so that the music is entertainment and not incidental.

---

[2] R.I. Gen. Laws § 5-22-1.1 provides as follows:

> Live entertainment – City of Providence. The board of licenses for the city of Providence is authorized to license, regulate, or prohibit "live entertainment" in the city of Providence, including, but not limited to, live performances of music or sound by individuals, bands, musicians, disc jockeys, dancing, or karaoke, with or without charge, provided that "incidental entertainment" be permitted as of right, and no license shall be required. "Incidental entertainment" means background music provided at a restaurant, bar, nightclub, supper club, or similar establishment, limited to the following format:
>
> (1) Live music performance limited to no more than a maximum of three (3) acoustic instruments that shall not be amplified by any means, electronic or otherwise; or
>
> (2) Prerecorded music or streamed music played over a permanently installed sound system. If a bar or restaurant includes incidental entertainment, it cannot charge a cover charge; shall not allow dancing by patrons of the establishment; cannot employ flashing, laser, or strobe lights; and the maximum volume, irrespective of the format, is limited solely to the boundaries of the premises at all times, and shall permit audible conversation among patrons of the establishment.

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 February 21, 2019 and its decision for February 27, 2019 was available online and the undersigned listened to both recordings.[3]

At the stay hearing, the City agreed that the Class BVX liquor license was revoked since the its hours of operation were reduced to midnight for at least six (6) months at which time, the Appellant could request later hours.

There is no dispute that the music was loud on the three (3) nights at issue. The complaints that the police received were from the condominium building next door to the Appellant. The violations were found for January 12, 19, and 27, 2019. On January 19, 2019 after the January 12, 2019 incident, the Appellant had removed speakers and the strobe lights.

Even if the loud music was not found to be entertainment without a license, the loud music could be found to be a disorderly conduct violation.[4] The Board found that the Appellant had made a material misrepresentation on its application to the Board since it never indicated that it would have entertainment. However, the Appellant argued that it was only playing incidental

[3] http://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=11306&Format=Minutes. http://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=11308&Format=Minutes.

[4] R.I. Gen. Laws § 3-5-23 provides 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.

music as allowed and it has tried to reduce the loudness so there was no misrepresentation to the Board.[5]

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.

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*.[6] 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.

---

[5] If a local licensing authority puts a condition that a certain format must be followed on a liquor license than such a change would be violation of a condition of licensing. The Department has previously held that a change in format is allowed and undertaken by a licensee at its own peril. See *Ice Lounge, Inc. d/b/a Ice Lounge v. City of Providence, Board of Licenses*, DBR No.: 14LQ064 (2/27/15) for a discussion of changes in business format. However in this matter, the parties dispute the type of music that is being played in the smoking bar.

[6] 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

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).[7]

In this matter, the Appellant's only sanction since 2011 has been a warning about loud music and then the City jumped right to revocation of the Class BVX license for entertainment without a license and a dispute over a business format (which is really the issue of entertainment without a license). When a local licensing authority fails to follow progressive discipline and engages in discipline that is found to be excessive, the Court has overturned a revocation of a liquor license as arbitrary and capricious. See *Jake and Ella's v. Department of Business Regulation*, 2002 WL 977812 (R.I. Super.) (R.I. Super.).

At the Board hearing, the Appellant argued that it has already taken down the speakers and lights and offered to put up foam at the back door (and to look at other options to reduce the noise)

[7] 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.

and requested that it be given a short leash to return to the Board within 30 days for the Board to monitor its progress.

The evidence at the Board hearing did not demonstrate that the City has 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* for immediate revocation. Rather the circumstances are such – in terms of the liquor license – that they fall under progressive discipline so that the Appellant can be reasonably sanctioned to deter repeated violations. See *Pakse* and *Jake and Ella's*. Without a stay, the Appellant will not be able to have a meaningful appeal. Case law allows a stay to be issued as a matter of discretion in order to maintain the *status quo* pending the full hearing. In this situation, the *status quo* can be maintained with conditions as set forth below.

VIII. ADMINISTRATIVE PENALTIES

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).

At the stay hearing, the Board offered to stipulate to a stay of the administrative penalties. R.I. Gen. Laws § 3-5-21 establishes minimum fines for violations and there is an issue regarding the amount of administrative penalties imposed in this matter by the Board. As the City agreed to a stay of the administrative penalties, the administrative penalties will be stayed.

IX. RECOMMENDATION

Based on the foregoing, the undersigned recommends that the following order be made.

1. A stay is granted of the revocation of the Class BVX liquor license as well as the reduced hours of the liquor licenses;[8] and
2. A stay is granted for the administrative penalties.

The granting of the stay is conditioned on the following:

1. Only incidental music be played so that the Appellant complies with R.I. Gen. Laws § 5-22-1.1 (e.g. cannot hear music outside, must be able to hear conversation inside, no strobe lights, etc.).
2. The Appellant shall appear at the Board as soon as possible after the issuance of this decision and then every 30 days pending this appeal to provide an update on its plan to mitigate noise from any incidental music. E.g. keeping the volume down to inside its establishment.
3. When the Appellant appears before the Board for the first time after the issuance of the order, it shall provide an updated business plan to the Board.

The Board and Appellant may agree to modify the conditions of the stay if they choose.

Nothing in this order precludes the undersigned from revisiting this order because of a change in circumstances. E.g. the violation of any of the conditions could warrant a review of the stay order.

Dated: March 4, 2019

Catherine R. Warren
Hearing Officer

[8] The Department only has authority over the liquor licenses.

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: 2/5/19

Elizabeth Tanner, Director
Director

A hearing will be scheduled on a mutually convenient date to be determined by the parties.[9]

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 6th day of March, 2019 that a copy of the within Order was sent by first class mail, postage prepaid to the following: Sergio Spaziano, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, R.I. 02903 Sspaziano@providenceri.gov, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, peter330350@gmail.com, and by hand-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920. .

[9] Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant is responsible for the stenographer.