



## 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.*

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. MOTION TO STAY

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." *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976). 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). While appeals before the Department do not fall under R.I. Gen. Laws § 42-35-15(c), 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.

#### IV. STANDARDS FOR DISORDERLY CONDUCT<sup>1</sup>

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 . . . 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.

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). 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

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<sup>1</sup> The February 5, 2016 order has a more detailed discussion of the standards at issue in this matter.

conduct by the licensee.” *Cesaroni*, at 296. See also *AJC Enterprises; Schillers; and Furtado v. Sarkas*, 373 A.2d 169 (R.I. 1977).

A final decision has not been made by the Board. 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. 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*.

A licensee is responsible for disorderly conduct inside its premises and disorderly conduct outside its premises that can be directly or indirectly linked to activities inside the premises.

#### V. DISCUSSION

A hearing began before the Board on February 4, 2016 regarding an incidence on January 29-30, 2016. The information received by the undersigned (at both stay hearings) is based on representations of the parties. A transcript was not available. It was agreed that there had been a disturbance inside the Appellant on January 29-30, 2016. The extent of the disorderly conduct is in dispute. There was then disorderly conduct outside the bar, but the extent of the nature of that conduct is in dispute. The number of people outside the club is in dispute. It is not in dispute that someone outside the club fired shots from a gun. It is undisputed that shots hit the building where the Appellant is located. It is not known whether the person who fired the shots was the Appellant’s patron. It was agreed by the parties that the time from the inside disturbance to the firing of the gun was five (5) to seven (7) minutes. It was agreed that the inside disturbance was less than a minute.

The Appellant argued that it has now been closed for 11 days and that it has no history of violence. The Appellant is willing to no longer use the parking lot across the street and chain it off so that patrons when exiting will disperse rather than congregate in the parking lot. The Appellant also is willing to no longer host hip hop or rap shows. The Appellant argued that these conditions would meet any public safety issues.

The City and the Board both argued that the Appellant had failed to call the police on two (2) incidences when there was an expectation that it would call the police. The first alleged incident is the January 10, 2016 incident where there was a scuffle in the bar and two (2) groups were thrown out but continued fighting with a woman allegedly being beat up. The parties agreed that the Appellant had offered to call rescue for the victim but she declined that rescue be called. However, she did go herself to the hospital which is how the police discovered there that she had been injured. The Appellant disputed the victim's account of the disturbance on January 10, 2016 and represented that it would present evidence contrary to the victim's at the Board hearing.

In terms of the January 29, 2016 incident, the police were at the Appellant's at the time of the shooting but the City and Board both argued that the Appellant should have called the police at the time of the inside disturbance. The Appellant represented that it would present testimony that under its security protocol the inside disturbance did not rise to the level of calling the police and pointed out that the time between the inside disturbance and the shooting was less than seven (7) minutes. The City agreed that the testimony of how many people were involved in the disturbance outside on January 29-30, 2016 might be high. The City agreed that the inside disturbance on January 29-30, 2016 was less than a minute.

It is undisputed that the shooter has not been identified and it is not known whether he or she was the Appellant's patron. The City argued that the Department could draw the inference that

the shooter was involved in the inside or outside disturbance and shot the gun. The Appellant argued that the shooter could have been someone outside or someone leaving one of the other nearby licensed establishments.

The Appellant argued there was no testimony at the Board hearing from the police regarding the ongoing safety concerns. The Appellant argued that based on the incidents, it has the likelihood of succeeding on the merits (e.g. no revocation). The Appellant argued that a police detail is not warranted, but its conditions would meet public safety concerns. The Appellant argued that it would suffer irreparable harm if forced to close pending the hearing at the Department as it would lose business which would not return and be forced to close.

The City agreed that the video for January 29, 2016 showed a minor disturbance inside but argued there was testimony regarding a major disturbance outside. The City agreed that the exterior video did not show a major melee outside, but argued that some of it including a beating took place off-camera. The City argued that there would not be irreparable harm as clubs can survive suspensions, etc.. The City argued that there is public harm if a stay is granted because of the public safety issues especially with the shooter still at large.

The undersigned is mindful that there are serious allegations against the Appellant that could impact public safety. However, there has not been a full hearing regarding both incidents. Assuming that there was disorderly conduct both nights (and the parties agreed there was but disagreed to the extent), a sanction would be imposed. The sanction would depend on the nature of the disturbances. In order to obtain a revocation, the disturbances must be egregious. The parties' representations of January 29-30, 2016 demonstrate how quickly things could have or did escalate. The inside disturbance was brief but less than seven (7) minutes later someone outside was firing a gun; though, it has not been established that the shooter was related to either the

internal or external disturbance. A full hearing is needed to determine the full extent of the disorderly conduct on both nights.

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.

#### VI. CONCLUSION

It cannot be determined without a full hearing whether the extent and severity of the disorderly conduct on both nights in January, 2016, and dependent on that finding, what the appropriate sanctions should be for the incidents. The License has already been suspended for 11 days. Under *Department of Corrections*, it is within the agency's discretion to hold the matter in *status quo* pending the full hearing that will be held by the Department pursuant to the February 5, 2016 order. The understandable concerns regarding public safety can be met by the imposition of conditions on a stay.

#### VII. RECOMMENDATION

Based on the forgoing, the undersigned recommends the following:

1. Two (2) police officer detail on Friday and Saturday and State holiday nights.<sup>2</sup>
2. The Appellant will not offer hip hop/rap events. The Appellant will provide written notice to the Board every Monday of the events that it is holding that week.<sup>3</sup>
3. The Appellant will no longer use the parking lot across the street on any day and chain it off.

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<sup>2</sup> The detail is imposed for weekends as the shooting incident occurred at the weekend.

<sup>3</sup> Filing notice with the Board administrator and the Board attorney is recommended.

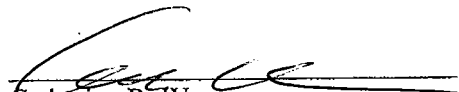
4. On the Monday of each week, the Appellant shall provide in writing to the Board its security plan for the week. E.g. staffing plans, security company (if any), etc.<sup>4</sup>

For the Appellant to re-open, it must be compliant with these conditions so that the parking lot must be chained off and the security plan filed with the Board. If a detail cannot be obtained on a required night, the Appellant cannot open that night.

Nothing in this order precludes the undersigned from revisiting this order because of a change in circumstances.

A full hearing on this matter will be held on **February 16, 2016 and 9:30 a.m. to 12:30 p.m.** and if need be on **February 17, 2016 at 9:30 a.m. to 12:00 p.m.**<sup>5</sup> The hearings will be held at the Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I.

Dated: 12/12/16

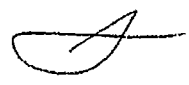
  
Catherine R. Warren  
Hearing Officer

#### 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: February 12, 2016

  
\_\_\_\_\_  
Macky McCleary  
Director

Entered this day as Administrative Order Number 16- 11 on 12<sup>th</sup> of February, 2016.

<sup>4</sup> *Id.*

<sup>5</sup> Further dates may be scheduled if needed.



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

The Director hereby modifies the recommended decision as follows:

The first sentence of Section VII, Paragraph 2 on page 7, the condition that Appellant will not offer hip-hop/rap events, is deleted. Although this condition was suggested by the Appellant, no evidence was presented showing any correlation between the type of music and the incidents at issue. While likely proposed without ill intent, on its face this condition is troubling and arguably offensive. We must avoid stereotypes associated with hip-hop/rap, rock and other music genres that are a part of today's culture.

This matter first came to the Department following the Board's hearing on February 4, 2016. The Department held a hearing on February 5, 2016, and by order on that same date instructed the Board to determine at its February 10, 2016 hearing whether a settlement could be reached with the Appellant and if not, to consider issuing a conditional stay pending the hearing before the Department. Notwithstanding the Department's order, no resolution was reached and the Board simply ordered the Appellant to remain closed pending the hearing before the Department. The Department is frustrated by the Board's failure to resolve this issue and deliver to the citizens and businesses of Providence on its responsibility to provide timely and fair adjudication.

The local licensing and safety issues presented in this case are significant. The Board's failure to resolve this matter at its prior hearings thwarts the progress made during the past year with respect to adjudicating such matters at the local level. The Department recognizes the Hearing Officer's judicious and timely handling of this matter. However, that does not alleviate the responsibility of the local authority to adjudicate these matters in that same manner. As the Department has stated repeatedly, local issues need to be given fair discourse and decision locally. The Department should not be used as a parallel venue for adjudication.

**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 12<sup>th</sup> day of February, 2016 that a copy of the within 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

Stephen M. Litwin, Esquire  
One Ship Street  
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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 as well as by electronic mail to Louis DeSimone, Esquire, attorney for the Board, and Stephen Ryan, Esquire, attorney for the Providence Police Department.)

