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

Mi Sueno, **Appellant,**	:	
v.	:	**DBR No.: 10-L-0169**
City of Providence, Board of Licenses, **Appellee.**	:	

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

I. INTRODUCTION

Mi Sueno ("Appellant") seeks a stay of the City of Providence, Board of Licenses' ("Board") decision to suspend its Class BX liquor license for the period of two (2) weeks to begin on October 4, 2010. The Board objected to the Appellant's motion. This matter came before the undersigned on September 30, 2010 in her capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation ("Department").

The facts stated herein are based on the representations made by counsel for Appellant and the Board. Counsel for the parties did agree on certain facts regarding these proceedings. At hearing, the Board's findings in its decision to suspend said license were discussed.

The parties agreed that after patrons were ejected on the night at issue fighting took place outside. Both parties agree that there was a period of calm outside and then fighting began. The parties agreed that the fighting included patrons from the club.

The parties disagreed that any fighting took place inside the club. Rather the Appellant argued that the club had taken steps to eject potential troublemakers and ejected them from the club.

The Board argued that the patrons were fighting in the doorway as the left and then they calmed down.

The Board argued that the Appellant's owner instigated the fighting outside by use of pepper spray.

The Appellant did not deny that the owner used the pepper spray. The Appellant argued the pepper spray was used prior to the patrons going outside. The Appellant argued that the pepper spray was used in an alcove/foyer once one enters the doors to the club. The Appellant argued that is not part of the club. However, there is no dispute that the foyer/walkway is part of the club's building and entrance.

The Appellant argued that the club owners took steps to eject potential troublemakers but there was no fighting inside but rather a heated discussion or altercation inside and the club owners was doing the right thing to eject patrons.

The Appellant did not dispute that police officers were called to respond to the fight.

The Appellant agreed that there was one arrest that night but disagreed that there were four arrests. The Board represented that there were four arrests that night related to the fighting.

The Board argued that there was videotapes showing its version of events but the undersigned did not view the videotapes.

It was undisputed that the Appellant's License has had some prior sanctions in the form of financial penalties but no suspensions.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-1 *et seq.*, R.I. Gen. Laws § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R. I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. DISCUSSION

The Board argued that the Appellant did not have a strong likelihood of success on the merits. The Appellant argued that it would suffer irreparable harm if shut down because it could not recoup its losses even if prevailed on appeal. The Appellant argued that the Board by not revoking the license must believe that the club can still operate.

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976), a stay will not be issued unless the party seeking the stay makes a "'strong showing'" that "(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest."

Despite the ruling in *Harsch*, the Supreme Court in *Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995) found that *Harsch* was not necessarily applicable in all agency actions and the Court could maintain the *status quo* in its discretion when reviewing an administrative decision pursuant to R.I. Gen. Laws § 42-35-15(c). The issue before the undersigned is a motion to stay a Decision which is subject to a *de novo* appeal and does not fall under R.I. Gen. Laws § 42-35-15(c). Nonetheless, it is instructive to note that the *Department of Corrections* found it a matter of discretion to hold matters in *status quo* pending review of an agency decision on its merits.

The Appellant does not deny there was fighting outside including by the ejected patrons. The Appellant disputes the extent of the license holder's involvement in the fighting and the extent of the penalty.

The current basis for suspension is for disorderly conditions involving fighting inside and outside the club and the owner's own actions. The Appellant has been previously disciplined for some illegal activity but without suspension. Liquor licensees are responsible for conduct that arises within their premises and for conduct that occurs off premises but can be reasonably inferred from the evidence had their origins inside. In suspending a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. Rather, the Rhode Island Supreme Court held in *Cesaroni v. Smith*, 202 A.2d 292, 295-296 (R.I. 1964) as follows:

> [T]he legislature, in enacting the pertinent provision of the statute, intended to impose upon such licensee the obligation to maintain an efficient and affirmative supervision over the conduct of his patrons in his place to such an extent as is necessary to maintain order therein. It is our opinion that as a practical matter a licensee assumes an obligation to affirmatively supervise the conduct of his patrons so as to preclude the generation therefrom of conditions in the neighborhood of like character to conditions that would result from maintenance of a nuisance therein.
>
> It is to be conceded that this imposes upon a licensee an onerous burden in the management of the licensed premises. It is, however, within the authority of the legislature, the liquor traffic being peculiarly within the police power of the state.

See also *The Edge-January, Inc. v. Pastore*, 430 A.2d 1063 (1981); *Manuel J. Furtado, Inc. v. Sarkas*, 373 A.2d 169 (R.I. 1977).[1]

[1] A serious egregious incident can be a basis for a revocation of a liquor license. See *Stagebands, Inc. d/b/a Giza v. Providence Board of Licenses*, DBR No.: 06-L-0147 (12/4/06) (disturbances and a shooting on one night justified revocation) (uphcld by Superior Court, PC 06-6454 (8/5/09).

A. Substantial Likelihood of Success on the Merits

Applying the criteria from *Harsch*, a stay will not be issued if the party seeking the stay cannot make a strong showing that it will prevail on the merits of its appeal. In the present case, the parties have not had an opportunity to support their respective positions because of time constraints. However, there is no dispute that there was fighting outside of the club by those ejected from the club. There is no dispute that the owner used pepper spray. When the pepper spray was used is disputed. However, assuming that the Appellant can prove the reasonableness of such use, the fact then remains that the fighting was so egregious as to necessitate the use of pepper spray to stop it. A license holder is responsible for conduct inside and outside a club. While the Appellant has not been suspended before, it has been sanctioned and there is a long line of Department cases upholding progressive discipline. *Pakse Market Corp. v. McConaghy,* 2003 WL 1880122 (R.I. Super.). There is no question that the Appellant is responsible for the fighting that parties both agreed occurred though the Appellant argues that the fighting was not as extensive as argued by the Board. However, even if the fighting is not as extensive as the Board alleges, the fact remains there was fighting outside for which the license holder is responsible. And in terms of the pepper spray, it is either proved 1) the owner was wrong to use pepper spray; or 2) the owner was right to use pepper spray and thus the fighting was extensive. Either way, the owner is responsible for that situation.[2]

[2] At hearing, the Appellant's arguments about certain events appear contradictory. If the club was ejecting patrons – but the patrons were not fighting and were calming down and were calm once outside – then there would be no reason to use pepper spray in the foyer next to the exit. The Appellant initially argued, "the evidence is going to show that as they were removing the patrons that were supposedly having an altercation inside everything was calm." However, the Appellant later argued that the club owner used the pepper spray while the patrons were exiting but disputed the Board's finding that there was fighting inside the club and instead argued that the club was removing patrons about to fight but who were not fighting. However, the undersigned is not making a decision on the factual use of pepper but rather that on the basis of either factual use, that would support the Board's decision.

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

The Appellant argued that it will suffer irreparable harm if it is forced to close. However, the Board (an interested party) has an interest in ensuring that liquor licensees – where the public gather - are compliant with their statutory obligations. In addition, there is a strong public protection interest. Not only does the public have an interest in ensuring that public spaces are safe, granting a stay raises issues of public safety and public protection.

The Appellant objects to the length of the sanction. The Department ensures that there is consistency among towns and notice given regarding possible sanctions (progressive discipline).

The parties dispute certain facts and how the events unfolded that night. Nonetheless, there is no dispute over the fighting outside necessitating the police being called. And the events were either egregious enough to use pepper spray or if not, the owner used it unnecessarily. If the Board had chosen to revoke said license, there would be an argument that the events were not egregious enough to warrant revocation without prior suspension (discipline). For a discussion of sanctions and progressive discipline, see *C & L Lounge, Inc. d/b/a Gabby's Bar and Grill; Gabriel Lopes v. Town of North Providence*, LCA-NP-98-17 (4/30/99) (thirty (30) day suspension for severe disorderly conduct but not so severe as to merit revocation).

Therefore, pursuant to *Harsch*, the Appellant has not made the strong showing of a likelihood of success on the merits necessary for the issuance of a stay in that the license holder is responsible for the fighting including its patrons and the sanction is within the parameters of prior decisions.

The parties did discuss whether a conditional stay should be granted. While the Board opposed the granting of a stay, the parties may eventually reach an agreement regarding conditions (e.g. mandatory police detail; earlier closing time) for a stay. While the undersigned

has found on the basis of *Harsh*, a stay should not be granted, this does not preclude the parties from entering into any such agreement.

V. RECOMMENDATION

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

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

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

Dated: 9/30/10

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: 09-30-2010

A. Michael Marques
Director

Entered this day as Administrative Order Number 10-127 on 30th of September, 2010.

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 20th day of September, 2010 that a copy of the within Order was sent by facsimile and first class mail, postage prepaid, to the following:

Maxford Foster, Esquire
City of Providence Law Department
275 Westminster Street
Providence, RI 02903
FAX 351-7596

Peter Petrarca, Esquire
330 Silver Spring Street
Providence, RI 02904
273-1111

and by hand-delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920