



*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. 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.

### **IV. DISCUSSION**

On June 15, 2022 a decision<sup>1</sup> was issued by the Department providing that the Appellant could continue to be licensed as a Class BV licensee but imposing nine (9) conditions on the

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<sup>1</sup> The decision can be found at <https://dbr.ri.gov/municipal-liquor-appeals-under-3-7-21>.

License. Pursuant to R.I. Gen. Laws § 3-5-8, Class B licenses expire on December 1st of every year. Thus, the Appellant's License would have expired toward the end of 2022 and would have been renewed at that time by the Board for 2023. This matter arises from the Board's denial of the Appellant's renewal application filed at the end of 2023 for 2024.

At the January 4, 2024 Board hearing,<sup>2</sup> the Board reviewed the conditions from the 2022 decision and found that there were at least two (2) or three (3) violations by the Appellant of those conditions. The Board found that since the Department's decision used the term "shall" for all the conditions that then required revocation or denial of renewal for violations of conditions. It is noted that the 2022 decision did not indicate that any violation of the condition mandated revocation or denial of renewal but rather indicated that the failure to comply with conditions could lead to revocation. It is within the discretion of the licensing authority, the Board, to determine what type of sanctions should be imposed for such violations. Obviously, any decision by the Board is appealable to the Department but the Board as the licensing authority has an interest in ensuring that its licensees comply with conditions of licensing.

**A. The 2022 Conditions**

The first condition was that only incidental music could be played by the Appellant. The reason was to ensure that the Appellant complied 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.). Thus, the condition required that only ambient music could be played so that the Appellant's music did not go over 50 dB. The Board found there was a potential violation of this condition.

The second condition was that the Appellant was to appear at the Board as soon as possible after the issuance of the decision and then every 30 days to provide an update on how it was operating

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<sup>2</sup> The undersigned listened to the hearing which recording can be found at <https://providenceri.qm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=14468&Format=Minutes>

and to review if any further complaints had been received by the Board in relation to the Appellant. It was agreed at the stay hearing that the Appellant did not appear every 30 days before the Board. The Appellant argued that it would be in the Board's purview to schedule those appearances. The Board argued that the Appellant made no effort to comply and never requested hearing dates. One most likely would assume that after the Appellant appeared for the first time as required by the decision that the Board would have started to schedule the 30 day reviews. At the same time, there seems to be no evidence that the Appellant requested hearing dates to ensure that it complied with the decision. The Board found that the Appellant did not comply with this condition.

The third condition was that when the Appellant appeared before the Board for the first time after the issuance of the decision, it was to provide an updated business plan to the Board. There is a business plan on record with the Board, but the Board at its 2024 renewal hearing apparently found it deficient. However, the License was renewed in 2022 so there may have been a finding that the business plan was sufficient at that time. The Board found that this was a potential violation.

The fourth condition related to whether the Appellant was to be a smoking bar. It required that when the Appellant appeared before the Board for the first time, it was to inform the Board whether it was a smoking bar. If it indicated at that time that it was a smoking bar, it was to provide the Board with copies of any tax affidavits filed in 2021 or previously. It was to provide proof of a ventilation system as required by law. If it could not provide that information, it could not be considered a smoking bar. The Appellant admitted that it did not comply with the smoking bar condition. The Appellant was to decide in 2022 whether it was a smoking bar. It has continued to offer hookah. However, it has not provided the affidavits as required. It represented that it has a ventilation system.

The fifth condition provided that when the Appellant appeared before the Board for the first time it was to provide a copy of the letter of good standing from the Division of Taxation. The Board did not find a violation of this condition since such a letter would have been required in 2022 for the Appellant's renewal.

The sixth condition was that there were to be no advertisements about music allowed in any venue or forum. It was undisputed at the stay hearing that the Appellant had an Instagram page with an advertisement with a picture of bongo drums. The Appellant argued that bongo drums can be played without amplification so that it would not need an entertainment license for them. However, the Appellant is only to play incidental music for background music. The point of the music advertisement ban was to ensure that the Appellant did not present itself as a destination for music when it is not a nightclub but a restaurant. The Board did not find the Instagram page to be violation but rather indicated it would defer to the Department on this issue.

The seventh condition was that the Appellant shall close at 10:00 p.m. The Board found a violation as there had been advertising by Appellant that it was open to 11:00 p.m. The Appellant argued that that was just an error in its advertising, and there was no evidence that it was actually open after 10:00 p.m. in that no neighbors had said so and there was no police evidence to that effect.

The eighth condition was that after one (1) year from the decision, the Board was to decide whether the Appellant should continue to appear monthly or whether the Appellant should appear quarterly, every other month, or not at all, etc. As the Board found a violation of the 30 day meetings, it found a violation of this condition as well.

The ninth condition was that the Appellant was not to open until it appeared before the Board with the information required by the decision. The decision noted that the Board hearing was to be scheduled as soon as possible after the Appellant indicated it was ready to appear on the agenda.

Clearly after the issuance of the 2022 decision, the Appellant was allowed to open and renew its License in 2022 despite the fact that the Appellant did not provide the smoking affidavits and despite the fact that there were no 30 day reviews.

The Appellant has not complied with all the conditions of the 2022 decision. There has been no evidence of any public protection interest due to violence. The Board (an interested party) has an interest in ensuring that liquor licensees – where the public gather - are compliant with their statutory obligations. The Board has an interest as the licensing authority to ensure that all licenses comply with statutory and regulatory requirements as well as any additional conditions of licensing.

In order for the Board to work with the Appellant to see if its License can be renewed by the Board perhaps with conditions that the Board chooses to impose, this matter is remanded to the Board for further consideration. It may be that the Board chooses to impose 30 day reporting requirements. It may be that the Board changes the closing time. It may be that the Board chooses to consider the time that the Appellant was closed pending this appeal to be a type of suspension for failure to comply with conditions of licensing.

However, during this remand that Appellant may not act as a smoking bar. It failed to comply with the 2022 requirements to be a smoking bar. If it wants to be a smoking bar, it must now provide proof to the Board. Presumably there is a 2023 affidavit if it was acting as a smoking bar last year. The Appellant cannot act as a smoking bar until it speaks to the Board and provides evidence satisfactory to the Board of its intent to be a smoking bar and compliance with such requirements, if it chooses to be a smoking bar. Additionally, there shall be no advertisements that have any relation to music whether by text or picture. The Appellant is not a destination to

listen to music. It is to be a restaurant and that should be reflected in the updated business plan that it is also to be provided to the Board during this remand.

**V. RECOMMENDATION**

Based on the foregoing, the undersigned recommends that a stay subject to the conditions delineated above be granted for the denial of the renewal of license application pending a remand to the Board for the Board to further consider the Appellant’s renewal application.

January 24, 2024  
Dated: \_\_\_\_\_

*Catherine R. Warren*  
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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: January 29, 2024

*Elizabeth Kelleher Dwyer*  
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Elizabeth Kelleher Dwyer, Esquire  
Director

**NOTICE OF APPELLATE RIGHTS**

**THIS ORDER CONSTITUTES AN INTERLOCUTORY ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-15. 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 29<sup>th</sup> day of January, 2024 that a copy of the within Order and Notice of Appellate Rights were 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, R.I. 02903, Nicholas Hemond, Esquire, DarrowEverett, LLP, 1 Turks Head Place, Suite 1200, Providence, R.I. 02903, and Louis A. DeSimone, Jr., Esquire, 1554 Cranston Street, Cranston, R.I. 02920 and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

*Megan Mihara*  
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