

consideration of the transcript of the Board’s oral Decision, its written Decision, and brief oral argument from counsel for both parties on October 28, 2013.¹

II. JURISDICTION

The Department has jurisdiction to review local liquor licensing decisions under R.I. Gen. Laws § 3-7-21, subject to relevant provisions of the Rhode Island Administrative Procedures Act, § 42-35-1 *et seq.*²

III. ISSUE

The issue is whether the Department should order a stay of the Board’s Decision pending the outcome of the appeal before the Department.

II. DISCUSSION

Under R.I. Gen. Laws § 3-7-21, the Department has the power “to make *any* decision or order he or she considers proper.” The grant of an order staying the decision of the local licensing authority pending the outcome of an appeal to the Department is thus within the Department’s sole discretion. *See Burton v. Lefebre*, 53 A.2d 456, 460 (R.I., 1947)(the appeal itself does not automatically stay the Board’s decision; rather, an order based on the circumstances of each case is required). In deciding whether to grant the stay, the Department has broad discretion and flexibility to balance the interests of the local authority and the general public against the interests of the licensee.³

¹ At the time of the consideration of this request for a stay, the transcript of the evidentiary hearing before the Board was provided.

² The Decision provides for suspension of “the licenses held by MDLL, LLC.” It is unknown whether this includes licenses under the Board’s jurisdiction other than the liquor license; however, the Department’s jurisdiction and the scope of this Decision is limited to review of disciplinary action taken on the liquor license. *See, e.g., Ada’s Creations, Inc. v. The City of Providence Board of Licenses*, DBR No. 13LQ056 (Interim Order adopted 6/6/13)(Department does not have jurisdiction to grant a stay of suspension of an entertainment license that is issued separate and apart from a liquor license).

³ Another factor that the Department may consider in deciding whether to issue a stay is Appellant’s likelihood of success on the merits. However, such a determination cannot be made at this time given the limited record as of the date of the consideration of the request for a stay.

With respect to the fines assessed against the Appellant, the harm that may be suffered by the Appellant if the imposition of said fines is not stayed is *de minimus*. Neither the transcript of the oral Decision nor the written Decision provide a due date for the fine. However, if the Board demands payment prior to full disposition of this appeal by the Department and the Department subsequently reverses or reduces the monetary penalty, the Appellant would be entitled to a refund or partial refund of the payment made.

With respect to the suspension of the liquor license, however, the interests of the Appellant in avoiding suspension during the pendency of its appeal outweigh the interests of the Board and the public. As the state “superlicensing authority,” the Department holds the power of “de novo” review in liquor licensing appeals, meaning that it provides the Appellant with a right to have its case reviewed by a Hearing Officer who “independently exercises the licensing function.”^{4, 5} If the Appellant prevails on the merits of the Department appeal, the damage caused by pre-appeal enforcement of the suspension may be irreparable. More specifically, if the Appellant suffers the three-day suspension, it may not be able to recover the economic harm incurred. Any claim for recovery against the Board to recoup this business loss is subject to the complex issues of governmental immunity⁶ and the difficult quantification of damages.

In contrast, the harm that may be suffered by the Board if the suspension is stayed and the Board then prevails on the merits of the appeal amounts to a mere delay in enforcing the suspension. The timeline for this case does not manifest urgency by the Board to take action

⁴ *Hallene v. Smith*, 98 R.I. 360, 363 (R.I., 1964); *Cesaroni v. Smith*, 98 R.I. 377, 379 (R.I., 1964). See also *Jake & Ella's, Inc. v. Dep't of Bus. Regulation*, 2002 WL 977812 (R.I. Super., 2002) (“the discretion given to the DBR goes as far as to vest the hearing officer with the authority to review the local board partially de novo and partially appellate if he/she sees fit.”); *The Rack, Inc. v. Providence Board of Licenses*, C.A. No. PC 2011-5909 (with respect to monetary penalties, providing that the Department has discretion to utilize a full “de novo” review or a less fact-intensive review).

⁵ R.I. Gen. Laws § 3-7-21 provides the Appellant with a ten day period to exercise its appellate rights, a period that would not expire until the last day of the suspension imposed by the Board.

⁶ See, e.g., *Martinelli v. Hopkins*, 787 A.2d 1158, 1167 (R.I. 2001).

immediately necessary for the protection of the public. The alleged incidences occurred on September 1 and 12, 2013; however, the Board did not hold a Show Cause Hearing until October 10, 2013. The final Decision rendered by the Board was further delayed from the date of the hearing until October 23, 2013, at which time the Board decided to impose a three-day suspension at the future dates of October 31 and November 1-2, 2013. The Board did not elect to exercise its emergency powers, *i.e.* to order an emergency suspension followed by an Emergency Show Cause Hearing. Therefore, while the fines and suspension imposed by the Board appear to have been designed serve the critical purpose of punishment for deterrence of future violations; the Board did not make a finding of a public safety concern that would necessitate immediate suspension. Moreover, the circumstances that were the focus of oral argument before the undersigned at the stay hearing (the September 12 incident) pertain to a very specific event hosted by a lessee of the premises, not a regularly scheduled act or in-house programming. There is no indication that the Appellant will repeat this event or any substantially similar event that would trigger the same safety issues during the pendency of the appeal.

In conclusion, it is recommended that: the request for a stay of the monetary penalties be denied; the request for a stay of the suspension be granted pending the outcome of the full appeal hearing. However, in consideration of the Board's interests, it is further recommended that the stay of the suspension be conditioned on the Appellant providing Providence Police with a written list of events to be held at the establishment when operated under the business format of "Roxy," at least one week in advance of said event.⁷ This list should be of sufficient detail to

⁷ MDLL, LLC also conducts business as "Lupo's;" however, it has been determined that "Roxy" and "Lupo's" are two "separate and distinct business formats" operated under one liquor license. DBR No. 11-L-0031 Recommended Order Denying Motion for Stay in Part and Granting the Motion for Stay in Part (04/22/11). Therefore, no list should be required for events to be held when operated as "Lupo's."

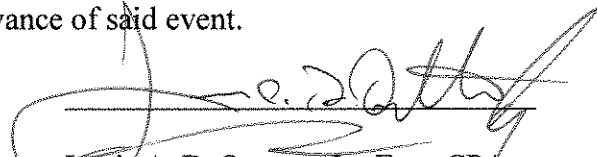
enable police to make a determination as to whether it will take any special precautionary or responsive measures.⁸ This condition should not be construed as authorizing the imposition of any additional detail requirements on the Appellant without either consent of the Appellant or satisfaction of applicable procedural requirements.

RECOMMENDATION

Based on the forgoing, the undersigned recommends that it be Ordered:

1. The request for a stay of the monetary penalties is denied.
2. The request for a stay of the suspension is granted with the condition that, until resolution of this appeal, the Appellant shall supply the Providence Police with a detailed written list of proposed events during operation under the business format of the "Roxy," at least one week in advance of said event.

Date: 10/30/2013


Louis A. DeQuattro, Jr., Esq., CPA
Hearing Officer
Deputy Director & Executive Counsel

INTERIM ORDER

I have read the Hearing Officer's recommendation and take the following action

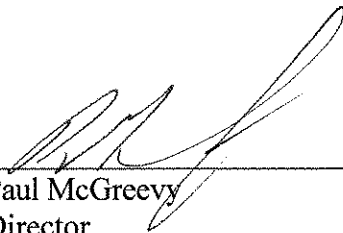
ADOPT

REJECT

MODIFY

⁸ While it appears from representation of counsel at the stay hearing that it is already the practice of Roxy's to provide the police with an entertainment list, the Board alleged that the September 12 event was not listed with sufficient detail to enable a fully-informed police response.

Date: 30 Oct 2013



Paul McGreevy
Director

Entered as an Administrative Order No.: 1308 this 30th day of October, 2013.

NOTICE OF APPELLATE RIGHTS

THIS ORDER IS REVIEWABLE BY THE SUPERIOR COURT PURSUANT TO R.I. GEN. LAWS § 42-35(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 ITSELF STAY ENFORCEMENT OF THIS ORDER.

CERTIFICATION

I hereby certify on this 30th day of October, 2013 that a copy of the within Order and Notice of Appellate Rights was sent by e-mail and first class mail, postage prepaid to -

Steve Ryan, Esq.
City of Providence Law Department
444 Westminster Street
Providence, RI 02903
sryan@providenceri.com

Louis A. DeSimone
703 W Shore Rd
Warwick, RI 02889-2648
ldatty@gmail.com

Stephen Litwin, Esq.
1 Ship Street
Providence, RI 02903
attysml@aol.com

and by email to Maria D'Alessandro, Deputy Director, Securities, Commercial Licensing and Racing & Athletics

