

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RI 02920

Magaly Morel d/b/a El Caribeno
Appellant,

v.

The City of Providence Board of Licenses,
Appellee.

:
:
:
:
:
:
:
:
:
:
:
:
:

DBR No. 13LQ137

INTERIM ORDER GRANTING PARTIAL STAY

I. INTRODUCTION

The City of Providence Board of Licenses (“Board”) alleges that Magaly Morel d/b/a El Caribeno (“Appellant”) violated certain provisions of the liquor law and conditions of licensure in its operation of a Class B liquor establishment on August 23, 2013. After holding hearings on these charges on October 2 and 24, 2013, the Board issued a written order on November 7, 2013, sanctioning the Appellant with a \$1,500 fine and an immediate ten day suspension to be served November 7-16, 2013. The Appellant immediately appealed this decision to the Department of Business Regulation (“Department”) in accordance with R.I. Gen. Laws § 3-7-21. With its appeal, the Appellant requested a stay of the Decision pending resolution of the appeal pursuant to Rule 4(b) of the Department’s Commercial Licensing Regulation 8, *Liquor Control Administration*.¹

¹ There is no dispute that the Appellant satisfied all the procedural requirements of Rule 4(b) that “requests for stays must be in writing with proper service to all parties of interest.”

This matter came before the undersigned in his capacity as Hearing Officer sitting as the designee of the Director of the Department. A hearing was held at the Department's offices on November 8, 2013 at which time counsel for both parties were given the opportunity to provide oral argument as to whether the stay should be granted or denied.² Upon consideration of said argument, the written submissions by counsel, and the Board's written Decision, the Hearing Officer issued a preliminary oral order to the same effect as this written Recommendation and Interim Order.³

II. JURISDICTION

The Department has jurisdiction to review local liquor licensing decisions under R.I. Gen. Laws § 3-7-21 and in doing so "to make *any* decision or order he or she considers proper." Being vested with "superlicensing" jurisdiction under Title III includes the authority to issue an order staying the decision of the local licensing authority pending the outcome of the Department appeal. *See Burton v. Lefebvre*, 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).

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.

IV. STANDARD OF REVIEW

² R.I. Gen. Laws § 3-7-21 provides the Appellant with a ten day period to decide whether to exercise its right to a *de novo* hearing. Nevertheless, the Board imposed a suspension to be served during this time period. As such, the Appellant had already suffered a one day suspension before having the opportunity to come before a Department Hearing Officer.

³ "Clearly a person may be bound by the terms of an oral injunctive order." *State v. Eckert*, 120 R.I. 560, 568, 389 A.2d 1234, 1239 (1978).

Judicial interpretation of R.I. Gen. Laws § 3-7-21 in light of the legislative intent to vest the Department with broad discretion as a “superlicensing authority,” gives the Department the power of “de novo” review. *Hallene v. Smith*, 98 R.I. 360, 363 (R.I., 1964).⁴ In other words, the Appellant has a right to have its case reviewed by a Hearing Officer who “independently exercises the licensing function”⁵ without having to defer to the findings or conclusions made by the Board.

V. DISCUSSION

Requests for Departmental stays in liquor licensing cases are distinguishable from “stays” in other legal contexts because the Department holds the power of “de novo” review. In deciding whether to grant a stay, there are no rigid legal factors to be applied; rather, the Hearing Officer will carefully balance the interests of the local authority and the general public against the interests of the licensee and consider any other circumstances that bear on the balance of the equities.^{6,7}

⁴ In fact, “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.” *Jake & Ella's, Inc. v. Dep't of Bus. Regulation*, 2002 WL 977812 (R.I. Super., 2002). See also *The Rack, Inc. v. Providence Board of Licenses*, C.A. No. PC 2011-5909 (discretion as to the type of hearing in fine review cases).

⁵ *Cesaroni v. Smith*, 98 R.I. 377, 379 (R.I., 1964)

⁶ The Board cites *Narragansett Electric Co. v. Harsch* as the applicable standard for considering requests for stays. 367 A.2d 195, 197 (1976). However, *Harsch* is distinguishable in that it applies when a court, not an administrative agency, is confronted with a request to stay a decision and when that court, unlike the Department in the liquor licensing context, is confined to appellate review of that decision for error of law. Moreover, the Rhode Island Supreme Court, noting that two justices dissented in *Harsch*, has subsequently provided that “[w]hile the *Harsch* criteria may be persuasive in a given context, we do not consider that they are rigid requirements that the reviewing court must meet in each instance.” *State, Dep't of Corr. v. Rhode Island State Labor Relations Bd.*, 658 A.2d 509, 510 (R.I. 1995).

⁷ With respect to the Board’s insistence that the Appellant will not succeed on the merits of its appeal because its presentation at the Board hearing was minimal, it must be emphasized that because Department review is *de novo*, “the burden is on the officer or board to prove the facts which constitute the cause which are alleged as grounds for the revocation or suspension of a license, and not on the licensee.” 48 C.J.S. Intoxicating Liquors § 243. Moreover, in order to prevail on the merits, the Board must explain how it arrived at the penalty it imposes, considering factors such as “the number and frequency of the violations, the real and/or potential danger to the public posed by the violation, the nature of any violations and sanctions previously imposed, and any other facts deemed relevant in fashioning an effective and appropriate sanction.” *Jake and Ella's, Inc. v. Department of Business Regulation*, 2002 WL 977812, *6 (R.I. Super., 2002). At this point, such rationale has not been introduced into the record.

With respect to the fines assessed against the Appellant, any harm that may be suffered by the Appellant if the imposition of said fines is not stayed pending appeal is curable. If 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. 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 ten day suspension, it may not be able to recover the economic harm incurred, most significantly, lost profits and good will. Any claim for recovery against the Board to recoup business losses is subject to the complex issues of governmental immunity⁸ and the difficulty of quantifying damages, especially for a relatively new establishment.⁹

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 Board has not established that such delay would cause immediate public danger or that there is a public safety significance to the specific dates it selected for the suspension. The Appellant advanced the fact that 74 days elapsed between the date of the alleged occurrence and the Board's final decision. The establishment remained open during this time and no public

⁸ See generally *Martinelli v. Hopkins*, 787 A.2d 1158, 1167 (R.I. 2001)(licensing action is governmental function subject to complete tort immunity unless "special duty" or "egregious conduct" exceptions apply); *Mall at Coventry Joint Venture v. McLeod*, 721 A.2d 865, 869 (R.I. 1998)(in passing upon applications for government permission under a regulatory scheme, officials are protected by "quasi-judicial immunity"; *Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991)("As to the inadequacy of legal remedies," bar of claims by governmental immunity "clearly establishes that any legal remedy is unavailable and that the only relief available is equitable in nature.").

⁹ Moreover, "[b]y its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages;" "accordingly, this kind of harm is often held to be irreparable." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, for 102 F.3d 12, 20 (1st Cir. 1996).

safety issues were reported. Neither did the Board 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 showing of a public safety concern that would necessitate immediate suspension.


In conclusion, it is recommended that: the request for a stay of the monetary penalties be denied; and the request for a stay of the suspension be granted pending the outcome of the full appeal hearing. A full hearing on the merits will be scheduled at the soonest convenience of all parties.

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.

Date: 11/13/13

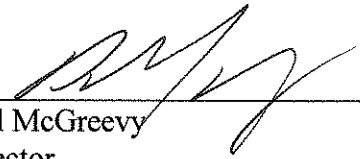

Louis A. DeQuattro, Jr., Esq., CPA
Hearing Officer
Deputy Director & Executive Counsel

INTERIM ORDER

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

ADOPT REJECT MODIFY

Date: 14 Nov 2013


Paul McGreevy
Director

Entered as an Administrative Order No.: 13-054 this 14th day of November, 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 14th day of November, 2013 that a copy of the within Interim Order and Notice of Appellate Rights was sent by e-mail and first class mail, postage prepaid to -

Christopher J. Petrarca, Esq.
Petrarca Law Offices, LLC
478A Broadway
Providence, RI 02909
sescobar@PetrarcaLLC.local

Jillian Barker, Esq.
Assistant City Solicitor
City of Providence
444 Westminister St., Suite 220
Providence, RI 02903
jbarker@providenceri.com

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

A handwritten signature in black ink, appearing to read "Maria D'Alessandro", written over a horizontal line.