

08-1-18

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION

J.J.A.M. Sport, Inc. d/b/a La Cabana Night Club	:	
Appellant,	:	
	:	
v.	:	DBR No.: 08-L-0182
	:	
Town of Lincoln Board of License Commissioners,	:	
Appellee.	:	

**RECOMMENDATION AND INTERIM ORDER GRANTING MOTION
FOR STAY (WITH CONDITION) AND NOTICE FOR DE NOVO HEARING**

I. INTRODUCTION

J.J.A.M. Sport, Inc. d/b/a La Cabana Night Club (“Appellant”) seeks a stay of the Town of Lincoln Board of License Commissioners (“Board” or “Lincoln”) Decision and Order of September 16, 2008 revoking Appellant’s Class B liquor license. The Board objected to the Appellant’s motion. This matter came before the undersigned on September 22, 2008 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. The parties agreed that in May, 2008, the parties had agreed that a condition of licensing for Appellant was to have no more than 100 patrons. The parties represented that this was to enable the Appellant to comply with the fire code. The Board found that on July 26, 2008 the Appellant was over capacity by almost 100 patrons. The Appellant argued that its testimony at hearing before the Board was that the overcapacity was approximately 50 patrons.

The parties agreed that since March, 2007, there have been four (4) incidences involving the Appellant. The parties agreed that none of these incidences involved overcapacity. The parties did agree that two (2) of the incidences involved the imposition of suspensions of some length. The parties did not describe the incidences.

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

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.”

The Appellant argued it would suffer irreparable harm if the stay is not granted because its business is being closed. The Appellant argued that there was no emergency to support revocation in that the basis for the revocation was overcapacity and there had not been a fight, no one had been injured, and there was no underage serving. The Appellant argued that it did not have any live entertainment and was only a sports bar so that there was not such a public safety threat.

Lincoln argued that under *Harsch*, the Appellant would suffer irreparable harm but that had to be balanced with the fact that the public harm that could arise from overcapacity as well as the burden on the taxpayers for the police to monitor the Appellant’s premises for compliance.

In addition, Lincoln argued that Appellant violated a condition of licensing that it had agreed to. Lincoln argued that a decision to grant a stay is a balancing test; otherwise, a stay would be automatic because of irreparable harm.

The undersigned inquired whether the parties would be amenable to requiring a police or fire detail to allow the Appellant to stay open. Lincoln could not agree to such a requirement. The undersigned inquired whether the parties would be amenable to an earlier closing time (currently Appellant closes at 1:00 a.m.) but Lincoln could not agree.

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 *Department of Corrections* found it a matter of discretion to hold matters in *status quo* pending review of an agency decision on its merits.

There is no dispute that there have been prior incidences at Appellant's and that the Appellant has had its License suspended twice before. However, the undersigned is not aware of the reasons for these suspensions. The current basis for revocation is overcapacity. Nonetheless, the Department has a long line of Department cases regarding progressive discipline and upholding the same. See *Pakse Market Corp. d/b/a Pakse Liquor v. Woonsocket City Council*, LCA-WO-00-11 (1/30/01).

The Appellant argued that it will suffer irreparable harm if it is forced to close. However, Lincoln 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 in that the public has an interest in ensuring that public spaces are safe.

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 the time constraints regarding the timing of the penalty. Nonetheless, the parties agree that progressive discipline has been imposed and while the parties contest the number of patrons involved in the July, 2008 incident, the fact remains that based on the representations made to the undersigned, the Appellant was over the 100 patron capacity.

While the parties could not agree to any conditions of a stay being granted, in light of Appellant's discipline history and in order to ensure the *status quo* is maintained but address any safety issues, the undersigned recommends a stay with the following conditions:

1. Either a one (1) man police or fire detail shall be on the premises in the evening until closing time.
2. If either a police or fire detail is unavailable, the Appellant shall close early at 11:00 p.m.

Therefore, no substantial harm will come to Lincoln if the stay is granted because no facts of an imminent threat of harm to the public have been alleged. In this case, a stay of the suspension with the above conditions maintains the *status quo* but addresses the pertinent safety issues until a hearing is held.


Therefore, the Appellant's motion for a stay of the Board's decision to revoke license is hereby granted with the above conditions.

The stay of the suspension will remain in effect until a decision is issued. During the pendency of the appeal, the Appellant must maintain compliance with all relevant licensing regulations and statutes and the conditions of the stay and any further violations by the Appellant will be grounds to reopen this order.

IV. RECOMMENDATION

This Hearing Officer recommends that Appellant's motion for a stay of suspension be granted with the above conditions. The Hearing Officer will contact the parties to schedule the hearing expeditiously.

Dated: September 23, 2008



Catherine R. Warren
Hearing Officer

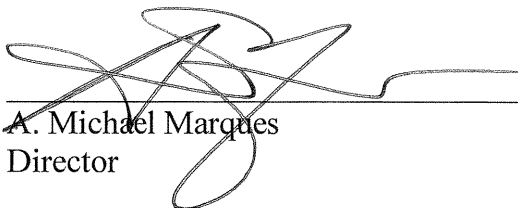
INTERIM ORDER

I have read the Hearing Officer's Order and Recommendation in this matter, and I hereby take the following action with regard to the Order and Recommendation:

ADOPT
 REJECT
 MODIFY

The hearing officer will contact the parties to schedule a hearing expeditiously.

Dated: 09-23-2008



A. Michael Marques
Director

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 24th day of September, 2008 that a copy of the within Order was sent by facsimile and first class mail, postage prepaid, to the following:

Frank J. Milos, Jr., Esquire
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and by hand-delivery to:

Maria D'Alessandro, Associate Director
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AB Ellison