

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

**Gianco, Inc. d/b/a \$3 Bar,
Appellant,**

v.

**City of Providence, Board of Licenses,
Appellee.**

DBR No.: 14LQ043

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

I. INTRODUCTION

On August 7, 2014, Gianco, Inc. d/b/a \$3 Bar (“Appellant”) filed a motion to stay the City of Providence, Board of Licenses’ (“Board”) decision taken that day to revoke the Appellant’s Class BX liquor license (“License”). The Board objected to the Appellant’s motion. This matter came before the undersigned on August 12, 2014 in her capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation (“Department”). This matter initially arose from a motion for stay filed by the Appellant with the Department regarding an order issued by the Board on July 30, 2014 to indefinitely close Appellant. A hearing was held on that stay request on August 4, 2014 and the matter remanded to the Board on August 5, 2014 for a further decision. On August 7, 2014, the Board held a hearing and revoked the License.

The Board’s July 30, 2014 decision was based on the incidents on July 26, 2014. The Board’s August 7, 2014 decision was taken based on the incidents of July 23 and July 26, 2014. A hearing had been held previously (on July 30, 2014) before the Board on the July 26, 2014 incident. An emergency hearing was held before the Board on the July 27, 2014 regarding the

July 23, 2014 incident. On the remand hearing on August 7, 2014, the Board heard testimony on the July 23, 2014 incident with notice to Appellant given one (1) hour before the meeting of its intention to hear testimony regarding July 23, 2014.

The Board treated the August 7, 2014 hearing as an emergency hearing for the July 23, 2014 incident but made a final decision to revoke all licenses. The Board's power for emergency hearings is limited by Providence Charter section 1102 which provides that the City cannot revoke a license without three (3) days written notice given of its intended action.¹ Instead, the process leading up to the Board's revocation was based on a full hearing before the Board for July 26, 2014 incident and an emergency hearing held on July 27, 2014 and August 7, 2014 before the Board for July 23, 2014 incident. At the Department stay hearing on August 12, 2014, the Board confirmed that the revocation was a final decision of the Board.

By order dated August 13, 2014, the Department denied the Appellant's motion to stay. Said order found that while Providence had not properly noticed its intent to hear the July 23, 2014 (parking lot incident), the Department would hear the appeal of both the parking lot incident and the July 26, 2014 incident (the fight). Said order found that based on the testimony before the Board, it would be likely that a suspension would issue for the fight but that there was a safety issue in regard to the parking lot incident which had not been fully litigated so that a stay was denied.

The first day of the Department hearing on the appeal of the License revocation was held on August 25, 2014. At that point, the Appellant played its security camera video to impeach the

¹ Providence Charter section 1102(3) provides as follows:

Unless otherwise provided by state law, suspend, annul, rescind, cancel or revoke any license issued by the board of licenses for any reason which the board may deem to be in the public interest; provided, however, that no license shall be suspended for more than seventy-two (72) hours or annulled, rescinded, cancelled or revoked unless the licensee shall have been given at least three (3) days' written notice of the action proposed to be taken and of the grounds therefor and the time and place of the hearing. The said licensee shall also be notified of the right to be represented at said hearing by legal counsel.

police officers' testimony at the Board hearing regarding the duration of the fight and the number of people involved. The parties agreed that the City had not been provided with the original data from the video cameras contained in a flashdrive but rather the video was on a CD taken from the flashdrive.

The video showed a woman inside the Appellant's right before 2:00 a.m. throwing something on the ground and then someone taking her outside. While outside this woman pushed and shoved people. She was pushed away and came back and pushed people. Several people including men with "staff" written on the back of their t-shirts were outside. There were several people outside that were involved in shoving match with people falling to the ground. There are also a few people taking photographs or videos with cell phones. Two (2) police officers walked by and cleared people away. At 2:05 a.m. the two (2) police officers walked by and nothing was happening. Cars were moving in the street. No one in front of the bar is seen clutching their eyes as if they had been sprayed with pepper spray. People are walking on the sidewalk in front of Appellant's and are able to pass.

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. STATUTORY BASIS FOR REVOCATION

R.I. Gen. Laws § 5-23-5 states in part as follows:

(b) If any licensed person permits the house or place where he or she is licensed to sell beverages under the provisions of this title to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood . . . he or she may be summoned before the board, body, or official which issued his or her license and before the department, when he or she and the witnesses for and against him or her may be heard. If it appears to the satisfaction of the board,

body, or official hearing the charges that the licensee has violated any of the provisions of this title or has permitted any of the things listed in this section, then the board, body, or official may suspend or revoke the license or enter another order.

IV. DISCUSSION OF CASES ON REVOCATION

In revoking 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.

Furthermore, the Court found that "disorderly" as contemplated in the statute meant as follows:

The word "disorderly" as used here contemplates conduct within premises where liquor is dispensed under a license that causes either directly or indirectly conditions in the neighborhood in annoyance of or disturbing to the residents thereof. *Id.* at 296.

Thus, a liquor licensee has the "responsibility to control the conduct of its patrons both within and without the premises in a manner so that the laws and regulations to which the license is subject will not be violated." *Schillers, Inc. v. Pastore*, 419 A. 2d 859 (R.I. 1980).

A liquor licensee is accountable for violations of law that occur on its premises and outside. *Vitali v. Smith*, 254 A.2d 766 (R.I. 1969). It is not a defense that a licensee is not aware of the violations or provided supervision to try to prevent violation. While such a responsibility

may be onerous, a licensee is subject to such a burden by the legislature and accepted such conditions by becoming licensed. *Therault v. O'Dowd*, 223 A.2d 841, 842-3 (R.I. 1966). See also *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965). As the Supreme Court has found, "the responsibility of a licensee for the conduct of his patrons within the licensed premises that makes it disorderly within the meaning of the statute is established by evidence showing a toleration or acquiescence in such conduct by the licensee." *Cesaroni*, at 296. See also *AJC Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Schillers*; and *Furtado v. Sarkas*, 118 R.I. 218 (1977).

Nonetheless, the revocation of a liquor license is a relatively rare event and is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety. See *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.) (disturbances and a shooting on one night justified revocation). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside justified revocation); *PAP Restaurant, Inc. v. d/b/a Tailgate's Grill and Bar v. Town of Smithfield, Board of License Commissioners*, DBR No.: 03-L-0019 (5/8/03) (series of infractions justified revocation).

Thus, the Department will uphold a revocation where an incident is so egregious as to justify revocation without progressive discipline. However, the Department will decline to uphold a revocation where the violation is not so egregious or extreme and the local authority has not engaged in progressive discipline. *Infra*.

V. STANDARD FOR ISSUANCE OF A STAY

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.

VI. ARGUMENTS

The Appellant argued that the video shows discrepancies in the testimony below which included that the disturbance lasted 20 minutes and included 75 to 100 people and that pepper spray might have been used. The Appellant argued that the duration of the fight was much shorter than testified to at the Board hearing. The Appellant argued that it has now been closed for 30 days and based on the video of the fight, any sanction imposed for the fight would not be longer than 30 days.

On the basis of the video evidence, the Appellant requested a stay for all of its licenses² due to a change in circumstances because of the inconsistency between the police’ testimony and

² This appeal only relates to the liquor license held by the Appellant. The Department does not have jurisdiction over the revocation of a victualing license, etc. See *El Nido v. Goldstein*, 626 A.2d 239 (R.I. 1993) (victualing license is a separate and distinct license from a liquor license). The Appellant is concerned that if the Department reinstates the Appellant’s Class B liquor license – which must be held in conjunction with a victualing license – that the Board will refuse to reinstate the victualing license which will result in an end-run around the Department’s jurisdiction. The Rhode Island Supreme Court has held that when a town council acts in a quasi-judicial manner and does not provide for a right of appeal, the proper avenue for appeal is *writ of certiorari* to the Rhode Island Supreme Court. *Cullen v. Town Council of Town of Lincoln*, 893 A.2d 239 (R.I. 2000); *Eastern Scrap Services, Inc. v. Harty*, 341 A.2d 718 (R.I. 1975). Thus, the Appellant has other avenues of appeal for its other licenses.

video. The Appellant argued that there is pending discovery for both parties regarding the parking lot incident so it cannot be determined when the hearing on the parking lot incident will be completed. However, the Appellant argued that the evidence for the fight indicates that based on Department precedence, the Appellant would not receive more than a 30 day suspension. The Appellant argued that it is unfair for it be closed for this long because the fight would not warrant it to be closed for longer than 30 days so it should be reopened pending the hearing on the parking lot incident. The Appellant argued that it understood the first denial of the stay but now with the video evidence and with a balancing of the equities it is not fair to keep it closed pending the hearing.

The City objected to the Motion to Renew the Stay because it had not yet reviewed the whole video. The City argued that the fight was longer than shown in the video as it went up the street and off-camera which is consistent with the police' testimony.

VII. DISCUSSION

The Board's revocation is based on the fight and the parking lot incident. As discussed in the previous order, on the basis of the evidence before the Board regarding July 26, 2014, there was a fight outside of the Appellant's. As discussed in the previous order, in terms of that fight, an imposition of a suspension (rather than revocation) would be consistent with previous Department matters. In *DL Enterprises d/b/a East Bay Tavern v. East Providence City Council*, DBR No. 14LQ009 (4/28/14), the Department reduced revocation to a 14 day suspension for fighting inside bar. In *JJAM Sports, Inc. d/b/a LaCabana Night Club Sports Bar and Grille, Inc. v. Lincoln Board of License Commissioners*, LCA-LI-99-05 (12/27/99), the Department uphold a two (2) day suspension for a fight inside the bar and a second fight outside in the parking lot with

the patrons refusing to leave and police (including from the adjoining community) being called to clear the patrons and a police officer had a beer bottle thrown at him.

Based on the video shown at hearing (subject to further testimony from the Board and considering any prior discipline), the Appellant would most likely receive at most a 30 day suspension. While the video adds new evidence regarding the duration of the fight and the number of participants, the first order denying the stay already acknowledged a suspension was likely as a sanction for the fight (as opposed to a revocation). Thus, there is not really a change in circumstances.

In terms of the parking lot incident, the Appellant has previously disputed that the parking lot killing had its origins inside with arguing among patrons who then fought in the parking lot behind it. The Appellant previously disputed the assertion that its staff knew of the fight and failed to intervene or contact police.

The Appellant's License was revoked on the basis of the fight and the parking lot incident. In determining whether a stay should be granted, the undersigned needs to consider whether the Appellant has made a strong showing that it will prevail on the merits of its entire appeal. The Appellant has made a showing that it might prevail if the revocation was based solely on the fight. However, the revocation is also based on the parking lot incident which is harder to evaluate as a full case was not put on below at the Board.

The Appellant argued that it is unfair to keep it closed pending a hearing. However, the standard for a stay revolves around the strong likelihood of success on the merits as well as public interest and irreparable harm.

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 Appellant was unable to put on evidence before the Board over the parking lot incident because of the short notice. As the revocation is based on both incidents, the stay standard must be met for both allegations.

If the Board can prove its case as set forth before the Board in terms of the parking lot incident, the matter could be similar to *Stagebands* or *Cardio*. On the other hand, if the Board is unable to make the direct or indirect link between conduct on-premises and the parking lot death, the matter could be similar to *El Tiburon Sports Bar, Inc. v. Providence Board of Licenses*, DBR No. 06-L-0087 (6/1/07) (no link between licensee and an assault down the street from licensee). However, the facts as alleged by the Board have not been fully litigated since the Appellant did not have a chance to be heard before the Board as it was only noticed as an emergency hearing.

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

The Appellant has 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.

VIII. CONCLUSION

Since the Appellant was unable to present its case at the Board hearing, it cannot demonstrate that it has strong showing that it will prevail on the merits of its appeal.

Nonetheless, there are serious safety concerns if the Board can prove its parking lot allegations. At this time, they are only allegations; though, the Public Safety Commissioner of Providence testified he had reviewed video of the incident and spoke to investigators of what is an on-going police investigation and that the victim was in the Appellant's arguing with others, went outside, went back in, and then went outside where the fight continued and the victim was struck with a two-by-four and eventually died. The testimony was also that the Appellant's staff was aware of the fight and failed to intervene or call for assistance. The Appellant disputes this account.

It cannot be determined without a full hearing what happened on July 23, 2014. For now, in terms of public safety concerns, the Department will maintain the *status quo* by recommending the denial of the stay request.

X. RECOMMENDATION

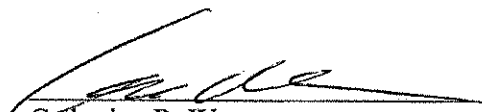
Based on the forgoing, the undersigned recommends that the Appellant's motion for a stay be denied.

Nothing in this order precludes the Appellant and the Board from agreeing to a stay.

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

A hearing is scheduled for September 17 and 19, 2014 at 9:30 a.m. at the Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI.

Dated: August 28, 2014

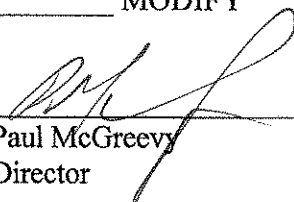

Catherine R. Warren
Hearing Officer

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:

 X ADOPT
 REJECT
 MODIFY

Dated: 28 Aug 2014



Paul McGreevy
Director

Entered this day as Administrative Order Number 14- 51 on 28th of August, 2014.

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 28th day of August, 2014 that a copy of the within Order was sent by email and first class mail, postage prepaid, to the following: Sergio Spaziano, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904 and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920

