

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

Dacosta Liquors, Inc.
Appellant,

v.

City of Providence Board of Licenses,
Appellee.

DBR No. 14LQ038

DECISION

I. INTRODUCTION

Dacosta Liquors, Inc. (“Appellant”) filed an appeal with the Department of Business Regulation (“Department”) for review of the June 26, 2014 decision of the City of Providence Board of Licenses (“Board”) revoking its Class A liquor license based on alleged sale of alcohol to minors on May 24, 29, 30, and June 5, 2014 and sale of tobacco to a minor on March 11, 2014. The Department received the administrative record pursuant to R.I. Gen. Laws § 3-7-21(c), which includes transcripts of the Board hearings held on October 16, 2013, November 14, 2013, December 5, 2013, February 5, 2014, and June 11, 2014, as well as the license history. On October 24, 2014, a hearing was held before the undersigned; neither the Appellant nor the Board presented any testimony at the Department hearing, instead resting on the administrative record and making oral argument. The undersigned requested documentation from the Division of Taxation to be submitted following the hearing; the Appellant submitted tax return documents.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to 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. ISSUE

Should the Department uphold the revocation of the Appellant's Class A liquor license?

IV. STANDARD OF REVIEW

The Rhode Island Supreme Court has explained that “§ 3-7-21 contemplates the removal of a cause by operation of law from a local board to the [state liquor] administrator,” a role statutorily vested in the Department. *Cesaroni v. Smith*, 98 R.I. 377, 379, 202 A.2d 292, 294 (1964). “Under such removal[,] jurisdiction is de novo, pursuant to which [the Department] independently exercises the licensing function.” *Id.* The Department follows the “principles of comity and deference to the local authorities and their desire to have control over their own town or city.” *Eagle Social Club d/b/a Ava's Wrath v. City of Providence Board of Licenses*, DBR No. 14LQ021; 14LQ026 (September 2, 2014).

V. EVIDENCE AND ARGUMENTS

According to the October 16, 2013 Board transcript, the Appellant came before Board on an allegation that an underage person was sent into the establishment to buy a twelve (12) pack of beer and did make said purchase. Counsel for the Appellant admitted that one of the owners was working that day and did not check the identification. Counsel represented: “He [the owner] wants to sell the business and he realized that there have been so many problems that he wants to get out of the business. It is too much for him and his wife to handle.” Counsel represented that

the Appellant has a buyer and was having a meeting with that buyer the following day. The Board voted to continue the matter until November 14, 2013.

The November 14, 2013 Board transcript shows that the Appellant met with potential buyers and had his counsel draft a purchase and sales agreement and prepare an application for the transfer of the license. The Board voted to continue the matter until December 5, 2013.

The December 5, 2013 Board transcript shows that Counsel for the Appellant had prepared all of the paperwork for the application for the transfer, that the Appellant entered into a purchase agreement, and that the issue of the remaining term of the lease to be assigned was still pending. The Chairman concluded the hearing with the statement “we’ll impose a fine when the transfer happens.”

The February 5, 2014 Board transcript shows that the Board imposed a \$1000 fine on the licensee, apparently for the violation first described in the October 16, 2013 transcript. The Board also approved the application for a transfer “subject to police, fire and tax clearance.”

The June 11, 2014 Board transcript shows that the Appellant stipulated to the incidences in question: sale of alcohol to minors on May 24, 29, 30, and June 5, 2014 and sale of tobacco to a minor on March 11, 2014. Detective Patrick Creamer testified as to the incident on May 24, 2014, which was sale of alcohol to a nineteen (19) year old individual. For the remaining incidences, Sergeant Tejada read the police reports into the record. Those records reveal the sale of alcohol to minors on May 29, 2014 (two sales), May 30, 2014 (one sale with two seventeen (17) year old individuals), and June 5, 2014 (one sale to a seventeen (17) year old using a driver’s license “which was easily recognized as being fraudulent”). The record also reflects that an underage assistant was conducting a tobacco compliance check at the premises and purchased

a Dutchmaster Palma (cigar) without being asked to produce identification. One of the owners was on the premises at the time of the tobacco purchase.

Owner Leonelis Dacosta also testified at the June 11, 2014 Board hearing. He testified that he owns the establishment with his wife. He testified that he was on vacation when the alcohol purchase incidences occurred. Dacosta testified that his employee told him that “those people showed IDs before he sold liquor.” He testified that the employee uses the minor book but that people refuse to sign it and he doesn’t know if he asked any of the minors in question to sign the book. He testified that he received a call from Division of Taxation and he needed to go to Taxation to file paperwork for the transfer. Dacosta testified that he did not see the names of the minors apprehended in the minor book and did not bring the minor book with him. He testified that he has explained the procedure for checking IDs to his employees.

The violation history for the past three (3) years from the date of the Board’s decision shows the following violations of sale to an underage individual: 1) 2/23/2012 - \$500 fine; 2) 5/17/2012 – three (3) day suspension; 3) 10/4/2012 - \$1000 fine; 4) 11/22/2012 – 20 days suspension;¹ 5) 7/11/2013 - \$1000 fine. And, as previously noted, the February 5, 2014 Board transcript shows that the Board imposed a \$1000 fine on the licensee, apparently for the violation first described in the October 16, 2013 transcript.

At the hearing before the undersigned, counsel for the Appellant made the following arguments and representations: The Appellant admitted to the May 24, 29, 30, and June 5, 2014 sales to underage patrons; however it was represented that they occurred while the owners were out of the country. The son was inexperienced and was working with a friend. The friend may have caused some of the violations to occur and had only worked there occasionally. Suspension and fine would be a more appropriate remedy. The licensee served a suspension over the

¹ This penalty was cumulatively imposed for underage sale and for sale of alcohol on Thanksgiving.

holidays without any violations. The Providence Police used a cadet that appeared to be of legal age. The Board approved a sale and transfer and all that is missing is that the state Division of Taxation did not give Letter of Good Standing. Revoking the license defeats rights to sale and purchase. The Appellant has remained personally liable on the lease while being closed. The matter could be remanded for the Board to consider a suspension, fine, and conditions on the license to be tacked on the transfer.

At the hearing before the undersigned, counsel for the Board made the following arguments and representations: The transfer was not consummated and violations were occurring in the interim. This licensee has been granted every opportunity to comply and make the transfer happened. Given the violation history and pattern of behavior, revocation is appropriate. The licensee is unfit to hold a license. A licensee has to make it an impossibility that violations occur on the premises. The license was a privilege conditioned on responsible operation.

VI. DISCUSSION

Pursuant to R.I. Gen. Laws § 3-8-1, “[I]licenses issued under this title shall not authorize ...the sale or delivery to any underaged person as defined in this title for purposes of sale, possession and consumption of alcoholic beverages, either for his or her own use or for the use of his or her parents, or of any other person.” Pursuant to R.I. Gen. Laws § 3-8-11.1(b)(3) it is unlawful “to knowingly furnish any alcoholic beverage for the sale, delivery, service of or giving to any person who has not reached his or her twenty-first (21st) birthday.” R.I. Gen. Laws § 11-9-13.8 prohibits holders of tobacco sale licenses from selling tobacco to minors. R.I. Gen. Laws § 3-5-23(b) provides:

“If any licensed person...permits any of the laws of this state to be violated 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.”

The undisputed evidence shows that there were five (5) sales of alcohol to minors across the course of four (4) days in two (2) months in violation of R.I. Gen. Laws § 3-8-1.

Additionally, the undisputed evidence shows there was a sale of tobacco to a minor in violation of R.I. Gen. Laws § 11-9-13.8. Although Dacosta testified that his employee told him that the minors showed IDs, the Appellant did not present the testimony of the employee to identify whether he checked the ID of each minor apprehended. The testimony of Dacosta as to what the employee told him is unreliable hearsay. The police did not report finding fake IDs on the minors apprehended, except as to one, which police described as obviously fraudulent. Even if the minors had presented false IDs, even believable false IDs, presentment of a fake ID is not a defense to sale of alcohol or tobacco to a minor.² The Appellant has a burden to recognize fake IDs and, if in doubt, to have the minor sign the minor book.³ The Appellant did not present evidence that any of the minors in question signed the minor book. If a patron refuses to sign the minor book, the licensee should refuse to sell alcohol to him or her. The Appellant’s employees clearly did not exercise due diligence in checking identifications and utilizing the minor book.⁴

The Appellant, by failing to prevent violations of § 3-8-1 and § 11-9-13.8 from occurring on the premises, did “permit[]...the laws of the state to be violated in the neighborhood.” R.I. Gen. Laws § 3-5-23(b). The Appellant’s argument that the owners were out of the country when

² The statute provides that in a criminal proceeding for furnishing alcohol to a minor, it is not a defense that the minor misrepresented his or her age. R.I. Gen. Laws § 3-8-11.3. It follows that the same principle should apply to a civil proceeding in which the burden of proof for showing a violation is reduced.

³ The Appellant did not use the minor book for the minors in question; however, for a description of a minor book, see R.I. Gen. Laws 3-8-6(c).

⁴ The Appellant’s representation that the minors were police assistants is incorrect with respect to the alcohol purchases; only the tobacco purchase was by a police assistant. Even if this representation were true, it is irrelevant because the argument that a minor looked like a person of age is not a defense.

the violations occurred does not change the analysis. It should be noted that one of the owners was on the premises when the sale of tobacco to a minor occurred.

The Rhode Island Supreme Court has made it clear that [i]It is the responsibility of an alcohol beverage licensee so to supervise the operation of a business carried on pursuant to his license as to make certain that the laws to which his license is subject are not violated.” *Scialo v. Smith*, 99 R.I. 738, 741 (1965). The liquor laws “make a licensee absolutely accountable for what happens on his premises; and that he is not aware of what is going on is not available as an excuse or a defense.” *Vitali v. Smith*, 105 R.I. 760, 762 (1969). R.I. Gen. Laws § 3-5-23 “does not require evidence of consent either expressed or implied.” *Therault v. O’Dowd*, 101 R.I. 395, 398 (1966).

In *Scialo*, a liquor license was revoked after a special agent observed a bartender collecting wagers. The special agent “admitted that he did not see petitioner on the premises during any of his visits.” *Id.* at 740. However, the Court still found the licensee liable, despite his absence, expressing that “[o]nerous though this burden may be, it is within the police power of the legislature to impose it.” *Id.* at 741. In *Vitali*, a license was suspended despite the fact that there was “no direct or implied knowledge of a single isolated violation of the gambling laws which occurred on their premises.” *Id.* at 761. In *Therault*, the Rhode Island Supreme Court found against the petitioner despite the testimony that the illicit conduct occurred at “the busiest of the day and that it was not probable that the petitioner, busily engaged in serving patrons, could have been aware of [another patron’s] activities” and that the licensee “had no knowledge of any [illicit activity] being conducted on his premises and would not have tolerated it under any circumstances.” *Id.* at 397. Analogously, the excuse that the owners were out of the country

does not save the Appellant from liability for permitting violations of state law to occur on the premises.

Having found that six (6) violations occurred on the premises in May and June 2014, R.I. Gen. Laws § 3-5-23(b) does allow suspension or revocation of the license. The analysis turns to the question of whether revocation was the appropriate disciplinary measure. “[T]here are no statutorily prescribed standards governing the imposition of sanctions for liquor control violations.” *Pakse Mkt. Corp. v. McGonaghy*, 2003 WL 1880122 (R.I. Super. Mar. 14, 2003). The Department is “authorized to impose any reasonable sanction that would deter appellant from repeatedly violating the law.” *Id.* Sanctions should be “just, reasonable, and consistent with prior sanctions.” *Curbside, Inc. v. Cumberland Town Council*, DBR No. 09-L-0086 at 18 (09/17/09). However, the Department does not “apply a mechanical grid” because “each matter has its own set of facts that need to be considered.” *Id.* The Department follows a “progressive disciplinary approach.” *C&L Lounge, Inc. d/b/a Gabby’s Bar and Grille v. Town of North Providence*, LC-NP-98-17 (04/30/99).

In this case, revocation is reasonable and consistent with prior sanctions. In *Pakse, supra*, the licensee had four (4) violations of R.I. Gen. Laws § 3-8-1 within three (3) years and served two day, four day, and fifteen day suspension for them. The Department upheld the municipality’s revocation of the license which was in turn upheld by the Superior Court. The Superior Court stated that “[s]erving alcohol to underage individuals can result in serious, even catastrophic consequences, compromising the public health, safety, and welfare.” *Pakse, supra* (citing *Decision of the DBR* at 5). In this case, the Appellant had five (5) underage drinking violations and one (1) underage tobacco violation in a matter of two (2) months and had an additional five (5) underage drinking violations in the last three (3) years. The Appellant has

been progressively disciplined with a \$500 fine on 2/23/2012, a three (3) day suspension 5/17/2012, a \$1000 fine on 10/4/2012, a 20 days suspension on 11/22/2012, a \$1000 fine on 7/11/2013, and a \$1000 fine on 2/5/2014.

In addition to revocation, there are mandatory fines in this case. R.I. Gen. Laws § 3-8-5 provides:

Any person who sells or suffers to be sold or delivered any beverage to a person who has not reached his or her twenty-first (21st) birthday either for his or her own use or the use of his or her parents or any other person, or allows any person who has not reached his or her twenty-first (21st) birthday to drink beverages on premises licensed under this title or suffers or allows any persons who have not reached their eighteenth (18th) birthday to sell or serve any beverage on the premises shall for the first offense be subject to a fine of two hundred fifty dollars (\$250); for the second offense, be subject to a fine of five hundred dollars (\$500), and for the third and any subsequent offense, be subject to a fine of seven hundred fifty dollars (\$750).

The five (5) sales of alcohol to minors that led to the revocation are “subsequent” offenses. Therefore, the Appellant *shall* be fined in the amount of \$3750 payable to the Board.

The transfer of the license was granted, subject to all necessary approvals, including taxation. The Certificate of Good Standing from the Division of Taxation is a pre-requisite of transfer. As of the date of the revocation decision, no Certificate was submitted to the Board. Therefore, the transfer was never consummated. As such, the license was properly revoked from the Appellant and no license remains to be transferred. There is no case law to support the notion that the Appellant has a right to sell its business or that the purchaser, no matter how qualified, has a right to purchase.

VII. FINDINGS OF FACT

1. On June 26, 2014, the City of Providence Board of Licenses revoked the Class A liquor license of Dacosta Liquors, Inc. based on an alleged sale of alcohol to minors on May 24, 29, 30, and June 6, 2014 and a sale of tobacco to a minor on March 11, 2014.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed that decision to the Director of the Department.
3. The facts contained in Section V and VI are reincorporated by reference herein.

VIII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 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.*
2. Five (5) violations of R.I. Gen. Laws § 3-8-1 did occur on the premises.
3. One (1) violation of R.I. Gen. Laws § 11-9-13.8 did occur on the premises.
4. Revocation of the license is appropriate given the disciplinary history and progressive discipline and sanctions imposed in an analogous Superior Court case.

IX. RECOMMENDATION

It is recommended that the Director order as follows:

1. The decision of the Board revoking the Class A license of the Appellant is upheld.
2. The Appellant shall be fined in the amount of \$3750 payable to the Board.

Date: 11/20/14



Jenna Algee, Esq.
Hearing Officer

ORDER

I have read the Hearing Officer's recommendation and I hereby (check one)

- Adopt
 Reject
 Modify

the recommendation of the Hearing Officer in the above-entitled Decision and Order.

Date: 20 Nov 2014



Paul McGreevy
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. 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.

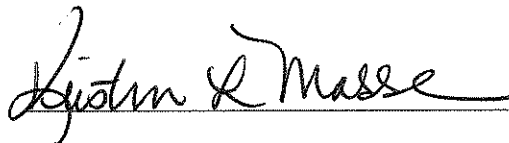
CERTIFICATION

I hereby certify on this 21st day of November, 2014 that a copy of the within Decision and Order and Notice of Appellate Rights was sent by first class mail, postage prepaid to -

Paul V. Jabour, Esq.
Law Office of Paul V. Jabour
343 Broadway, 2nd Floor
Providence, RI 02909

Mario Martone, Esq.
City of Providence Law Department
444 Westminster Street, Suite 220
Providence, RI 02903

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

A handwritten signature in black ink, reading "Justin R. Masse", written over a horizontal line.