

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

Lovera VIP Inc. d/b/a Lovera VIP
Appellant,

v.

City of Providence, Board of Licenses,
Appellee.

DBR No.: 18LQ023

ORDER RE: MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed by Lovera VIP, Inc. d/b/a Lovera VIP (“Appellant”) regarding an order issued by the City of Providence, Board of Licenses (“Board”) on October 29, 2018 regarding the Appellant’s Class BV liquor license (“License”).¹ The parties agreed that on October 20, 2018, the Board, pursuant to Providence Charter section 1102²

¹ This liquor appeal to the Department is governed by R.I. Gen. Laws § 3-7-21 which provides in part as follows:
Appeals from the local boards to director. – (a) Upon the application of any petitioner for a license, or of any person authorized to protest against the granting of a license, including those persons granted standing pursuant to § 3-5-19, or upon the application of any licensee whose license has been revoked or suspended by any local board or authority, the director has the right to review the decision of any local board, and after hearing, to confirm or reverse the decision of the local board in whole or in part, and to make any decision or order he or she considers proper, but the application shall be made within ten (10) days after the making of the decision or order sought to be reviewed. Notice of the decision or order shall be given by the local or licensing board to the applicant within twenty-four (24) hours after the making of its decision or order and the decision or order shall not be suspended except by the order of the director.

² 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interest; provided, however, that no license shall be suspended for more than seventy-two (72) hours or annulled, rescinded, cancelled or revoked unless the licensee shall have been given at least three (3) days’ written notice of the action proposed to be taken and of the grounds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.

suspended the License for three (3) days. The Board's October 20, 2018 action arose out of a shooting outside the Appellant. A full hearing was not held as the parties reached a tentative settlement on October 22, 2018 which was to be presented to the Board on November 1, 2018. The Appellant was allowed to re-open on October 24 and 25, 2018. However, on October 26, 2018, the Board citing new evidence closed the Appellant for three (3) days under section 1102. The new evidence was an interior video showing an altercation between patrons and the Appellant's security staff. A further hearing was scheduled for Monday, October 29, 2018. The Appellant's attorney is court excused this week so did not appear on Monday, October 29, 2018, but sent a letter of objection. Because the Appellant's attorney is court excused this week, the Board rather than use the November 1, 2018 date for a hearing scheduled the hearing on November 5, 2018 and continued to close the Appellant pending hearing. The Board found that the new video evidence raised public safety concerns. The Appellant requested a stay of the closure pending full hearing. A stay hearing was held before the undersigned on October 30, 2018 in her capacity as Hearing Officer delegated by the Director of Department.

II. JURISDICTION

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.*

A liquor appeal to the Department pursuant to R.I. Gen. Laws § 3-7-21 is considered a *de novo* hearing. The Department's jurisdiction is *de novo* and the Department independently exercises the licensing function. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964); and *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964). Because the Department's has such broad and comprehensive control over traffic in intoxicating liquor, its power has been referred to as a "super-licensing board." *Baginski v. Alcoholic Beverage*

Comm., 4 A.2d 265, 267 (R.I. 1939). See also *Board of Police Com'rs v. Reynolds*, 133 A.2d 737 (R.I. 1957). The purpose of this authority is to ensure the uniform and consistent regulation of liquor statewide. *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964).

III. MOTION TO STAY

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." *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976). 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). While appeals before the Department do not fall under R.I. Gen. Laws § 42-35-15(c), 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.

IV. STANDARDS FOR DISORDERLY CONDUCT

R.I. Gen. Laws § 3-5-23 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.

In revoking or suspending 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.

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 licensee is responsible for disorderly conduct inside its premises and disorderly conduct outside its premises that can be directly or indirectly linked to activities inside the premises.

IV. ARGUMENTS

The parties disagreed with what is shown on the interior video.³ The Board and City represented that two (2) patrons and security staff engaged in a dispute regarding an unpaid bill.

³ The Board heard testimony regarding the video, but that hearing was *ex parte* and the testimony was not subject to cross-examination.

The Board and the City represented that a security staff member punched one patron to the floor and punched him while he was on the floor and then forced him to hand over money. The Appellant disputed that the video showed that. The Appellant agreed that the security staff member should not have punched the patron on the floor but represented that the patron grabbed the security staff member before being punched. The Appellant disputed that the video showed the staff members coercing money from a patron. The City and Board represented that the two (2) patrons were surrounded by a total of five (5) security staff members during the altercation.

The Appellant argued that the Board allowed it to re-open after the shooting outside and that the video showing a security staff member punching a patron did not warrant closing it for over a week pending hearing. It represented that the staff member who punched the patron on the floor had been fired.

The Board and City indicated that the Board did not know the staff member had been fired when it decided on October 29, 2018 to continue to keep the Appellant closed pending the hearing. The Board and City argued that because security escalated the situation over an unpaid bill, the Appellant cannot be trusted to operate properly.

The parties agreed that except for the shooting allegations, there has been no prior discipline for any disorderly conduct and any discipline has been for minor violations.

V. DISCUSSION

The genesis for the requirement for some type of hearing on an action being taken by the government arises from due process requirements. The leading U.S. Supreme Court case for determining what type of property interest should be protected and what due process is necessary is *Mathews v. Eldridge*, 424 US 319 (1976).⁴ *Mathews* allows flexibility regarding due process

⁴ *Mathews* sets forth three (3) factors to consider whether an individual has received due process:

requirements. Thus, the required procedures vary according to the interests at stake in a particular context but the fundamental requirement is the opportunity to be heard at a meaningful time and in a meaningful manner. See *Brock v. Roadway Express, Inc.*, 481 US 252 (1987). See also *Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1 (R.I. 2005). In certain situations, a post-deprivation hearing satisfies due process requirements. *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202 (R.I. 1997).⁵

In this matter, the Board ordered the Appellant to close pending a hearing scheduled for November 5, 2018 based on safety concerns. These concerns are due to the interior video and not due to the shooting (as the Appellant was allowed to re-open after the shooting). The patrons in the video could have been the patrons that fired shots outside, but that has not been determined and was not argued at the stay hearing. Thus, the Board has not made a final determination regarding any violations or sanctions but has temporarily closed the Appellant pending hearing. If the hearing is not completed on November 5, 2018, the Board could decide on November 5, 2018 to re-open the Appellant pending a further hearing or if the hearing is completed on November 5, 2018 and a violation is found by the Board, the Board may impose further discipline or decide that no further discipline is warranted.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

⁵ Section 1102(b) provides that if a License is to be suspended for more than 72 hours, there must be three (3) days written notice given of the action prepared to be taken and the grounds therefor and the time and place of hearing. As discussed in a prior Department order, the Board could suspend a liquor license again on a three (3) day emergency basis pending a full hearing or a hearing on any particular safety concerns regarding a licensee to take place after the three (3) day period. *Pasha Lounge, Inc. d/b/a Pasha Hookah Lounge v. City of Providences, Board of Licenses*, DBR No. 15LQ007 (5/21/15) (discussion of the section 1102).

In this situation, the Board rather than scheduling the full hearing three (3) days later chose out of scheduling concerns to schedule it for November 5, 2018. The Appellant's attorney argues there are no safety concerns to warrant a closing prior to the full hearing.

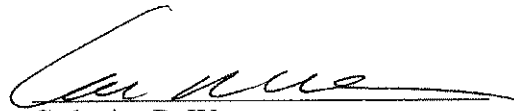
The Appellant represented that it was willing to have a police detail on Friday and Saturday nights as part of its initial settlement agreement with the Board.

The Board and City were concerned because while one staff member was fired, there were still others working at the Appellant who were part of the altercation (the facts of which are in dispute) and were involved in what the City and Board argued was the escalation of a situation involving an unpaid bill.

VI. CONCLUSION AND RECOMMENDATION

There has been no final decision by the Board regarding the security staff and how it operates at the Appellant. The Appellant represented that it fired the security staff member that punched the patron while the patron was on the floor. However, there are still questions regarding the other security staff members. Therefore, the closing prior to November 5, 2018 is stayed on the condition that a police detail is on duty every night the Appellant is opened prior to November 5, 2018. On November 5, 2018, the Board will review this matter further and determine whether it believes the Appellant needs to stay closed pending any further hearings and/or if a detail is still needed during the week and/or weekend.

Dated: October 31, 2018

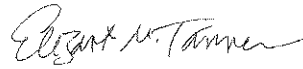

Catherine R. Warren
Hearing Officer

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:

 ADOPT
 x REJECT (see attached)
 MODIFY

Dated: 11/2/18



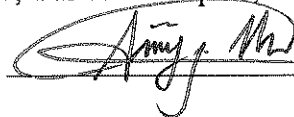
Liz Tanner, Esquire
Director

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 2nd day of ~~October~~ ^{November}, 2018 that a copy of the within Order was sent by email and first class mail, postage prepaid, to the following: Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 Mmartone@providenceri.com; Nicholas Hemond, Esquire, DarrowEverett, LLP, 1 Turks Head Place, Suite 1200, Providence, RI nhemond@darroverett.com; Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, RI 02889 ldatty@gmail.com and by hand-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920



DIRECTOR'S ORDER

The Director rejects the recommendation in Section VI and hereby incorporates the following into the decision and order:

On October 20, 2018, the Board issued an emergency 3-day closure following a shooting that occurred outside the Appellant's premises. On October 26, 2018, the Board issued a second emergency 3-day closure of the Appellant based upon new video evidence of an altercation that had occurred inside the premises between patrons and members of the Appellant's security staff.¹ At the hearing on October 29, 2018, the Board had received a letter of objection from the Appellant's counsel who was unable to appear because he was court excused, so the Board ordered that the Appellant would remain closed pending further hearing. Considering that the Appellant's counsel was court excused on November 1, 2018, the Board scheduled the matter for hearing on November 5, 2018.

The Board's closure order is based upon safety concerns. The Appellant represented that it has fired one security staff member who punched a patron to the floor, punched him while on the floor and then forced the patron to hand over money. The Board represented that five (5) security staff members were involved in the altercation with two (2) patrons, raising the concern that while one staff member was fired, the others involved in the altercation are still working at the Appellant.

Although in considering a request for stay, the Department may determine to maintain the *status quo* in its the discretion, the Department declines to do so here. The Appellant has not made

¹ The audio of the Board's emergency hearing including testimony received on October 26, 2018, is available on the Board's website at the following link.
<http://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=11271&MinutesID=8780&FileFormat=pdf&Format=Minutes&MediaFileFormat=MP3>

the required strong showing that it will prevail on the merits of its appeal, it will suffer irreparable harm if the stay is not granted, no substantial harm will come to other interested parties and issuance of a stay will not harm the public interest.

Based upon the foregoing, the Appellant's request to stay the Board's decision is denied.