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

Gulliver's Tavern, Inc. d/b/a Foxy Lady, Appellant,	:	
v.	:	**DBR No.: 18LQ028**
City of Providence, Board of Licenses, Appellee.	:	

RE: MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed on December 20, 2018 by Gulliver's Tavern, Inc. d/b/a Foxy Lady ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on December 19, 2018 by the City of Providence, Board of Licenses ("Board") to revoke its Class BVX liquor license and Class N (nightclub) liquor licenses.[1] A hearing on the motion to stay was heard on December 21, 2018 before the undersigned who was delegated to hear this matter by the Director of the Department.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to 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

[1] At the Board hearing, the Board also revoked the Appellant's other City licenses, but the Department does not have jurisdiction over those licenses. Appeals to the Department can only relate to the liquor license held by the Appellant. See *El Nido v. Goldstein*, 626 A.2d 239 (R.I. 1993) (victualing license is a separate and distinct license from a liquor license).

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. THE BASIS FOR REVOCATOIN

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, or permits any gambling or unlawful gaming to be carried on in the neighborhood, or permits any of the laws of this state to be violated in the neighborhood, in addition to any punishment or penalties that may be prescribed by statute for that offense, 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.

R.I. Gen. Laws § 3-5-21 states in part as follows:

> Revocation or suspension of licenses – Fines for violating conditions of license. – (a) Every license is subject to revocation or suspension and a licensee is subject to fine by the board, body or official issuing the license, or by the department or by the division of taxation, on its own motion, for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.
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> (b) Any fine imposed pursuant to this section shall not exceed five hundred dollars ($500) for the first offense and shall not exceed one thousand dollars ($1,000) for each subsequent offense. For the purposes of this section, any offense committed by a licensee three (3) years after a previous offense shall be considered a first offense.

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. See *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964). The same statute also forbids a licensee from permitting any laws of Rhode Island from being violated. 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 a 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).

The Department reviews sanctions to ensure statewide consistency and appropriateness in the situation. It also supports progressive discipline barring the rare and extreme event where revocation may be warranted without prior discipline. It also accepts the principles of comity and deference to the local authorities and their desire to have control over their own town or city. At the same time, pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21, the Department ensures that tensions between local boards and licensees are settled in a consistent manner. Nonetheless, there is not a mechanical application of sanctions as each matter has its own sets of circumstances. See *C&L Lounge, Inc. d/b/a Gabby's Bar and Grille; Gabriel L. Lopes v. Town of North Providence*, LCA – NP-98-17 (4/30/99). At the same time, a sanction cannot be arbitrary and capricious. The unevenness of the application of a sanction does not render its application unwarranted in law but excessive variance would be evidence that an action was arbitrary and

capricious. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). See *Jake and Ella's v. Department of Business Regulation*, 2002 WL 977812 (R.I. Super.) (R.I. Super.) (overturning a revocation of a liquor license as arbitrary and capricious).

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) and *Pakse* (upholding revocation when had four (4) incidents of underage sales within three (3) years). 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 with licensee failing to call the police 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.*

IV. STANDARD FOR ISSUANCE OF A STAY

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (R.I. 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.

V. PRIOR DISICIPLINE

The Appellant has no prior discipline.

VI. ARGUMENTS

It is undisputed that three (3) individuals (apparently contractors) of Appellant's were arrested by the Providence police for "loitering for indecent purposes – prostitution" on December 11, 2018 at the Appellant's. All arrests took place after three (3) different undercover detectives went downstairs at the Appellant to the basement for lap dances in what are called "V.I.P. rooms."

The Appellant argued that it has no history of discipline and then in one (1) night there were three (3) criminal charges of solicitation against three (3) women dancers at the establishment and those charges have not yet gone to court. The Appellant argued there was no evidence that management was involved in any of the alleged transactions. The Appellant argued that it would suffer irreparable harm because it is closed and losing business and good will and over 200 employees are out of work. The Appellant argued that any sanction should be in line with progressive discipline and that revocation was an overly harsh sanction.

The Board argued that it found that management knew of the prostitution as it allowed these un-monitored lap dance rooms and were profiting from the prostitution. The City argued that even if management did not know of the prostitution, it is still liable under liquor case law and that these arrests are an egregious event that warrants revocation for a first offence. The Board argued that the Appellant is not suffering irreparable hard because it is only economic hardship.

VII. DISCUSSION

The information received by the undersigned is based on representations of the parties. The undersigned did not have a complete transcript of the Board hearing; however, an audio of the Board's hearing for December 13, 17, and 19, 2018 was available online and the undersigned listened to the December 13 and 17 hearings and the December 19 hearing when the Board made its decision.[2]

The Appellant has a B liquor license as well as a BX (extended hours) which is conditioned on a victualing license. The Board also revoked the Appellant's victualing license. By order of the Rhode Island Supreme Court[3] dated December 21, 2018, the Court did not grant a stay of that revocation but scheduled a full hearing before the Court to hear this matter and at that time could revisit the stay request.

The parties agreed that even if the Department stayed the BVX license revocation, said license could not be used without a stay of the victualing license revocation. However, Class N licenses are separate from a victualing license. R.I. Gen. Laws § 3-7-16.6 and relevant City

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[2] https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=10679&Format=Minutes. https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=11278&Format=Minutes. https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=10681&Format=Minutes.

[3] 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); and *Eastern Scrap Services, Inc. v. Harty*, 341 A.2d 718 (R.I. 1975).

ordinances. Thus, the parties agreed that if the Department stayed the N license revocation, the Appellant could open as a nightclub though without adult entertainment (as a stay of the revocation of the entertainment license also was not granted by the Supreme Court).

The Appellant argued that it would re-open if a stay was granted as a nightclub in a different business format. The City argued that if a stay was granted for the Class N, the City would have no idea what the business format would be as in this case the Appellant's regular business format is adult entertainment so the Appellant could not re-open as it was (like in a usual BV revocation or suspension stay).

In making its decision, one Board member voted against revocation finding it too harsh. Another member indicated that the Appellant had not put forward a plan to prevent such activities in future. (The Board chose not to impose such a plan itself, e.g. closing VIP rooms for time or changing how they are used/accessed, etc.). The vote was 3 to 1 for revocation.

The Department has a long line of cases regarding progressive discipline and upholding the same. The progressive discipline imposed on a licensee depends on the violations and the circumstances of a licensee's violation(s). In this matter, the City argued that the prostitution arrests are egregious enough to justify revocation.

In *Pakse*, the Department and Superior Court upheld the progressive discipline imposed on said licensee for repeated underage violations. The Court found that the local authority was authorized to impose a reasonable sanction that would deter the licensee from repeatedly violating the law, and the Department found that the local authority's imposition of a two (2) day suspension for the first offence with progressively harsher sanctions for the second and third offense, and revocation for the fourth was not arbitrary and capricious because it was based on the premise that the licensee's continued (repeated) violations posed a danger to the community. Thus, the Court

upheld the Department's conclusion that revocation represented a reasonable punishment after the logical progression of suspension sanctions related to repeated violations posing a public danger.

In recently reviewing its cases regarding underage drinking (a violation of R.I. Gen. Laws § 3-5-23), the Department reiterated that it has consistently imposed progressive discipline except for egregious violations under the disorderly conduct statutory provisions such as in *Stagebands*.[4] For example, the Department imposed progressive discipline in *Eagle Social Club d/b/a Ava's Wrath v. Providence Board of Licenses*, DBR Nos. 14LQ021; 14LQ023 (7/29/14) ("Eagle I") where the local authority had revoked a liquor license without imposing progressive discipline. In that matter, the licensee previously had an eight (8) day suspension for four (4) different instances of underage drinking, and the Board imposed a revocation after more underage drinking violations. Instead of revocation, the Department in Eagle I reduced the revocation to 45 days and imposed a 60 day suspension for a further underage violation. In *Eagle Social Club d/b/a Ava's Wrath v. Providence Board of Licenses*, DBR No. 14LQ056 (12/23/14) ("Eagle II"), the Department upheld the revocation of the license after the fourth underage violation in one (1) year. As in *Pakse*, the Department and the local authority concluded in *Eagle II* that progressive discipline was ineffective as the licensee had continuous violations in one (1) year. The same analysis was used in *Dacosta Liquors, Inc. v. City of Providence, Board of Licenses*, DBR No. 14LQ038 (11/20/14), in which the licensee had various underage violations between 2012 and 2015 and received an administrative penalty, a three (3) day suspension, another administrative penalty, a 20 day

[4] The case is *In the Matter of: P.B. Management Inc. and Peter Buonanni d/b/a Cornerstone Pub*, DBR No.: 14LQ003 (6/1/16) which was a Departmental liquor prosecution; however, the issue of discipline and sanctions are the same as in a liquor licensing appeal.

suspension, another administrative penalty, and finally revocation. See also *Bourbon Street, Inc. d/b/a Senor Frogs v. Newport Board of License Commissioners*, 1999 WL 1335011 (R.I. Super).[5]

More recently, where a liquor licensee's manager was arrested for selling drugs, the Board ended up compromising at a 30 day suspension after discussing a 10, 60, or 90 day suspension or revocation of License. *Tel Aviv, LLC d/b/a Tel Aviv v. City of Providence*, 16LQ015 (12/18/16). At the stay hearing for this matter, the Board distinguished *Tel Aviv* from this matter on the basis that in *Tel Aviv* the owner did not know of the drug sales. Of course, whether the owner knew or did not know of a violation does not relieve an owner of responsibility for a violation. See *Therault.*[6]

Turning to a Board case involving prostitution inside a liquor licensee, in 2013 in a matter where undercover Providence police arrested dancers at an establishment for prostitution via lap dances in private booths, the Board concluded that the establishment created an area (private booths) conducive to the occurrence of illegal activities. The Board imposed a 20 day suspension of the establishment's liquor license which was upheld on appeal to the Department. See *Satin Doll, LLC d/b/a v. City of Providence Board of Licenses*, 13LQ157 (3/19/18).

While it is unclear whether the Appellant would have a substantial likelihood of success on the merits in showing that the prostitution allegations are inaccurate,[7] it has a substantial

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[5] The Superior Court upheld the decision to revoke the liquor license after a series of progressive discipline over a year for serious overcrowding on different nights, 18 arrests for underage drinking, illegal drinks promotion, two (2) different disorderly conduct violations, and finally another three (3) incidents of underage drinking.

[6] The Board made the same argument regarding knowledge of the violation in comparing *171 Chestnut Street LLC d/b/a Art Bar v. City of Providence Board of Licenses*, 18LQ025 (11/20/18) to this matter. In *Art Bar*, a patron brought a gun into a nightclub and fired it at the ceiling and the Board suspended its liquor license for 30 days and imposed conditions on its liquor license. (The Board has the authority to impose conditions on the various licenses it issues). The Board also reduced that establishment's hours for its entertainment license for 90 days. That licensee had no prior discipline and offered a new security plan at its Board hearing. Even if the owner did not know of the gun being brought into the establishment, the owner is still responsible for such disorderly conduct.

[7] An administrative hearing has a lower standard of proof required than the criminal standard of beyond a reasonable doubt. Therefore, even if the criminal charges against the three (3) women are dismissed, the City could still proceed on the allegations made against them.

likelihood of success in terms of overturning the revocation of the liquor licenses; though, this decision only addresses the Class N license.[8] For the sake of the analysis regarding overturning the revocation of the liquor licenses, the analysis assumes that a violation of law (prostitution) has been shown.[9]

The evidence at the Board hearing did not demonstrate that the City had the substantially likelihood of success in showing that this matter included the types of circumstances that rise to an egregious event like *Stagebands* or *Cardio*. Rather the circumstances are such – in terms of the liquor license – that they would fall under progressive discipline so that the Appellant can be reasonably sanctioned to deter repeated violations. See *Pakse*.

In terms of public safety, the entertainment license is revoked and no stay has been issued. Also the women involved in the charges have been arrested. If a stay is not issued, the Appellant will not be able to have a meaningful hearing on the matter.

At the same time, the Department is mindful that allowing a stay of the Class N license revocation without a stay of the other license revocations is a change in the Appellant's business format. It is understandable that the Board as the local licensing authority would want to know what the new format would entail and that there is an appropriate business and security plan in place. Therefore, a condition of a stay would be that the Appellant files and appears before the Board to discuss its new format, new business plan, and security plan and the Board approve such plans before the Appellant can open under its Class N license. The Department would further

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[8] The same analysis would apply to the Appellant's Class BVX license; however, as indicated above, even if a stay was granted for that revocation, it cannot be used without the victualing license.

[9] Prostitution was shown in *Satin Doll* by testimony and that one of the dancers charged with prostitution chose a filing of the charges against her.

impose a condition of a police detail on Friday and Saturday nights (which the Appellant has already been using for many years) as well as any openings the night before a State holiday.

Based on the Department precedent in terms of appropriate sanctions for disorderly conduct and violations of law and what is considered an egregious event, there is a substantially likelihood of success that the Appellant will be able to overturn the revocation of the liquor license. Also there is no public danger. More importantly, without a stay, the Appellant will not be able to have a meaningful appeal. Finally, case law allows a stay to be issued as a matter of discretion in order to maintain the *status quo* pending the full hearing. In this situation, *status quo* would not be maintained in terms of all licenses, but the *status quo* can be maintained for the Class N license.

IX. RECOMMENDATION

Based on the foregoing, the undersigned recommends that a stay be granted for the Class N license revocation with the condition that the Appellant files and appears before the Board to discuss its new format, new business plan, and security plan for the Board's approval before it can open under its Class N license and when it re-opens, it maintain a police detail on Friday and Saturday nights as well as any openings the night before a State holiday.

Dated: 12/24/18

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: 12/24/18

Elizabeth Tanner, Director
Director

A hearing will be scheduled on a mutually convenient date to be determined by the parties.[10]

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 24th day of December, 2018 that a copy of the within Order was sent by email and first class mail, postage prepaid, to the following: Fausto Anguilla, Esquire, 56 Pine Street, Suite 200, Providence, R.I. 02903, James J. Lepore, Esquire, Coia & Lepore, Ltd., 226 South Main Street, Providence, R.I. 02903, Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, R.I. 02903, and Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, R.I. 02889 and by hand-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

[10] Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant is responsible for the stenographer.