

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION**

**Club Heat, Inc. d/b/a Level II
Appellant,**

v.

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

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DBR No.: 08-L-0291

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

I. INTRODUCTION

Club Heat, Inc. d/b/a Level II (“Appellant”) seeks a stay of the City of Providence Board of Licenses (“Board” or “Providence”) December 18, 2008 order imposing a thirty (30) day suspension. The Board objected to Appellant’s motion. This matter came before the undersigned on December 18, 2008 in her capacity as Hearing Officer as the designee of the Director by order dated October 31, 2006 in which the Director delegated the authority to hear appeals of local liquor licensing boards’ decisions filed pursuant to R.I. Gen. Laws § 3-7-21 to the undersigned.

The facts stated herein are based on the representations made by counsel for Appellant and the Board. Counsel for the parties did agree on certain facts regarding these proceedings. The undersigned has not received any records and/or documents confirming these facts.

The parties agreed that in the evening of December 13 to December 14, 2008, at closing time, the security staff at the Appellant’s called the police detail (on duty at Appellant’s) for assistance to clear patrons from inside the club. The two (2) officer police detail called for police back-up so that a total of ten (10) police officers cleared patrons from inside the club.

Apparently, this took ten (10) minutes. One of the patrons was arrested outside the club for disorderly conduct (shouting at a police officer).

In addition, there were two (2) individuals injured that night. The parties disagreed over whether these two (2) individuals' injuries related to the events at Appellant's. It was represented that a police officer found an individual who was bleeding from the head lying outside the building that houses the Appellant as well as two (2) other liquor licensees. Also, later that evening another individual went to the hospital with an injury and his wife indicated to a police officer that she believed her husband was injured inside the club. Neither individual testified at the Board hearing regarding how they were injured.

The parties disputed what was happening inside Appellant's when the police were called to clear the patrons. The Board argued that there was fighting among the patrons which the Appellant denied.

The Appellant did not present a case before the Board. The Appellant argued that the evidence before the Board was very slim and the burden was on the police. The Board argued that based on the uncontradicted evidence before the Board it could be reasonably inferred that the above referenced individuals were injured at Appellant's. The Appellant argued that those individuals did not testify at the Board hearing so an inference cannot be drawn from their injuries.

In addition, the parties agreed that there are currently two (2) other pending disciplinary actions before the Board. However, there has been no final disposition in either matter.

The Appellant argued that except for one (1) arrest, there were no other arrests made that night. The Appellant argued there were no assaults and no fights on the night in question.

The parties agreed that on July 24, 2008, the Appellant had an administrative penalty of \$200 imposed for underage drinking. The parties agreed that in the last six (6) months, a \$500

penalty was imposed for an overcapacity violation and a one (1) day suspension was imposed for another incident of overcapacity. Those two (2) matters are currently on appeal to the Department.

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

The Appellant argued that because this is a *de novo* appeal, a stay should be granted so that the appeal may be fully litigated. The Appellant argued that if a stay is not granted then that would moot any right of appeal so that the *status quo* should be maintained.

The Board argued that the Appellant did not make a showing of a substantial likelihood of success on the merits because the Appellant did not present any evidence or testimony at the Board hearing so the Appellant had no evidence of its own to rely on so only could rely on the uncontradicted evidence before the Board regarding the night in question.

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.

There is no dispute that there have been prior incidents at Appellant's and that the Appellant has had its License suspended once (though on appeal). The current basis for the suspension is for disorderly conditions inside the Appellant's. The Department has a long line of Department cases regarding progressive discipline and upholding the same. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.). In addition, liquor licensees are responsible for conduct that arises within their premises and for conduct that occurs off premises but can be reasonably inferred from the evidence had their origins inside. *The Edge-January, Inc. v. Pastore*, 430 A.2d 1063 (1981); *Manuel J. Furtado, Inc. v. Sarkas*, 373 A.2d 169 (R.I. 1977).

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 time constraints. Nonetheless, the parties agreed that discipline has been previously imposed and agreed that the police had to clear the patrons from inside Appellant's on the night in question. The parties dispute what the meaning is of the fact that ten (10) police officers were involved in clearing out a club at closing time. The fact that security called for assistance from the police detail and the police detail had to call for back-up indicates that the crowd was not exiting in an appropriate or successful manner; however, the extent of the problems that caused ten (10) officers to have to clear the crowd obviously were not established in this stay hearing. One (1) arrest was made of a patron. Despite the facts not being fully litigated, based on the

representation of the parties, clearly conditions were such that Appellant's security called the police detail for assistance in clearing the patrons.

A. Substantial Likelihood of Success on the Merits

There is no dispute that within the space of several months, there has been at least three (3) violations (underage, overcapacity) by the Appellant and a one (1) day suspension (though on appeal). While the full facts regarding the night in question have not been litigated, the fact remains that a crowd inside the Appellant's was not exiting properly which necessitated security calling for police assistance and ten (10) officers had to clear out the patrons from inside the club. In addition, one (1) arrest was made. It is hard on these facts to find that the Appellant has a substantial likelihood of success on the merits in demonstrating that there was not disorderly conduct within the Appellant's premises because the Appellant as the holder of a liquor license is responsible for actions within and outside its premises.

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

The Appellant argued in its filing 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 gathers - 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 since eight (8) officers were called in off the streets to assist the two (2) officer detail to clear the crowd. A licensee is responsible for the actions of its patrons.

While the undersigned is mindful of the discretion of a hearing officer or Court to maintain the *status quo* while an appeal is pending, there is a strong public safety consideration in that a liquor licensee is responsible for actions of its patrons. In this matter, there is no dispute

that a large number of police officers were required to disperse patrons from inside the club during which one (1) patron was arrested.

Therefore, pursuant to *Harsch*, the Appellant has not made the strong showing necessary for the issuance of a stay.

The parties did not discuss whether a conditional stay should be granted. While the Board opposed the granting of a stay, the parties may eventually reach an agreement regarding conditions (e.g. larger numbers of mandatory police detail, earlier closing time, smaller capacity) for a stay. While the undersigned has found on the basis of *Harsh*, a stay should not be granted, this does not preclude the parties from entering into any such agreement.

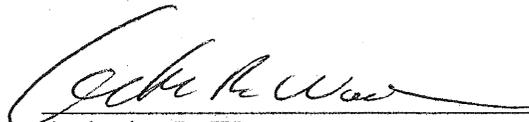
V. RECOMMENDATION

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

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

If neither party appeals the proposed denial of the stay, the undersigned further recommends that a *de novo* hearing be scheduled for December 31, 2008 at 9:30 a.m. at the Department of Administration, One Capitol Hill, Providence, RI 02908. This date may be rescheduled at the request of the parties.

Dated: December 19, 2008


Catherine R. Warren
Hearing Officer

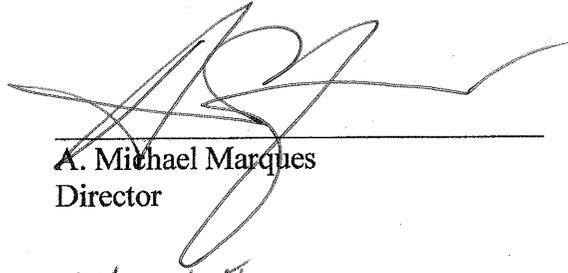
INTERIM ORDER

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

ADOPT
 REJECT
 MODIFY

If neither party appeals the denial of the stay of the Board's Decision, a *de novo* hearing shall be held on December 31, 2008 at 9:30 a.m. as set forth above.

Dated: 12-19-08



A. Michael Marques
Director

Entered this day as Administrative Order Number 08-236 on 19th of December, 2008.

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 19th day of December, 2008 that a copy of the within Order was sent by facsimile and first class mail, postage prepaid, to the following:

Kevin McHugh, Esquire
City of Providence Law Department
275 Westminster Street
Providence, RI 02903
Fax. 401-351-7596

John J. DeSimone, Esquire
DeSimone & DeSimone
735 Smith Street
Providence, RI 02903
Fax 401-454-1402

and by hand-delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920

A. B. Ellison