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.	:	**DBR No.: 14LQ043**
City of Providence, Board of Licenses, **Appellee.**	:	

RECOMMENDATION AND INTERIM ORDER FOR REMAND

I. INTRODUCTION

This matter arose from a motion for stay filed by Gianco, Inc. d/b/a $3 Bar ("Appellant") with the Department of Business Regulation ("Department") regarding an order issued by the City of Providence, Board of Licenses' ("Board") on July 30, 2014. Based on representations from the parties and a transcript of the July 30, 2014 hearing before the Board, on July 27, 2014, the Board convened an emergency hearing regarding the Respondent. Said emergency hearing was held pursuant to Providence Charter section 1102.[1] At the emergency hearing, the Appellant was closed for three (3) days and given three (3) days' notice of hearing. The Appellant's counsel was not present and no cross-examination of witnesses took place at the emergency hearing.

The emergency hearing addressed incidents that took place on July 23, 2014. At the hearing on July 30, 2014, the Board did not go forward with any allegations against 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interest; provided, however, that no license shall be suspended for more than seventy-two (72) hours or annulled, rescinded, cancelled or revoked unless the licensee shall have been given at least three (3) days' written notice of the action proposed to be taken and of the grounds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.

Appellant related to the July 23, 2014 incident. The Board's decision on July 30, 2014 only related to the July 26, 2014 incident.

The specific events of July 26, 2014 are in dispute but in general there was fighting outside of the Appellant's location on Atwells Avenue in Providence. The length of the fighting and the time taken by the police to disperse the fighting and the number of people watching the fighting and whether the Appellant's security staff used pepper spray is in dispute. There was no testimony before the Board of any weapons being used in the fighting. There was testimony that the fighting or on-lookers blocked the street. The testimony related to yelling, screaming, and physical actions by either the people fighting outside or by the on-lookers when told to disperse.

For the Board hearing, the Board subpoenaed the Appellant's security camera footage from the Appellant and the Appellant refused to produce the footage. The Board voted to find the Appellant in contempt and to seek an order finding the Appellant in contempt in Superior Court. Instead of making a final decision on the basis of the testimony heard or continuing the hearing to a date certain, the Board made a motion "to keep $3 Bar closed until the final decision due to the records in the Superior Court that we are waiting on" and the Board voted to close the Appellant.[2] The Appellant seeks a stay of the closure. This matter came before the undersigned on August 4, 2014 in her capacity as Hearing Officer delegated by the Director of Department.

II. JURISDICTION AND MOTION TO STAY ARGUMENTS

In terms of jurisdiction, at the stay hearing, the Board argued that the Department did not have jurisdiction to hear the request for stay as there was no final decision by the Board from which the Appellant could seek a stay. The Board argued that the closure order was not punitive but was imposed for public safety and issued pursuant to the emergency powers of section 1102.

[2] At the stay hearing, the Board represented that the order refers to all licenses held by the Appellant. However, the appeal to the Department only relates to the liquor license held by the Appellant.

The Board argued that the Appellant's objection to the subpoena was prolonging a decision by the Board.

In terms of jurisdiction, the Appellant argued that the motion for stay was interlocutory so that the Department had jurisdiction to hear the request for stay. The Appellant argued that the closure was a *de facto* suspension or revocation as the closing was open ended and there is no telling how long the contempt process in court would take. The Appellant argued that it is a legal issue whether it can be compelled to produce its own video security footage to the Board.

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.

In terms of the stay, the Appellant argued that as the only issue before the undersigned is the events of July 26, 2014, the Appellant would like to reopen until the Board reconvenes and takes action on the liquor license. The Appellant represented that it is willing to implement security conditions.[3]

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[3] The July 30, 2014 Board transcript indicated that there were no police detail on July 27, 2014 and the security staff numbered three (3). At the stay hearing, the Appellant represented that its capacity was 220.

In terms of the stay, the Board argued that a stay could not issue as there has been no final decision to stay so that the requirements to issue a stay cannot be met such that the Appellant cannot show a strong likelihood of success on the merits as there has been no final decision. The Board argued that financial harm of closure is not considered irreparable harm and there is a threat to public safety if the Appellant stays open. The Board also argued that if the City's closing was stayed that would undermine the Board's power to issue emergency closings needed to protect the public safety. Lastly, the Board argued that since the hearing was ongoing the appropriate review standard would be to keep the matter *status quo* (the Appellant closed) as provided for in the *Department of Corrections*. The Board had no objection to setting a control date for a Board hearing.

III. DISCUSSION

A liquor appeal to the Department pursuant to R.I. Gen. Laws § 3-7-21[4] 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).[5] 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*

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[4] R.I. Gen. Laws § 3-7-21(a) provides 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.

[5] See also 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.*, and R. I. Gen. Laws § 42-14-1 *et seq.*

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).

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 *Matthews v. Eldridge*, 424 US 319 (1976).[6] *Matthews* allows flexibility regarding 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).

In this matter, the Board has argued that the closing is for public safety and is not punitive. However, the Board has ordered the Appellant to close with no control date for hearing to either determine whether the safety issues still exist or whether a decision should be taken on the liquor license. Without a termination date or at the least a review date, the closing runs the risk of becoming indefinite – a *de facto* suspension or revocation - depending on actions taken in Superior Court. Thus, the chance for the Appellant to have a meaningful hearing before the Board could never come to fruition depending on how long the Superior Court litigation lasts.

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[6] *Matthews* sets forth three (3) factors to consider whether an individual has received due process:

> 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.

Based on the transcript, the Board's decision on closing the Appellant only relates to waiting for a final decision on the evidence pending the outcome of a potential Superior Court action. The Board had no discussion regarding public safety and whether closing the Appellant was necessary for public safety or whether the Appellant could take steps to increase its security that would meet public safety concerns. Based on the transcript, the concerns before the Board related to the July 23, 2014 incidents include fighting outside the bar, the time taken by the police to disperse the onlookers, two (2) arrests made of individuals who refused to disperse, and the blocking of the street by the crowd outside the Appellant's. There is an array of measures that a liquor licensee can choose to implement and/or the Board can make a condition(s) of licensing and/or reach an agreement with a licensee to implement.[7]

The hearing on an appeal before the Department is not an appeal pursuant to the R.I. Administrative Procedures Act, R.I. Gen. Laws § 42-35-1 *et seq.* However, it is instructive to note that the Administrative Procedures Act, R.I. Gen. Laws § 42-35-13(a) provides, "[a]ny preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency order would not provide an adequate remedy." In this matter, the Appellant could end up having a *de facto* suspension or revocation of license without a right to appeal or to be heard. It would be a violation of a liquor licenseholders' right to appeal if the Board could avoid making a final decision on a license by closing a licensee indefinitely.

In light of the above, the Department has the authority to hear such an interlocutory appeal.

[7] For example, such considerations for the Appellant's could include increasing the number of security staff required to work at the Appellant's, requiring a police detail, decreasing the number of patrons allowed at the Appellant's, reducing its hours that it is opened, setting the Appellant's up for weekly or monthly or quarterly review of conditions imposed/agreed to in order to ensure that safety measures are appropriately implemented and addressed.

IV. CONCLUSION

At the stay hearing, the Board argued that the closure was for safety reasons and/or also for a cooling off period. It was also suggested that if the Board had made a disciplinary finding, the license would have been suspended or revoked so that the Appellant would be in the same situation as now. However, if the liquor license had been "officially" suspended or revoked (instead of by implication), the Appellant would have had a final decision to appeal. Right now, the Appellant needs to be able to appeal a closing by the Board and in order for a stay to be considered and/or the appeal to be heard on the merits, the Board must make a decision that provides a basis for appeal.

On the record, the reasons for the Board's decision to close the Appellant's indefinitely was to allow it to wait for the video footage. If the Board is to argue that the public safety caused the closure and still believes on review that public safety necessitates closure, it must make and base such a finding clearly on the record so that such a decision can be properly reviewed. If the Board chooses to make a disciplinary closure then it can state that on the record and that decision can be reviewed in light of the Department's holdings related to discipline.[8] Such a decision by the Board will provide a basis for any appeal (if necessary after the Board further considers this matter).

[8] Obviously, the Board could make a decision related to both reasons but would needs state its reasons.

V. RECOMMENDATION

Based on the forgoing, the undersigned recommends the following:

This matter is remanded to the Board and consistent with this order, the Board shall enter a new order regarding the Appellant's liquor license at its next meeting on Wednesday, August 6, 2014[9] (unless both parties agree to another date).[10]

Dated: August 5, 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:

✓ ADOPT
_____ REJECT
_____ MODIFY

Dated: 7 August 2014

Paul McGreevy
Director

Entered this day as Administrative Order Number 14-49 on 12th of August, 2014.

[9] It is the undersigned's understanding from the stay hearing that the Board's next meeting is August 6, 2014 unless in order to comply with the Open Meetings Act, the meeting needs to be scheduled for August 7, 2014.

[10] The Appellant will remained closed until the Board considers this matter which is why the Board is to consider this matter at the next legally available meeting.

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 12th 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

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