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

Biscayne Entertainment, Inc., **Appellant,**	:	
v.	:	**DBR No.: 20LQ003**
City of Providence, Board of Licenses, **Appellee.**	:	

ORDER ON THE MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed on February 13, 2020 by Biscayne Entertainment, Inc. ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on February 13, 2020 by the City of Providence, Board of Licenses ("Board") to revoke the Appellant's Class BVX liquor license and Class N (nightclub) liquor licenses and impose an administrative penalty of $1,000.[1] A hearing on the motion to stay was heard on February 14, 2020 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.*

[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 licenses 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).

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. THE BASIS FOR REVOCATION

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.
>
> (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); and *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

No prior discipline by the Appellant was referenced at the stay hearing. The Board hearing indicated there had been a prior sanction but more than three (3) years prior to these allegations.

VI. ARGUMENTS

The Appellant represented it hopes to come to an agreement with the City regarding a stay for the revocation of its non-liquor licenses. The Appellant also requested a stay of the administrative penalty of $1,000 for the sale of cocaine. The Appellant argued that this revocation is based on two (2) incidences where undercover officers received propositions for sex. The Appellant argued that under *DiRaimo v. City of Providence*, 714 A.2d 554 (R.I. 1998), simulated sex is allowed and actual sex acts are permitted as long as no money is exchanged. The Appellant argued that the City could not infer that what was overheard by the police officers was sex for money. The Appellant argued that the City misinterpreted § 14-17 of the City Ordinance regarding the issue of "gross negligence" of allowing prostitution. The Appellant argued that provision does not require strict liability and there is no evidence that the manager allowed propositioning for sex. The Appellant argued that just because the backroom has cubicles does not mean it meets the gross negligence standard. The Appellant argued that the club owner testified that the licensee was subpoenaed in July, 2019 by a Federal grand jury before he knew of these allegations which he learned of in December, 2019 and he made changes to the cubicles in July, 2019 prior to knowing

of these charges. The Appellant also argued it changed employee contracts and fired staff in August, 2019. The Appellant argued that the Board applied three (3) different definitions of gross negligence to this matter.

The Board argued that two (2) police officers were propositioned with one offer made in Spanish, but the other offer was made in English. The Board argued that the bartender and manager were in close proximity to the police officers and dancers when the propositions were made and the backroom provides for all nude activities and one cannot see over the booths. The Board argued there was a lack of supervision. The Board argued that the issue of gross negligence has to be reviewed as the Ordinance section applies to all City licenses. The Board argued that this matter is different from *Gulliver's Tavern, Inc. d/b/a Foxy Lady v. City of Providence, Board of Licenses*, DBR No. 18LQ028 (6/13/19) (resolved without a full hearing) since there was a finding of gross negligence in this matter and once that finding is made, the sanction is mandatory. The Board argued that the Appellant's conditions (backroom, cubicles, employee gatekeeper for backroom) fostered and assisted in prostitution. The Board argued the fact that the Appellant changed the backroom configuration after the date of the allegations is irrelevant since it was grossly negligent at the time of the violations.

In reply, the Appellant argued that the owner took those actions in July before learning of these allegations. The Appellant argued that it would be willing to make its cubicles configured as was agreed in the *Foxy Lady* settlement with the City. The Appellant argued that the evidence was the music was loud inside so the bartender and manager could not have heard the propositions.

VII. ADMINISTRATIVE PENALTIES

The Board imposed an administrative penalty on the Appellant. Pursuant to R.I. Gen. Laws § 3-7-21, the Department does not have authority to hear appeals of fines. However, the Superior Court has held that the Department has implied jurisdiction to review administrative fines imposed

by local boards pursuant to R.I. Gen. Laws § 3-5-21. *The Rack, Inc. d/b/a Smoke v. Providence Board of Licenses*, et al. CA No. PC 2011-5909 (7/22/13). The Court found that the Department did not have to apply a *de novo* standard of review to appeals of administrative fines but that the Department must review the record and articulate and document a substantial, non-arbitrary rationale for invoking its discretion to dismiss appeals of fines imposed by local licensing boards and that the exercise of such discretion must be reasonable. The Court further found that if the monetary fine imposed on a licensee by a local liquor licensing board is within statewide limits set by statute then such a finding by the Department may be sufficient basis for the Department to dismiss a licensee's appeal.

R.I. Gen. Laws § 3-5-21 establishes minimum fines for violations. R.I. Gen. Laws § 3-5-21(b) provides that a first offense by a liquor licensee shall be fined $500 with the fine for each subsequent offence not to exceed $1,000. In other words, the first offense of the liquor statute cannot be fined more than $500 with each subsequent offense of the liquor licensing law not being fined more than $1,000 but if the licensee has no offenses for three (3) years, the clock is re-set and any violation would be considered a first offense. In this matter, the Appellant has had an administrative penalty imposed of $1,000. The Board indicated that there had been no discipline in the prior three (3) years so the administrative penalty to be imposed at the most would be $500 for the sale of cocaine. Therefore, the administrative penalty is partially stayed: the $1,000 administrative penalty is partially stayed in the amount of $500.

VIII. 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 January 15, 27, and 29, 2020 and the February 12, 2020 hearing when the Board made its decision is on the Providence website and the undersigned listened to the audio.[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. The Appellant represented that it was hoping to reach an agreement with the City regarding a stay of the non-liquor licenses.[3] The Class N license is separate from a victualing license. R.I. Gen. Laws § 3-7-16.6 and relevant City ordinances.

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 *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.

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[2] http://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=12136&Format=Minutes.
http://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=12021&Format=Minutes.
http://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=12139&Format=Minutes.
http://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=12145&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).

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 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]

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[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.

[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.

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 (3/19/14).

Here, the Board found that under the City Ordinance § 14-17, there was gross negligence mandating revocation of all licenses. That provision provides in part as follows:

> (a) ***
> *Prostitution* means the act of engaging, agreeing or offering to engage in sexual conduct (as defined in R.I.G.L. § 11-34.1-2) with another person in return for a fee.
> ***
> (b) Notwithstanding any provision in this chapter to the contrary, it shall be unlawful for a licensee, or any licensed business, or any worker of a licensee or licensed business to:
> (1) Engage in or permit prostitution, loitering for prostitution, or pandering on the premises;
> ***
> (c) If, after a hearing before the board of licenses in accordance with its rules and regulations, a licensee or operator of a licensed business is found to have violated the regulations in this section or allowed a worker or any other person to violate the regulations in this section, if it is determined after hearing that such violations resulted from the gross negligence of the licensee or operator of a licensed business, in addition to any punishment or penalties that may be prescribed by statute for that offense, the board of licenses shall immediately revoke all licenses held by the licensee.

Without the finding of gross negligence, the Appellant would have a substantial likelihood of success in terms of overturning the revocation of the liquor licenses. For the sake of the analysis

regarding overturning the revocation of the liquor licenses, the analysis assumes that a violation of law (prostitution/sale of cocaine) has been shown.[6]

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 allegations were fired by the Appellant in August, 2019. If a stay is not issued, the Appellant will not be able to have a meaningful hearing on the matter.

The issue of gross negligence goes to a general licensing penalty mandated for the Board. On appeal, the Department would review the applicability of this section and/or whether the possible violations resulted from gross negligence.

In the *Satin Doll*, the Department pointed out the licensee could have reconfigured the booths or periodically checked on the booths. In that case, the Department did not order the reconfiguration as part of its determination of the liquor licensing sanction. Here, at the stay hearing, the Appellant offered to reconfigure its backroom like in the *Foxy Lady*. The Appellant represented that it had made the backroom more transparent after the July, 2019 subpoena but would be willing to reconfigure it further along the lines of the *Foxy Lady*.

The Department's jurisdiction is over the liquor licenses. The City and the Appellant could reach an agreement over a stay of the revocation of the non-liquor licenses or an overall settlement

[6] 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.

(possibly along the lines of the *Foxy Lady*) in terms of any reconfiguration of the backroom in relation to the entertainment license.

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 licenses (with no gross negligence finding). 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 liquor licenses.

IX. RECOMMENDATION

Based on the foregoing, the undersigned recommends that a stay be granted for the Class B and N license revocation. However, it is understood that the B license cannot be used without a victualing license and that use of the victualing license is either via a stay agreement with the City or from a ruling by the Supreme Court. If the Appellant plans to open using its N license (and/or with its Class B if it receives a stay for the victualing license revocation)[7] without its other licenses, the Appellant must notify and appear 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 must maintain a police detail on Friday and Saturday nights as well as any openings the night before a State holiday. A partial stay in the amount of $500 is granted for the administrative penalty.

[7] The Department is mindful that if the Appellant opens just with its Class N license and without its other licenses that would be 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.

Dated: February 20, 2020

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: 2/18/2020

Elizabeth M. Tanner, Esquire
Director

A hearing will be scheduled on a mutually convenient date to be determined by the parties.[8]

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.

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

CERTIFICATION

I hereby certify on this 18th day of February, 2020 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, R.I. 02903, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, Nicholas Hemond, Esquire, One Turks Head Place, Suite 1200, Providence, R.I. 02903, and Louis A. DeSimone, Jr., Esquire, 1554 Cranston Street, Cranston, R.I. 02920 and by hand-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.