

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

Vibe Lounge and Hookah Bar, Inc.,	:	
Appellant,	:	
	:	
	:	DBR No. 21LQ004
v.	:	
	:	
City of Pawtucket, Board of Licenses,	:	
Appellee.	:	

ORDER RE: MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed on May 12, 2021 by Vibe Lounge and Hookah Bar, Inc. (“Appellant”) with the Department of Business Regulation (“Department”) pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on May 11, 2021 by the City of Pawtucket, Board of Licenses (“Board”) revoking the Appellant’s Class BV liquor license (“License”). A hearing on the motion to stay was heard¹ on May 14, 2021 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 exercises the licensing function. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984);

¹ Due to the COVID19 pandemic, the stay hearing was heard remotely.

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:

(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:

- (1) Breach by the holder of the license of the conditions on which it was issued;
- or
- (2) Violation by the holder of the license of any rule or regulation applicable;
- or
- ***
- (4) Breach of any provisions of this chapter.

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. *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964). The 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 DISCIPLINE

The parties agreed the Appellant was licensed in 2019 and had not been before the Board prior to the hearing from which this appeal arises. The Appellant did receive two (2) COVID violations from the Department of Business Regulation/Department of Health; though, the Appellant’s attorney represented that he challenged the validity of the second COVID citation.

VI. ARGUMENTS

The Appellant argued that any violations did not rise to the level of revocation and that there would be irreparable harm if the Appellant is closed pending the hearing especially as it has been closed since April 23, 2021. The Appellant stated it would accept a police detail at night for any day that Appellant is open during the pendency of the hearing.

The Board argued that while it understands the argument of irreparable harm, there is a concern about public safety because of these four (4) incidents that happened within 18 days and the prior COVID violations. However, the Board argued that if a stay was granted, it would request that a police detail be assigned when the Appellant is open and that the Appellant close at midnight rather than at 1:00 a.m.

VII. DISCUSSION

The information received by the undersigned is based on representations of the parties. The undersigned did not have a transcript of the Board hearing; however, an audio of the Board's hearing for May 11, 2021 was available online and the undersigned listened to that recording.²

The revocation is based on incidences on April 5, 11, 18, and 23. The incidence of April 23, 2021 relates to a shooting outside the Appellant. The Appellant admitted that that was an after hour violation each for April 11 and 18, 2021. On April 5, 2021, the parties represented there was an argument near the Appellant's rear door that went into parking with security trying to intervene and being knocked down and the police had to use pepper spray. The Appellant argued there was no violation regarding that incident involving a patron. The Board argued that there was a disorderly violation. On April 11, 2021, there were allegations that a patron from the Appellant exited and went to his car where he spun his tires and caused a nuisance. On April 18, 2021, there were allegations that all the cars in the area at closing time belonged to the Appellant's patrons which caused the streets to be blocked because the patrons were not getting into their vehicles and leaving. The police testimony estimated that the crowd was 150 to 200 people and all police on duty had to be called to disperse the crowd. The Appellant argued that not all the cars could belong to the Appellant and argued that there were no violations outside, and the only violation would be the after hour violation. The police testimony was no other establishment was open, but the Appellant argued there are two (2) other establishments open in that area at that time.

On April 23, 2021, 911 was called at 12:51 a.m. for the shooting. The Appellant represented that the shooter had a verbal altercation inside and was removed by the Appellant's

² See <https://clerkshq.com/Pawtucket-ri> . The recording is of the May 11, 2021 special session of Pawtucket Board of License Commissioners (the recording starts during direct examination of a police officer about the April 11, 2021 incidence. The recording covers the incidences of April 11, 18, and 23).

owner at 11:15 p.m. and that about 10 minutes later the owner looked outside and did not see the shooter. The Appellant represented that the shooting occurred about an hour after the shooter was removed and the shooter lay in wait outside. The Appellant argued that there was no direct or indirect connection between the Appellant and the shooting because of the break in time.

The Board argued that the police testimony was that the Appellant resisted allowing the police inside and the detective had to force himself in (though the victim later found outside). The Appellant represented that its employees cooperated with the police and did not hinder the police from entering the Appellant. It was agreed that the Appellant's security video was turned over to the City and was not shown at the hearing. The Appellant argued that it had not been able to see the video but represented that the video would show that there was no impediment by the Appellant to the police when they answered the 911 call.³

At the Board hearing, Captain David Holden testified that the police obtained the Appellant's DVR video and video from businesses in the surrounding area. He testified that he reviewed some of the available video, and he identified the shooter inside the Appellant and that the shooter entered shortly after the four (4) individuals that he victimized later. He testified that the shooter left the Appellant and then "he leaves the area." He testified that about an hour later the shooter is in the parking lot and looks like he is concealing himself and that when the four (4) people exit, the shooter walked up to one person fired twice and missed and then fired five times at another person hitting that person five (5) times.

The Department has consistently followed progressive discipline barring an egregious act. *Supra*. The incidences of April 5, 11, and 18 do not appear to rise to level of revocation. See *CAG*

³ The Appellant requested that the video that was referred to by the police during the Board hearing be produced and turned over to the Appellant. The undersigned indicated that she believed the video should be turned over. The parties agreed to work on a protective order in relation to the production of any video by the Board to the Appellant.

Productions, LP d/b/a Euphoria v. City of Providence, Board of Licenses, DBR No.: 16LQ022 (4/3/17); and *Ocean State Hospitality, Inc. d/b/a Fatt Squirrel v. Providence Board of Licenses*, DBR No.: 16LQ002 (3/31/16). Assuming those violations (e.g. after hours, disorderly) are proved, those violations could rise to the level of administrative penalties and/or a term of suspension (with the timing of violations impacting the type of penalty imposed).

In terms of the shooting, the Board was unable to review the video from the Appellant and businesses in the area. Captain Holden testified that the shooter left the area and then was concealing himself in the parking lot about an hour after he was inside the Appellant. There will be an issue at hearing regarding whether the Appellant can be directly or indirectly responsible for the shooting especially as it concerns what happened between the ejection and the shooting. See *The Vault LLC v. City of Providence Board of Licenses*, 16LQ008 (9/14/16).⁴

Applying the stay criteria, 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. However, it is discretionary to issue a stay in order to maintain the *status quo* pending an appeal. In this matter, it cannot be ascertained which party will prevail without a full hearing on what happened inside and then outside in terms of the shooting. If a stay is not granted for the revocation, the Appellant will not have a meaningful appeal. The Appellant has been closed since April 24, 2021 (day after the shooting).

⁴ In that matter, a patron was escorted out of the establishment but did not leave and tried to get back inside and talked to the bouncer before shooting a gun 19 minutes after being escorted out. *Vault* found as follows:

If a patron leaves a Class B liquor licensee on his or her own steam without incident inside and then walks down the street for a coffee and then returns and fights with the bouncers, it would be hard to make a link that the licensee would be indirectly responsible for that fight and said patron would no longer have been a patron. Here, there is a lag time between the Appellant's ejection and the shooting which could raise the issue of when is a patron no longer a patron. However, here the shooter was patron who never left the outside of the premises and tried to get back in (more than once) after being ejected for fighting so that an indirect link can be made from his actions inside to his actions outside. *Id.* at 13.

VIII. RECOMMENDATION

It is discretionary to issue a stay in order to maintain the *status quo* pending an appeal. In this matter, it cannot be ascertained which party will prevail without a full hearing on what happened inside and then outside. If a stay is not granted for the revocation, the Appellant will not have a meaningful appeal. The granting of a partial stay maintains the *status quo* pending the full hearing. The Board requested that if a stay be granted that it be conditioned on closing at midnight. For now, the stay will be conditioned on a midnight closing and police detail (two-person) at night (approximately 10:00 p.m. to 1:00 a.m.) when the Appellant is open. The Department will review these conditions of the stay within 30 days unless the parties reach their own agreement regarding the conditions of a stay (e.g. detail just at weekends, one person detail, time covered, opening hours etc.).⁵

Dated: May 18, 2021

\s\ Catherine R. Warren

Catherine R. Warren
Hearing Officer

INTERIM ORDER

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

ADOPT
 REJECT
 MODIFY

Dated: May 19 2021

Elizabeth Dwyer as designee for

Elizabeth M. Tanner, Esquire
Director

⁵ Or if the parties are able to resolve the matter.

A hearing will be scheduled on a mutually convenient date to be determined by the parties.⁶

NOTICE OF APPELLATE RIGHTS

THIS ORDER CONSTITUTES AN INTERLOCUTORY ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-15. 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 19th day of May, 2021 that a copy of the within Order was sent by first class mail, postage prepaid and by electronic delivery to the following: Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, peter330350@gmail.com, and Frank Milos, Esquire, City Solicitor, 137 Roosevelt Avenue, Pawtucket, R.I. 02860, Fmilos@pawtucketri.com, and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

/s/ Diane L. Paravisini

⁶ Pursuant to R.I. Gen. Laws § 3-7-21, the Appellants are responsible for the stenographer.