

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

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Ice Lounge, Inc. d/b/a Ice Lounge,	:	
Appellant,	:	
	:	
v.	:	DBR No.: 15LQ008
	:	
City of Providence, Board of Licenses,	:	
Appellee.	:	

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

**I. INTRODUCTION**

Ice Lounge, Inc. d/b/a Ice Lounge (“Appellant”) seeks a stay of the City of Providence, Board of Licenses’ (“Board”) decision taken on May 28, 2015 to revoke its Class BX liquor 2:00 a.m. (extended hours) license as well as impose a three (3) day suspension on its Class BV license on June 4, 5, and 6 and impose a \$1,500 administrative penalty and police detail for Friday and Saturday nights. The Board objected to the Appellant’s motion. This matter came before the undersigned on May 29, 2015 in her capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation (“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. STATUTORY BASIS FOR REVOCATION OR SUSPENSION

R.I. Gen. Laws § 3-7-7<sup>1</sup> provides that a town or city may grant a Class B licensee a 2:00 a.m. closing time on Friday and Saturday nights.

In *28 Prospect Hill Street, Inc. v. Gaines*, 461 A.2d 923 (R.I. 1983), the Court found that a city or town may enact a blanket prohibition of a 2:00 a.m. closing time applicable to all Class B licensees and such a blanket prohibition would not trigger any due process concerns. However, there is a distinction between allowing a blanket prohibition of 2:00 a.m. closing times for all Class B licenses *and* a city or town decision/sanction concerning an individual license holder based on reasons or allegations raised by local officials. While the Board argued that the Department did not have jurisdiction over the 2:00 a.m. closing revocation as that was a question of hours of operation, that argument previously has been rejected by the Department. In *Joseph's Pub v. Smithfield Appeal Board of License Commissioners*, LCA-SM-97-06 (8/21/97), p. 9, the Department found “[c]ontrary to the Town’s position, due process rights or protections are due an individual licensee when faced with a city of town decision to suspend, revoke or sanction on that licensee’s 2:00 a.m. closing authorization.” In other words, a town may prohibit all 2:00 a.m. closings but an individual revocation has the right to a hearing and appeal. *Joseph’s*

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<sup>1</sup> R.I. Gen. Laws § 3-7-7 states in part as follows:

**Class B license.** – (a)(1) A retailer's Class B license is issued only to a licensed bona fide tavern keeper or victualer whose tavern or victualing house may be open for business and regularly patronized at least from nine o'clock (9:00) a.m. to seven o'clock (7:00) p.m. provided no beverage is sold or served after one o'clock (1:00) a.m., nor before six o'clock (6:00) a.m. Local licensing boards may fix an earlier closing time within their jurisdiction, at their discretion. The East Greenwich town council may, in its discretion, issue full and limited Class B licenses which may not be transferred, but which shall revert to the town of East Greenwich if not renewed by the holder.

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(4) Any holder of a Class B license may, upon the approval of the local licensing board and for the additional payment of two hundred dollars (\$200) to five hundred dollars (\$500), open for business at twelve o'clock (12:00) p.m. and on Fridays and Saturdays and the night before legal state holidays may close at two o'clock (2:00) a.m. All requests for a two o'clock (2:00) a.m. license shall be advertised by the local licensing board in a newspaper having a circulation in the county where the establishment applying for the license is located.

*Pub* related to the revocation of a 2:00 a.m. license closing hour and the standard of review for a revocation or suspension of license is “for cause.”

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.

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, 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 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 (R.I. 1966). See also *Schillers* and *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965).

Nonetheless, 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*

*Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation of license 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 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.*

#### V. STANDARD FOR ISSUANCE OF A STAY

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.

## **VI. PRIOR DISCIPLINE**

The Appellant recently received a 30 day suspension for 1) disorderly conduct on October 27, 2014 where the police were called to help disperse a disorderly crowd; and 2) for several violations to which the Appellant stipulated to such as public smoking and entertainment without license. The disorderly conduct in October, 2014 did not consist of any physical violence and the Appellant promptly called the police. Prior to October, 2014, the Appellant's other violations were not disorderly but included some administrative penalties for underage drinking, entertainment without a license, and public smoking.

## **VII. DISCUSSION**

The undersigned did not have a transcript of the Board hearing. Instead, the arguments are based on representations made by the parties. The Appellant was found to have unlicensed entertainment pursuant to R.I. Gen. Laws § 5-22-4.<sup>2</sup> It was represented that the police heard loud music emanating from the building where the Appellant is located. Apparently, a man in the basement of the building was "livestreaming" music. The Appellant is on the second floor of the building and a restaurant is on the first floor. The Board found that the man was providing entertainment to the Appellant. He did not testify at the hearing. Apparently, he denied to the police that he was working for the Appellant. Apparently, the police testified that his music and the music heard in the Appellant's were similar.

The Appellant argued that it had a strong likelihood of success on the merits as there was no evidence to support a finding that the Appellant was connected to the man in the basement.

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<sup>2</sup> Apparently the decision contained a typographical error and referred to R.I. Gen. Laws § 3-22-4 which does not exist.

The Board argued that it had a strong likelihood of success on the merits as there was enough evidence to support the inference that the man was working for the Appellant. The Appellant argued that there was no harm to the public as the issue was the playing of music and there was no emergency by the Board and no physical harm. The Board argued that there is a public interest in ensuring that licensees abide by the law. The Appellant also argued that even if the Board could prove its allegations, there would still be no violation of R.I. Gen. Laws § 5-22-4.

### **VIII. ADMINISTRATIVE PENALTIES**

The Appellant raised the issue of the administrative penalties imposed by the Board. Pursuant to R.I. Gen. Laws § 3-7-21, the Department does not have authority to hear appeals of fines. However, the Superior Court found that the Department has implied jurisdiction to review administrative fines imposed by local boards pursuant to R.I. Gen. Laws § 3-5-21. See *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. *Id.* at pp. 14-17.

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. Here, the administrative penalties (assuming both attach to the liquor license) are within the statutory requirements.

**IX. CONCLUSION**

The Department has consistently followed progressive discipline barring an egregious act. 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. In this matter, it cannot be ascertained which party will prevail without a full hearing.

If a stay is not granted for the three (3) day suspension, the Appellant will not have a meaningful appeal. The same is true with the 2:00 a.m. revocation. There are no allegations of a threat to public safety. Rather it is in the interest of the public that licensees abide by the law which can be addressed by imposing conditions on a stay. Granting a partial stay maintains the *status quo* pending the full hearing.

**X. RECOMMENDATION**

Based on the forgoing, the undersigned recommends that following order be made.

1. A stay is granted of the police detail, the three (3) day suspension, and revocation of 2:00 a.m. license; and
2. A stay is denied for the \$1,500 administrative penalty.

The granting of the stay is conditioned on the following

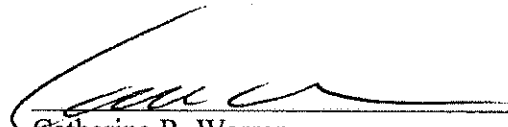
1. No entertainment without a license;
2. No disc jockeys;
3. No acting as a nightclub; and
4. Only ambient music be played.

The Board and Appellant may agree to modify the conditions of the stay if they choose.

Nothing in this order precludes the undersigned to revisit this order because of a change in circumstances. E.g. the violation of any of the conditions could warrant a review of the stay order.

**A DE NOVO HEARING WILL BE HELD ON JUNE 16, 2015 at 9:30 a.m. AT THE DEPARTMENT OF BUSINESS REGULATION, PASTORE COMPLEX, 1511 PONTIAC AVENUE, CRANSTON, RI.<sup>3</sup>**

Dated: June 1, 2015

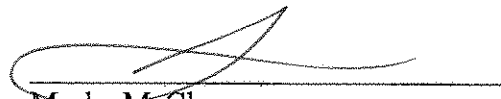
  
Catherine R. Warren  
Hearing Officer

**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  
  X   MODIFY *see attached*

Dated: 6/3/15

  
Macky McCleary  
Director

Entered this day as Administrative Order Number 15-19 on 3<sup>rd</sup> of June, 2015.

<sup>3</sup> If this date is inconvenient to a party(s), the party should contact the other party and the undersigned to schedule a mutually convenient date. The Appellant is advised that pursuant to R.I. Gen. Laws § 3-7-21, it is the Appellant's responsibility to provide a stenographer at hearing.

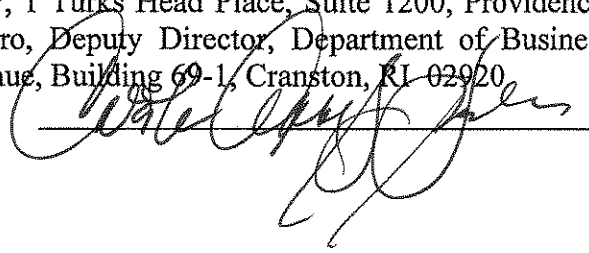


**NOTICE OF APPELLATE RIGHTS**

**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 30<sup>th</sup> day of June, 2015 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, RI 02903 and Nicholas Hemond, Esquire, DarrowEverett, LLP, 1 Turks Head Place, Suite 1200, Providence, RI 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.



A handwritten signature in black ink is written over a horizontal line. The signature is cursive and appears to read "Walter J. [unclear]".

## **DIRECTOR'S MODIFICATION OF RECOMMENDED DECISION**

The Director hereby modifies the recommended Decision by rejecting Sections IX and X and replacing such Sections with the following:

### **IX. CONCLUSION**

The Department has consistently followed progressive discipline barring an egregious act. 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. In this matter, it cannot be ascertained which party will prevail without a full hearing.

If a stay is not granted for the three (3) day suspension and revocation of the 2:00 a.m. license, the Appellant will not have a meaningful appeal. Moreover, granting a stay as to the suspension and revocation will not result in substantial harm to other interested parties or harm the public interest, particularly if the Friday/Saturday police detail remains in place and certain conditions are imposed with respect to a stay. Granting a partial stay with conditions maintains the *status quo* pending the full hearing.

### **X. Based upon the foregoing:**

1. A stay is granted of the three (3) day suspension, and revocation of the 2:00 a.m. license; and
2. A stay is denied for the \$1,500 administrative penalty and the police detail.

The granting of the stay is conditioned on the following:

1. No entertainment without a license;
2. No disc jockeys;

3. No acting as a nightclub; and
4. Only ambient music be played.

The Board and Appellant may agree to modify the conditions of the stay if they choose.

Nothing in this order precludes the undersigned to revisit this order because of a change in circumstances. E.g. the violation of any of the conditions could warrant a review of the stay order.

**A HEARING ON THE APPELLANT'S APPEAL OF THE BOARD'S DECISION OF MAY 28, 2015, WILL BE HELD ON JUNE 16, 2015, AT 9:30 A.M. AT THE DEPARTMENT OF BUSINESS REGULATION, PASTORE COMPLEX, 1511 PONTIAC AVENUE, CRANSTON, RI.<sup>3</sup>**

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<sup>3</sup> If this date is inconvenient to a party(s), the party should contact the other party and the undersigned to schedule a mutually convenient date. The Appellant is advised that pursuant to R.I. Gen. Laws § 3-7-21, it is the Appellant's responsibility to provide a stenographer at hearing.