

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX, BLDG 68-69
1511 PONTIAC AVENUE
CRANSTON, RI 02920**

IN THE MATTER OF:	:	
	:	
Alisha Pilkington,	:	DBR No.: 15RA005
	:	
Respondent.	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an Order to Show Cause why License Should not be Revoked, Notice of Pre-hearing Conference, and Appointment of Hearing Officer (“Order to Show Cause”) issued to Alisha Pilkington (“Respondent”) by the Department of Business Regulation (“Department”) on May 19, 2015. The Respondent holds a Gaming Facility-Service Employee license (“License”) issued pursuant to R.I. Gen. Laws § 41-4-1 *et seq.* On or about January 23, 2015, the Respondent applied to renew her License to work at a bar and restaurant at Twin River Casino from which the Order to Show Cause issued. A hearing was held on July 8, 2015. Both parties were represented by counsel with the parties resting on the record.

II. JURISDICTION

The administrative hearing was held pursuant to R.I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 41-4-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. ISSUE

Whether the Respondent's License should be renewed pursuant to R.I. Gen. Laws § 41-4-9.1 and *Racing and Athletics Regulation 9 – Racing and Athletics Criminal Background Investigation* ("RAR9").¹

IV. TESTIMONY AND MATERIAL FACTS

Before turning to testimony, the following undisputed facts were ascertained from the exhibits and testimony at hearing:

1. The Respondent has held her License since October 19, 2009. See Department's Exhibit Three (3) (Notice of License Approval sent by the Department to Respondent).

2. The 2009 Notice of License Approval forwarded to the Respondent indicates that a licensee notify the Department if "[y]ou are charged with, and/or convicted of any crime (other than traffic offenses) which changes in any way the representations made in your application." *Id.*

3. The grant of the License was based on a Service Employee application submitted by the Respondent to the Department on October 16, 2009. See Department's Exhibit One (1) (initial application submitted by the Respondent to the Department).

4. The Respondent answered in the negative to the question about criminal history on her initial License application. *Id.*

5. The Respondent's national background check revealed an arrest for shoplifting, a misdemeanor, by the Providence Police Department on June 10, 2004. See Department's Exhibit Two (2) (criminal history record).²

¹ The Order to Show Cause was entitled Order to Show Cause why License Should not be Revoked; however, the issue is really whether the renewal application for the License should be denied.

² This exhibit was sealed per order of the hearing officer.

6. The Department had knowledge of the 2004 arrest prior to issuing the License and issued the License.

7. On or about December 8, 2011, the Respondent submitted an application to renew her License. The Respondent answered in the negative in response to the question about criminal background in her 2011 renewal application. See Department's Exhibit Four (4) (Respondent's renewal of License application).

8. The License was renewed by the Department.

9. On or about January 23, 2015, the Respondent submitted an application to renew her License. See Department's Exhibit Five (5) (Respondent's renewal of License application).

10. After the Respondent submitted the 2015 renewal application, the Department discovered that the Respondent was arrested for felony larceny in Rhode Island on March 17, 2011. See Department's Exhibit Six (6) (FBI Report).³

Christina Tobiasz ("Tobiasz"), Chief Licensing Examiner, testified on behalf of the Department. She testified that she reviews and processes racing and athletics license applications. She testified that the Department approved the Respondent's initial 2009 application for her License even though the Department knew about her 2004 arrest and the Respondent had not included the information in her application. She testified that the Respondent submitted a renewal application in 2011, but at that time, the Department was not conducting background checks and would not have known any information after 2009 relating to the Respondent's criminal background. However, she testified that in 2015 after the Respondent submitted her 2015 renewal application, the Department discovered that on March 17, 2011, the Respondent was arrested for felony larceny. Tobiasz testified that the instructions regarding criminal history on the 2015 application are the same as the instructions regarding criminal

³ This exhibit was sealed per order of the hearing officer.

history from the 2009 application. She testified that question 40 from the application asks, “[h]ave you ever been arrested or charged with any crime or offense in Rhode Island or any other jurisdictions within the last ten years?” She testified the Respondent answered in the negative in 2011 and 2015. See Department’s Exhibits One (1) (2011 application) and Five (5) (2015 application).

On cross-examination, Tobiasz testified that there are instructions in the application that indicate an applicant may answer question 40 in the negative if an arrest or conviction has been expunged. She testified that the application does not define the term expunged.

The Respondent testified on her behalf. She testified that she is still employed as a bartender at a restaurant bar at Twin River. She testified that she had been told by a public defender in 2009 that her 2004 arrest had been expunged and since she believed her arrest had been expunged, she answered in the negative on her application. She testified that in 2011, she went through a program with the Attorney General’s office regarding her 2011 arrest and was told her 2011 arrest would be expunged after she completed her community service. She testified that she believed the 2011 arrest had been expunged, so she answered in the negative on her renewal applications. She testified that she looked up the criminal records online and she had no record online. She apologized and testified it was a mistake that she had not fully disclosed her arrests on the application. She testified that she did not intend to deceive the Department or to commit fraud.

On cross-examination, the Respondent testified that did not have any paperwork that relates to the expungement of the arrests and she did not remember the names of the people who told her the arrests would be expunged.

V. DISCUSSION

A. **Legislative Intent**

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, “the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM*, 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. **Standard of Review for an Administrative Hearing**

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* See *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. *Id.* When there is no direct evidence on a particular issue, a fair

preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

C. Statute

R.I. Gen. Laws § 41-4-9.1 states in part as follows:

Licensing of concessioners, vendors, and pari-mutuel totalizator companies. –
(a) All persons, firms, partnerships, associations, or corporations desiring to operate any concession allied to any dog racing track, shall apply for a license to the division of racing and athletics, on such forms and in such a manner as prescribed by regulations of the division. The division by regulations shall establish other occupational licensing for all employees of the concessions, all pari-mutuel employees, and all persons employed in any other capacity by the race track management, and for other persons engaged in racing activities at any dog racing track.

(c) In determining whether to grant a license pursuant to this section the division may require the applicant to submit information as to: financial standing and credit; moral character; criminal record, if any; previous employment; corporate, partnership or association affiliations; ownership of personal assets; and such other information as it deems pertinent to the issuance of the license. The division may reject for good cause an application for a license, and it may suspend or revoke for good cause any license issued by it after a hearing held in accordance with chapter 35 of title 42 and subject to further appeal procedures provided by § 41-2-3.

Section 5 of the RAR9 provides in part as follows:

CRITERIA TO BE USED IN DETERMINING WHETHER BASED ON A CHRI [criminal history record information], APPLICATION FOR A LICENSE OR PERMIT OR RENEWAL THEREOF WILL BE APPROVED

- A. Types of CHRI That May Warrant Denial of Application for License or Permit or renewal of a License or Permit
 - 1. Convictions of Offenses that occurred within the last twenty (20) years; and
 - 2. Arrests and/or Charges that occurred within the last ten (10) years

- B. Aggravating factors related to the CHRI to be considered by the Department in connection with an application for a license or permit or a renewal thereof include, but are not limited to:

5. Applicant's refusal, delay, or inadequate explanation of facts and circumstances of information reflected on CHRI or obtained during the investigation of information on the CHRI;

8. Applicant's submission of false or misleading statements or evidence to the department.

C. Mitigating factors related to the CHRI which may be considered by the Department in connection with an application for a license or permit or a renewal thereof include, but are not limited to:

1. Relevance and seriousness of the applicant's CHRI record to type of license or permit sought;
2. Duration of time since the date of Arrest and/or Charge and/or Offense;

6. Age of the applicant at the time of the Arrest, Charge; and/or Offense.

8. Applicant's cooperation with the Department's investigation;
9. No evidence of significant harm to a victim(s) or public as reflected in the investigation of the applicant's CHRI;

12. Documented explanation by the applicant regarding circumstances related to Arrest, Charge and/or Offense.

D. Whether the Respondent's License Should be Renewed

The Department sought denial of the Respondent's renewal application pursuant to R.I. Gen. Laws § 41-4-9.1 and Sections 5(B)(4) and (8) of RAR9 which provide that the Department may consider moral character and criminal record(s) in determining whether there is good cause to deny an application for license. The Department argued that the Respondent failed to disclose her 2004 arrest on her initial application in 2009 and on her renewal applications in 2011 and in 2015 and failed to disclose her 2011 arrest on her 2011 and 2015 renewal applications. The Department argued that the Respondent's responses regarding her criminal background were misleading and inadequate explanations pursuant to Section 5 of RAR9.

a. 2004 Arrest

Section 5(A) of RAR9 provides that arrests within ten (10) years of an application may warrant denial of an application. The 2004 arrest happened over ten (10) years before the 2015 renewal application so if this had been a new application in 2015, the arrest would not necessarily warrant denial. In this matter, the arrest was not revealed by the Respondent in 2009, but was known by the Department when the License was issued. The Respondent credibly testified that she thought the 2004 arrest had been expunged and even tried to confirm the same by checking the online criminal records which contained no criminal records in her name.⁴ The instructions on the application indicate that an applicant may answer “no” to the criminal background question if an arrest has been expunged or sealed. In addition, mitigating factors to be considered under Sections 5(C)(1) and (6) of RAR9 are the relation of the type of charge to the type of license (service employee) and the age at time of arrest. The Respondent was 18 years old – and is currently 29 years old - at the time of the misdemeanor arrest for shoplifting and has held a service employee license for almost six (6) years. The fact that she failed to disclose a 2004 misdemeanor shoplifting arrest does not rise to the level that would warrant denial of a renewal application. At hearing, she adequately explained what happened and the License had been issued in 2009 with the Department’s knowledge of the 2004 arrest.⁵

b. 2011 Arrest

The Department also argued that the Respondent failed to notify the Department and failed to disclose her 2011 arrest on both her 2011 and 2015 renewal applications. It is true that

⁴ As indicated at the hearing, the undersigned takes administrative notice of the on-line criminal records maintained by the Rhode Island Courts’ website. See *Arnold v. Lebel*, 941 A.2d 813 (R.I. 2007). Said on-line records contain no record of the Respondent. See http://courtconnect.courts.ri.gov/pls/ri_adult/ck_public_qry_main.cp_main_idx#openinnewwindow

⁵ This analysis could be different if, for example, it was shown that the Department had knowledge of a more serious conviction, but erroneously issued a license.

the Respondent did not notify the Department of her arrest and did not disclose it on her 2011 and 2015 renewal applications. However, she credibly testified that she believed that the arrest had been expunged by completing a program with the Attorney General's office and she checked on-line criminal records to see if she was listed and she was not. If an arrest is expunged, the application indicates that an applicant can answer "no" to the criminal background record. The Notice of License Approval does not have a time frame to notify the Department of an arrest⁶ and in this matter, the Respondent believed the arrest was expunged. The Respondent was not convicted of the larceny charge; she only was arrested and believed by entering into a program at the Attorney General's office that the arrest was no longer on her record.

c. Conclusion

The Department also relied on previous denial cases where applicants for various licenses at Twin River omitted arrests or convictions. However, those cases are distinguishable from this matter since those applicants failed to disclose various arrests or pleas on new applications for licensing and there were other grounds for denial in two (2) of the three (3) cases.⁷

The Respondent is employed by a restaurant (not gaming operations) and has been employed using her License since 2009 and no other issues have come to the forefront. Based on the forgoing, while the Respondent erroneously believed her 2004 and 2011 arrests were

⁶ The undersigned takes administrative notice that the Department's Notice of License Approval now states that notification must be within three (3) days but that time frame is not included in the Respondent's Notice of License Approval.

⁷ The applicant in *In the Matter of Cherri Fields*, DBR No. 14RA012 (7/15/14) sought a service employee license, but failed to disclose on her initial application for licensing, five (5) arrests and two (2) *nolo contendere* pleas. The applicant in *In the Matter of Menkyo Vy*, DBR No. 13RA116 (10/28/14) sought a table game dealer license, but only partially disclosed his arrests and failed to disclose certain arrests arising out of the same incident. This decision denied that applicant's license application not only for omitting certain arrests but also for other discrepancies on his application as well as for other conduct. The applicant in *In the Matter of Eugenio Teixeira*, DBR No. 14RA007 (6/26/14) sought a service employee license, but failed to disclose *nolo contendere* pleas to drug possession and driving after denial. This decision again denied an applicant's license not just for omitting certain information in his application, but also denied the license based on his actions (such as drug use).

expunged, the fact that she failed to disclose them does not constitute good cause to deny her License renewal application.

VI. FINDINGS OF FACT

1. Pursuant to R.I. Gen. Laws § 41-4-9.1., the Respondent applied to renew her License to work at a restaurant at Twin River Casino.

2. On May 19, 2015, the Department issued an Order to Show Cause to Respondent.

3. A hearing was held on July 8, 2015. Both parties were represented by counsel. The parties rested on the record.

4. The Respondent omitted her 2004 arrest in her initial 2009 application. The Department had knowledge of the Respondent's 2004 arrest and issued the License to her in 2009.

5. The Respondent omitted both the 2004 and 2011 arrests in her 2011 and 2015 renewal applications.

6. The Respondent credibly testified as to the reasons why she omitted the arrests.

7. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

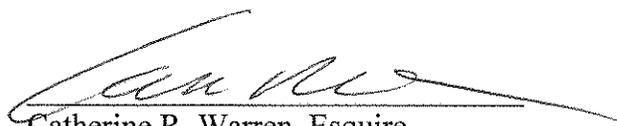
1. The Department has jurisdiction pursuant to R.I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 41-4-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. The Department has not met its burden to deny the Respondent's renewal application for License.

VIII. RECOMMENDATION

Based on the forgoing, the undersigned recommends that the Respondent's License be renewed pursuant to R.I. Gen. Laws § 41-4-9.1 and Section 5 of the RAR9.

Entered this day 14th August, 2015.


Catherine R. Warren, Esquire
Hearing Officer

ORDER

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

ADOPT
 REJECT
 MODIFY

Dated: 8/24/15


Macky McCleary
Director

NOTICE OF APPELLATE RIGHTS

THIS ORDER 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.

CERTIFICATION

I hereby certify that on this 25th day of August, 2015, that a copy of the within decision was sent by first class mail, postage prepaid to J. Ryan McNelis, Esquire, Nicholson & Associates, 265 George Washington Highway, Smithfield RI 02917 and by electronic delivery to Jenna Algee, Esquire and Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI.

