STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, R.I. 02920

DL Enterprises d/b/a East Bay Tavern, Appellant,	:	
v.	:	**DBR No.: 14LQ019**
East Providence City Council, Appellee.	:	

DECISION

I. INTRODUCTION

On April 10, 2014, the East Providence City Council acting in its capacity as the East Providence Board of Licensing ("Board") imposed a 30 day suspension of DL Enterprises d/b/a East Bay Tavern's ("Appellant") Class B liquor license ("License"). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision by the Board to the Director of the Department of Business Regulation ("Department"). Prior to a hearing on appeal, the Department by order dated April 11, 2014 conditionally stayed the suspension. Pursuant to R.I. Gen. Laws § 3-7-21(c),[1] the parties agreed to base the appeal on the record before the Board. Oral argument was held on April 16, 2014 before the undersigned[2] with the parties resting on the record.[3]

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[1] R.I. Gen. Laws § 3-7-21 states in part as follows:

> Appeals from the local boards to director.
> ***
> (c) The director may accept into evidence a stenographic transcript of a witness's sworn testimony presented before the local board that was subject to cross examination. This testimony may be rebutted by competent testimony presented at the hearing held by the director.

[2] The undersigned was delegated to hear this appeal by order of the Director of the Department.

[3] The transcript was received on May 2, 2014.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to 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. ISSUE

Whether to uphold or overturn the Board's decision to suspend the Appellant's License.

IV. MATERIAL FACTS AND TESTIMONY

This issue turns on print and radio advertisements that were run by the Appellant regarding drinks specials and whether such advertisements violated R.I. Gen. Laws § 3-7-26 and Rule 16 of the *Commercial Licensing Regulation 8 Liquor Control Administration* ("CLR8"). In response to a request from the Appellant to the Department for a ruling on the legality of said advertisements, the Department found that the advertisements in question violated R.I. Gen. Laws § 3-7-26 and Rule 16 of CLR8. See Joint Exhibit One (1) (Department opinion).

The parties agreed that the Appellant violated R.I. Gen. Laws § 3-7-26 and Rule 16 of CLR8 and the issue on appeal is what is the appropriate sanction for said violation.

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, 1134 (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. The Appeal before the Department

The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) (as the hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence); *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964); and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (Department's jurisdiction is *de novo* and the Department independently exercises the licensing function). Thus, while there was not a new hearing before the Department, the proceeding before the Department is considered a *de novo* hearing. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision.

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*, 2002 WL977812 (R.I. Super.) (overturning a revocation of a liquor license as arbitrary and capricious).

An appeal proceeding held pursuant to R.I. Gen. Laws § 3-7-21 is considered a civil proceeding. See *Board of License Commissioners of Tiverton v. Pastore*, 463 A.2d 161 (R.I. 1983). In civil proceedings, unless otherwise specified, the burden of proof generally needed for moving parties to prevail is a fair preponderance of the evidence. *Jackson Furniture Co. v Lieberman*, 14 A.2d 27 (R.I. 1940). See also *Parenti v. McConaghy*, 2006 WL 1314255 (R.I.Super.); and *Manny's Café, Inc. v. Tiverton Board of Commissioners*, LCA TI-97-16 (11/10/97) (Department decision discusses burden of proof for proceedings held pursuant to R.I. Gen. Laws § 3-7-21).

C. Relevant Statutes and Regulation

R.I. Gen. Laws § 3-7-26 states in part as follows:

Certain practices prohibited. – (a) No licensee, employee or agent of any licensee who operates under a license to sell alcoholic beverages shall:

(1) Cause or require any person or persons to buy more than one drink at a time by reducing the price of that drink;

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(b) (1) No licensee shall advertise or promote in any manner, or in any medium, happy hours, open bars, two-for-one nights and/or free drink specials.

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(d) Adherence to this section is deemed to be a condition attached to the issuance and/or continuation of every license to sell alcoholic beverages for consumption on the licensed premises, and this section shall be enforced by the applicable local licensing authority, its agents, and the department.

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Rule 16 of CLR8 states as follows:

Happy Hour - Retail

No licensee or employee or agent of an alcoholic beverage license shall sell, offer to sell or deliver to any person or group of persons any drinks at a price less than the price regularly charged for such drinks during the period of Monday through Friday until 6 P.M. or Friday at 6 P.M. through Sunday.

All licensees shall maintain a schedule of the prices charged for all drinks to be served and consumed on the premises or in any room or part thereof. Such prices shall be effective for the period of Monday through Friday until 6 P.M. and/or Friday at 6 P.M. through Sunday provided; however, that the Friday through Sunday time period may be extended for an additional 24 hours on those weekends which have a Monday holiday following, provided such holiday is recognized and observed by the State of Rhode Island.

Happy hour and any similar type activities are prohibited.

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.

D. Arguments

The Appellant argued that on April 7, 2014, it was served with an Emergency Show Cause Hearing Notice to appear before the Board regarding these violations and on the day it received said notice, it voluntarily pulled the advertisements in question and requested an opinion from the Department on their legality. The Appellant represented that it spoke with the radio station over what would be legal before running the advertisements.[4] The Appellant argued that it has been in business for 8 1/2 years without any issues so that the Board's $500 penalty and 30 day suspension is excessive based on the frequency and the severity of the violations. The Appellant argued that a warning would have been more appropriate but the Board is targeting it for some reason.

The Board argued that under the Rules of Evidence 404(b), the Board can draw inferences on the Appellant's actions and while there had been an appeal of the Board's prior sanction imposed on the Appellant, the Board can infer that not only is the Appellant not understanding the rules governing its conduct, it is not trying to understand the licensing rules. The Board argued that the issue is a question of health and safety and welfare to ensure that the Appellant follows the rules and does not advertise what is not allowed. The Board argued that the Appellant has prior discipline and the advertisements were being used to attract patrons that would be illegally served.

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[4] This was testified to at the hearing before the Board. A transcript of the April 9, 2014 Board hearing was not entered as an exhibit but the undersigned accessed the hearing video online at – http://www.mytestserver.com/video/test2/playvideo3.asp?sFileName= http://video.clerkshq.com/RI_EastProvidence_CityCouncil_20140409b

E. What is the Appropriate Sanction

The Appellant did not dispute that it violated the statute and regulation. The Appellant argued that the Board was targeting it in suspending its License. While there is no evidence that the Board was in fact targeting the Appellant, this is a *de novo* appeal so that any alleged error of law or fact committed by the municipal agency is of no consequence. *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964).

At the time of the oral argument before the undersigned, the Board's finding of disorderly conduct by Appellant and revocation of its License was on appeal to the Department. Subsequent to argument in this matter, the Department issued a decision on April 28, 2014 which reduced the Board's revocation of the Appellant's License for disorderly conduct to a two (2) week suspension of License. See *DL Enterprises d/b/a East Bay Tavern v. East Providence City Council*, DBR No. 14LQ009 (4/28/14).

The Department has a long line of Department cases regarding progressive discipline and upholding the same. *Pakse Market Corp. v. McConaghy,* 2003 WL 1880122 (R.I. Super.). The progressive discipline imposed on a licensee depends on the violations and the circumstances of a licensee's violation(s). In this matter, the Appellant has already has had a suspension for disorderly conduct. This violation at issue was not related to violence but does relate to public safety since the statute and regulation seek to prevent excessive intoxication by prohibiting drink specials.

In *Pakse Market*, there had been four (4) underage violations within three (3) years with the first violation receiving a two (2) day suspension, the second a four (4) day suspension, the third a fifteen (15) day suspension, and the fourth a revocation. The local

authority concluded that the licensee was unable to comply with statutory requirements and revoked the license which was upheld by the Department and Superior Court.

The Appellant has had a two (2) week suspension for disorderly conduct. This is the Appellant's second violation of the liquor licensing law within a short period of time. If this second violation was a disorderly conduct violation, the suspension would most likely be longer than two (2) weeks. However, this is not a disorderly conduct violation and luckily for the Appellant, the violation was actually limited by the quick action of the Board to ensure the drinks promotion did not go ahead as advertised so that the violations are limited to the advertisements and not the actual holding of the drinks promotion. In light of *Pakse*, the Department's support of progressive discipline, and the facts (such as the type of violation; second violation within a short time) at issue, the 30 day suspension is reduced to a five (5) day suspension.

The Appellant raised the issue of the fine 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(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. R.I. Gen. Laws § 3-5-21 establishes minimum fines for violations. Thus, the first offense is for any offense of the liquor licensing law and the subsequent offense is for any subsequent offense of the liquor licensing laws rather than pinpointing whether the violation is the first or subsequent offence of a specific statutory or regulatory violation. This interpretation is supported by the fact that the statute provides for a clean slate for all offenses if the licensee has not had any offenses for three (3) years. 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.

The administrative penalty imposed by the Board is the statutory minimum administrative penalty for the first offense. Whether this was the Appellant's first offense or not, the penalty is within the limits for the first offense. Thus, there are no grounds for the appeal of the administrative penalty so that the penalty appeal is dismissed.

VI. FINDINGS OF FACT

1. On April 10, 2014, the Board notified the Appellant that its License had been suspended for 30 days and an administrative penalty of $500 imposed.

2. Pursuant to Rhode Island General Laws § 3-7-21, the Appellant appealed that decision by the Board to the Director of the Department.

3. The suspension was conditionally stayed by the Department pending the appeal.

4. Oral argument was held on April 16, 2014, before the undersigned sitting as a designee of the Director.

5. The facts contained in Sections IV and V, are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to 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.*

2. The Appellant violated R.I. Gen. Laws § 3-5-21 by violating R.I. Gen. Laws § 3-7-26 and Rule 16 of CLR8.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board suspending the Appellant's License for 30 days be reduced to five (5) days to start on the 31st day after the execution of this decision. The Hearing Officer further recommends that the appeal of the $500 administrative penalty be dismissed and the penalty is payable on the 31st day after the execution of this decision.[5]

Dated: May 21, 2014

Catherine R. Warren
Hearing Officer

[5] This assumes that the penalty has not been paid already. It is not clear from the record whether the penalty was paid; however, it was the subject of appeal.

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:

__X__ ADOPT
_____ REJECT
_____ MODIFY

Dated: 23 May 2014

Paul McGreevy
Director

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.

CERTIFICATION

I hereby certify on this 23rd day of May, 2014, that a copy of the within Order was sent by first class mail, postage prepaid to William Maaia, Esquire, Law Offices of William C. Maaia & Associates, 349 Warren Avenue, East Providence, RI 02914
wcm@maaialaw.com and

Robert E. Craven, Esquire, City of East Providence, Assistant Solicitor, 7405 Post Road, North Kingston, RI 02852
bob@robertcraven.com and

by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 68, Cranston, Rhode Island.