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:	
Mariazinha Pina Fonseca,	**DBR No.: 15RA003**
Respondent.	

DECISION

I. INTRODUCTION

This matter arose pursuant to an Order to Show Cause why Renewal Application Should not be Denied, Notice of Pre-hearing Conference, and Appointment of Hearing Officer ("Order to Show Cause") issued to Mariazinha Pina Fonseca ("Respondent") by the Department of Business Regulation ("Department") on April 23, 2015. Pursuant to R.I. Gen. Laws § 42-4-9.1, the Respondent applied to renew her Non-Facility/Vendor Employee license ("License") to work at a sandwich shop at Twin River Casino. A hearing was held on June 10, 2015. The Department was represented by counsel and the Respondent was *pro se*. The parties rested 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").

IV. TESTIMONY AND MATERIAL FACTS

Before turning to testimony, the following facts can be ascertained from the exhibits entered into evidence at hearing.

1. The Respondent has held her License since March 20, 2012. See Department's Exhibit One (1) (Notice of License Approval sent by the Department to Respondent).

2. On the Respondent's initial application for her License received by the Department on March 14, 2012 the Respondent disclosed her 2011 domestic breaking and entering arrest. See Department's Exhibit Five (5) (Respondent's 2012 License Application for Non-Facility/Vendor Employees).

3. In 2011, the Respondent was arrested for breaking and entering but was not charged in that no information was signed.[1]

4. On November 3, 2014, the Respondent filed an application to renew her License with the Department. See Department's Exhibit Two (2) (Respondent's renewal of License application).

5. In her renewal application, the Respondent disclosed a "domestic disturbance" arrest in Pawtucket, Rhode Island, with the arrest being by the Pawtucket Police. The

[1] As indicated at the hearing, the undersigned takes administrative notice of the on-line criminal and arrest records maintained by the Rhode Island Courts' website. See *Arnold v. Lebel*, 941 A.2d 813 (R.I. 2007). Said on-line records indicate that the Respondent was arrested in 2011 as disclosed on her 2012 application but that she was never charged ("no information signed"). See http://courtconnect.courts.state.ri.us/pls/ri_adult/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=62-2011-06021&begin_date=&end_date=

Respondent indicated that this arrest was September 1, 2014 and that this arrest was dismissed. See Department's Exhibit Two (2).

6. Instead of September 1, 2014, the Respondent was actually arrested on August 4, 2014 by the Pawtucket Police for "domestic-disorderly conduct" and "domestic-felony assault." See Department's Exhibit Four (4) (Pawtucket Police arrest report).

7. The Respondent was not charged after her 2014 arrest and the matter was dismissed.[2]

Christina Tobiasz, Chief Licensing Examiner, testified on behalf of the Department. She testified that Notice of License Approval forwarded to the Respondent when she was licensed in 2012 indicates that a licensee must inform the Department if he or she is charged with and/or convicted of any crime. She testified that after the Respondent filed her 2014 renewal application, a review of the FBI's national background check indicated that the Respondent had been arrested in 2011 and 2014. See Department's Exhibit Three (3).[3] She testified that the Respondent did not notify the Department of her 2014 arrest. She testified that the Department obtained a copy of the Respondent's August 4, 2014 arrest report from the Pawtucket Police.

The Respondent testified on her behalf. She testified that the 2011and the 2014 arrests both arose out of fights with her boyfriend. She testified that for both arrests, she went to Court and was told they were all set and both were dismissed. She testified that on the application when she indicated the arrest was in September, 2014, she actually meant August 4, 2014. She testified that she still employed at the sandwich shop at Twin River.

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[2] As indicated at the hearing, the undersigned takes administrative notice of the on-line criminal and arrest records maintained by the Rhode Island Courts' website. See *Arnold v. Lebel*, 941 A.2d 813 (R.I. 2007). Said on-line records indicate that the Respondent was arrested in 2014 but that she was never charged ("no information signed"). See
http://courtconnect.courts.state.ri.us/pls/ri_adult/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=62-2014-08538&begin_date=&end_date=

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

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.
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> ***
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> (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
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> 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:
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> ***

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

D. Whether the Respondent's License Should be Renewed

The Department sought denial of the Application pursuant to R.I. Gen. Laws § 41-4-9.1 and Section 5 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. Section 5(A) of RAR9 provides that an arrest within the last 10 years may warrant a denial of application. Section 5(B)(5) of RAR9 provides that an inadequate explanation of a criminal conviction or arrest may warrant denial of application. Section 5(B)(8) of RAR9 provides that false or misleading statements may warrant denial of an application.

The Department argued that there was good cause to deny the renewal of License. The Department argued that the Respondent failed to disclose her 2011 arrest and did not adequately disclose her 2014 arrest on her 2014 renewal application. The Department argued that these failures by the Respondent were misleading statements and inadequate explanations under Section 5 of RAR9. The Respondent argued that based on the Department's prior decisions, there was good cause to deny this application.

In reviewing the Respondent's renewal application, she disclosed her 2014 arrest, but gave the wrong date (September instead of August). The police report indicated that the Respondent's 2014 arrests were for "Domestic-Felony Assault" and "Domestic-Disorderly Conduct (making loud/disturbance)." On her renewal application, the Respondent indicated that she had been arrested for "Domestic Disturbance," gave the location and date of the arrest, and the arresting police department. The fact that the Respondent did not exactly parrot the arrest

report in stating the exact title for the arrest does not rise to the level of a misleading statement or inadequate explanation. Both arrests were listed by the police as "domestic" and that is what the Respondent wrote in her renewal application. The Respondent included the term "disturbance" as well which is what one of her arrests was entitled. On the basis of the information given by the Respondent, the Department obtained the police report. The Respondent disclosed her 2014 arrest to the Department on her renewal application. Accidentally given the wrong date is not misleading. The Respondent's disclosure was adequate in that it described the nature, place, year, and location of arrest.

The Department also argued that the Respondent violated the Notice of License Approval by not notifying the Department of her 2014 arrest. The Notice of License Approval indicated that a licensee needs to notify the Department of a change in address, name, or employment or if "[y]ou are charged with, and/or convicted of any crime . . . which changes in any way the representations made on your application." The Notice of License Approval does not have a time frame for such notice.[4] In this situation, the Respondent notified the Department of the 2014 arrest three (3) months after her arrest by way of her renewal application. The Respondent apparently was not charged in 2014 because while she was arrested, no information was signed and the matters dismissed. The Notice of License Approval does not mention notifying the Department of arrests, but rather speaks of charges or convictions.[5] The Respondent notified the Department of her arrest. There are no grounds based on the Notice of License Approval to find that the Respondent failed to promptly or appropriately notify the Department of her 2014 arrest.

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[4] The undersigned takes administrative notice that the Department's Notice of License Approval now states within three (3) days but that is not included in the Respondent's Notice of License Approval.

[5] Section 4(A) of RAR9 defines "arrest" as "detaining, holding or taking into custody by any police or other law enforcement authorities based on probable cause that a person has committed a crime." Section 4(B) defines "charge" as "any indictment, complaint, information, summons, or other notice of the alleged commission of a crime." Based on those definitions, it would appear that the Respondent was never actually charged with a crime. Certainly, no information was signed and she was not indicted.

The Department also argued that the Respondent failed to notify the Department of her 2011 arrest on her 2014 renewal application. It is true that this Respondent did not include her 2011 arrest in the 2014 renewal application; however, she had already notified the Department of that arrest in her initial application. Since the Department already had notice of the 2011 arrest, it cannot be found that the Respondent was being misleading or providing an inadequate explanation by not including it in the renewal application. The Respondent disclosed her 2011 arrest on her 2012 application and it did not preclude her from being licensed the Department and indeed she has been working at a sandwich shop at Twin River since 2012.

The Department 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.[6] In this matter, the Respondent disclosed her 2011 arrest in 2012 and it was not a barrier to licensing. As the Department had notice of this arrest, the omission of the 2011 arrest on 2014 renewal application is not misleading. The Respondent disclosed her 2014 arrest on her 2014 renewal application.

The Respondent disclosed her 2011 arrest on her initial application and disclosed her 2014 arrest on her renewal application. She has been employed using her License since 2012 and no other issues have come to the forefront. The Department only argued that the

[6] 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).

Respondent's omission rose to good cause to deny the license.[7] The Department seeks denial on the basis of how the Respondent completed her 2014 renewal application. The Respondent disclosed her 2014 arrest on her 2014 renewal application. She disclosed her 2011 arrest on her initial application. The failure to disclose her 2011 arrest on her renewal application was not misleading or inadequate as the Department already was on notice of that arrest so she was not trying to conceal it. While the Respondent should have disclosed her 2011 arrest again on her renewal application, the failure to do so after she had already in 2012 does not constitute good cause to deny her License renewal application.

VI. FINDINGS OF FACT

1. Pursuant to R.I. Gen. Laws § 42-4-9.1, the Respondent applied to renew her License to work at a sandwich shop at Twin River Casino.

2. On April 23, 2015, the Department issued an Order to Show Cause to Respondent.

3. A hearing was held on June 10, 2015. The Department was represented by counsel and the Respondent was *pro se*. The parties rested on the record.

4. The Respondent disclosed her 2011 arrest in her initial 2012 application.

5. The Respondent omitted her 2011 arrest in her 2014 renewal application.

6. The Respondent disclosed her 2014 arrest in her 2014 renewal application.

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

[7] RAR9 provides for mitigating factors when considering criminal history in licensing decisions. However, in this matter, the only grounds for denial are the Respondent's application and how she responded on the renewal application. The Department did not include in the Order to Show Cause the actions that caused the arrests. Thus, the mitigation factors are not relevant. However, in looking at the mitigating factors contained in Section 5(C) it should be noticed that the Respondent's arrests are not relevant to her License in that she works at a sandwich shop and the Respondent testified at hearing as to arrests and that she was not charged.

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.*

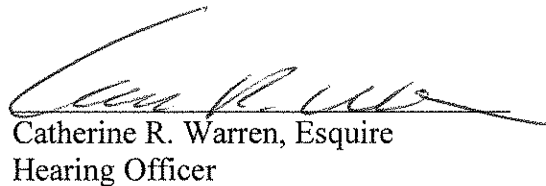
2. The Respondent's adequately disclosed her 2014 arrest on her renewal application. The Respondent had already disclosed her 2011 arrest on her 2012 initial application so her omission of the 2011 arrest on her 2014 renewal application was not misleading or inadequate.

3. 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 and Section 5 of the RAR9.

Entered this day 7th July, 2015.



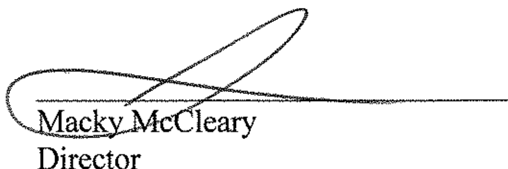
Catherine R. Warren, Esquire
Hearing Officer

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: 7/7/15



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 9th day of July, 2015, that a copy of the within decision was sent by first class mail, postage prepaid to Ms. Mariazinha Pina Fonseca, 172 McGill Street, Pawtucket, RI 02860 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.