

**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:

Kimberley Albro,

Respondent.

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DBR No.: 15RA006

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 Kimberley Albro (“Respondent”) by the Department of Business Regulation (“Department”) on June 4, 2015. Pursuant to R.I. Gen. Laws § 42-4-9.1, the Respondent holds an Operations Employee License (“License”) to work as a validator at Newport Grand. A hearing was scheduled for June 23, 2015 at which time the Respondent did not appear at hearing. Pursuant to Section 9 of *Central Management Regulation 2 Rules of Procedure for Administrative Hearing* (“CMR2”), service may be made by hand-delivery or first class mail and service is complete upon mailing when sent to the last known address of the party. In this matter, the Order to Show Cause was sent to the Respondent’s last known address by first class and certified mail.¹ Since the Respondent was adequately noticed of hearing, a hearing

¹ Department’s Exhibit One (1) included the United States Post Office tracking sheet that shows that notice of certified mail had been left for the Respondent. It was represented by the Department’s counsel that the regular mail had not been returned by the United States Post Office to the Department. Christina Tobiasz, Chief Licensing Examiner, testified for the Department that the Order to Show Cause was sent to the Respondent’s most recent address on record with the Department.

was held before the undersigned on June 23, 2015.² Additionally, Section 21 of the CMR2 provides that a default judgment may be entered based on pleadings and/or evidence submitted at hearing by a non-defaulting party. The Department was represented by counsel who 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.*, and CMR2.

III. ISSUE

Whether the Respondent's License should be revoked pursuant to R.I. Gen. Laws § 41-4-9.1.

IV. TESTIMONY AND MATERIAL FACTS

Christina Tobiasz, Chief Licensing Examiner, testified on behalf of the Department. She testified that the Respondent holds an Operations Employee License. She testified that when the Respondent's License was approved she was notified that the approval of the License had certain conditions including that a licensee must inform the Department within three (3) days if he or she is arrested and/or if his or her employment ends or if he or she is terminated. See Department's Exhibit Two (2) (notice of license approval). She testified that the Department was notified by the controller at Newport Grand that the Respondent no longer worked at Newport Grand. See Department's Exhibit Four (4) (April 20, 2015 email from Newport Grand's controller to Ms. Tobiasz stating that Respondent had been terminated for cause from Newport Grand). She testified that the Respondent was arrested on April 3, 2015. See Department's Exhibit Three (3) (Rhode Island State Police inter-departmental communication indicating that Respondent was

² Pursuant to a delegation of authority by the Director of the Department of Business Regulation.

arrested for embezzlement and fraudulent conversion over \$100). The undersigned took administrative notice³ of the online criminal information that showed the Respondent was arrested and charged with felony embezzlement over \$100.⁴

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.*

³ Administrative notice is allowed by R.I. Gen. Laws § 42-35-10 which states in part as follows:

(4) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency’s specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

⁴ See

http://courtconnect.courts.state.ri.us/pls/ri_adult/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=22-2015-00661&begin_date=&end_date=

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.

D. Whether the Respondent's License Should be Revoked

The Department sought to revoke the Respondent's License pursuant to R.I. Gen. Laws § 41-4-9.1. The Department argued that the Respondent's employment was terminated and she failed to notify the Department of her termination as well as her arrest and charge.

It is undisputed that the Respondent is no longer employed by Newport Grand. See Department's Exhibit Four (4). R.I. Gen. Laws §41-4-9.1 and *Racing and Athletics Regulation 8 – Licensing Application* ("RAR8") provide that the Department shall establish occupational licensing for all employees of concessions at gaming facilities.⁵ RAR8 defines an Operations Employee License as follows:

Operations Employee License - All individuals employed in the simulcast operation of the Dog Racing Track or Gaming Facility are required to hold an Operations Employee License. An application form for an Operations Employee License is contained herein at Appendix A.

The purpose of said license is to license operations employees (such as validators) at gaming facilities (such as Newport Grand). Without employment as an operations employee, an applicant/employee cannot obtain an Operations Employee License. Indeed, obtaining such a license is required for anyone employed as an operations employee by Newport Grand. Unlike a license that allows the holder to practice in a specified field (often after demonstrating certain specified knowledge) without a condition of employment in that field, this type of license is tied to employment. Thus, some licenses do not require employment to be held by a licensee. However, the Respondent's License is required upon employment as an operations employee at a gaming facility in Rhode Island. Without employment, such a license cannot be held. Thus, employment as an operations employee at Newport Grand is a condition of licensing. The

⁵ RAR8 defines "gaming facility" as "any building, enclosure, or premises at which pari-mutuel, simulcast, or slot operations are conducted."

Respondent was terminated from such employment so she cannot hold the License. The Respondent's termination from employment at Newport Grand is grounds to revoke her License.

It is also undisputed that the Respondent was arrested for embezzlement for over \$100. See Department's Exhibit Three (3). R.I. Gen. Laws § 41-4-9.1 provides that the Department may consider moral character in determining whether there is good cause to revoke the License. Section 5(A) of *Racing and Athletics Regulation 9 – Racing and Athletics Criminal Background Investigation* ("RAR9") provides that an arrest or charge within the last 10 years may warrant a denial of application. Along with her arrest and being charged, the Respondent failed to notify the Department of her arrest and charge for embezzlement.

Pursuant to R.I. Gen. Laws § 41-4-9.1 and RAR9, the Department has grounds to revoke the Respondent's License as she no longer is employed by Newport Grand and was arrested and charged with embezzlement over \$100. She also failed to notify the Department that she had been arrested and charged and no longer was employed at Newport Grand.

VI. FINDINGS OF FACT

1. Pursuant to Section 21 of the CMR2, the Respondent is declared to be in default for failing to appear at the hearing.
2. Pursuant to Section 21 of the CMR2 and based on the testimony at hearing, the allegations in the Order to Show Cause are found to be true.
3. An Order to Show Cause was sent by the Department to the Respondent on June 4, 2015 to the Respondent's address on record with the Department.
4. A hearing was held on June 23, 2015 at which time the Respondent did not appear. As the Respondent had adequate notice of hearing, the undersigned held the hearing.

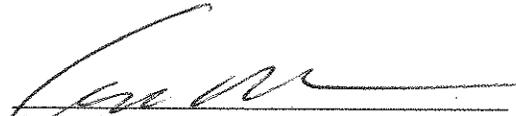
5. The Respondent is no longer employed at Newport Grand and was arrested and charged with embezzlement over \$100. She also failed to notify the Department of her termination, arrest, and charge.

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

VII. CONCLUSIONS OF LAW

Based on the forgoing, the undersigned recommends that the Respondent's License be revoked pursuant to R.I. Gen. Laws § 41-4-9.

Entered this day 15th 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: 7/16/15


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 17th day of July, 2015, that a copy of the within decision was sent by first class mail, postage prepaid and certified mail to Ms. Kimberley Albro, 224 Willow Lane, Portsmouth, RI 02871 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.

