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

IN THE MATTER OF:	
CRD ENTERPRISES INC. d/b/a JAN-PRO CLEANING SYSTEMS OF SOUTHERN NEW ENGLAND,	**DBR No. 10-S-0112**
Respondent.	

DECISION

Hearing Officer: Catherine R. Warren, Esquire

Hearing Held: October 21, 26, and November 8, 2010

Appearances:

For the Department of Business Regulation: Ellen Balasco, Esquire

For the Respondent: Harris K. Weiner, Esquire

I. INTRODUCTION

The above-entitled matter came before the Department of Business Regulation ("Department") pursuant to an Order to Show Cause Why Order to Cease and Desist Unregistered Activity Should Not Be Issued, Notice of Hearing, and Appointment of Hearing Officer ("Order to Show Cause") issued to CRD Enterprises, Inc. d/b/a Jan-Pro Cleaning Systems of New England ("Respondent") on July 30, 2010. A pre-hearing conference was held in this matter on August 17, 2010 wherein the issues involved were clarified. A hearing on this matter was held on October 21, 26, and November 8, 2010.

At the hearing, the Respondent and the Department were represented by counsel. The parties timely filed briefs by March 4, 2011.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 19-28.1-1 *et seq*. and R.I. Gen. Laws § 42-35-1 *et seq*.

III. ISSUE

Whether the Respondent engaged in unlicensed activity pursuant to R.I. Gen. Laws § 19-28.1-5 and if so, what is the appropriate penalty.

IV. MATERIAL FACTS AND TESTIMONY

Joanne Sullivan ("Sullivan"), Principal Securities Examiner, testified on behalf of the Department. Sullivan testified the Department oversees the licensing and registration of franchises. She testified that the Respondent first applied in February 1999 as a franchisor. She testified that the applicable statute requires expiration 120 days after the end of a registrant's fiscal year which is usually December 31 so thus 95% of franchise registrations expire on April 30 each year. She testified that the Respondent's 1999 registration expired on April 30, 2000 since it did not file a timely renewal. She testified that after filing a late renewal, Respondent's registration became effective on December 10, 2001. She testified that the Respondent had late renewals in 2002 and 2003 with its registration being effective on November 20 and June 17 respectively. See Department's Exhibit One (1) (Respondent's registration history).

Sullivan testified that Respondent's 2004 renewal application was timely received on April 30, 2004 and became effective on May 10, 2004. See Department's Exhibit Three (3) (2004 application). She testified that the Respondent's 2004 registration

expired on April 30, 2005 and the Respondent's renewal application was not received until August 2, 2005. She testified that the statute does not provide for a reinstatement of a license so that late renewals are treated as new applications. She testified that since Respondent allowed its registration to expire and didn't submit an application until August, 2005, it was treated as a new applicant, required to pay $500 as opposed to $250 for renewals, and attested that it had neither offered nor sold any franchises during its unregistered period. See Department's Exhibit Four (4) (2005 application). She testified that the Respondent was also treated as a new applicant in 2006 due to the fact that its application for registration was not received until November 21, 2006 and its registration then became effective on January 1, 2007 and expired on April 30, 2007.

Sullivan testified that the next application the Department received from the Respondent was a CD-ROM on July 28, 2008 along with a check for $500. See Department's Exhibit Six (6). She testified that Respondent initially sent a paper application and the Department requested it be submitted on disc. She testified that that the CD-ROM application contained the Franchise Disclosure Document ("FDD") as well as two (2) unreadable files. She testified that on October 10, 2008, she called Respondent's president, Raymond LaPointe ("LaPointe"), regarding the unreadable files and left a voice mail for him on his cell phone. She testified that he had requested that he be contacted by cell phone. She testified that she received no further communication from him until October 22, 2009 when he submitted Respondent's next application. She testified that the Respondent submitted a check for $600 which was the current fee for a new application. See Department's Exhibit Seven (7) (2009 application). She testified that pursuant to Department's policy, the Department requested an affidavit from the

Respondent attesting that there was no activity during the unregistered period at which time the LaPointe informed the Department of the 39 transactions that are at issue in this hearing. She also testified that she received a facsimile from LaPointe on October 14, 2009. See Department's Exhibit Eight (8) (contains 2007 application).

Sullivan testified that she conducted a search for the missing 2007 application and found no record that the application had ever been received. Sullivan testified that on November 19, 2009, she received another facsimile from Respondent with a copy of an October 29, 2007 check for $500 made out to the Department that had never been cashed. See Department's Exhibit Nine (9). She testified that on May 10, 2010 the Department received Respondent's application for registration which was initially found deficient, but was granted on August 24, 2010. See Department's Exhibit Ten (10).

On cross-examination, Sullivan testified that in 2008, the Department stopped accepting paper applications and switched from the Uniform Franchise Offering Circulars ("UFOC") to the FDD and started acknowledging approvals and sending deficiency notices via email as opposed to letter. She testified that the Department cashed Respondent's check forwarded with his July 29, 2008 application. See Respondent's Exhibit Three (3).

Raymond LaPointe ("LaPointe") testified on behalf of the Respondent. He testified that he is the Respondent's president and sole shareholder and it has been in business since 1999 and sells franchises to people who then own their own cleaning company. He testified that he oversees the entire operation including sales, operations, and billing. He further testified that he currently has 72 franchises with 66 operating.

LaPointe testified that in 2007, his administrative assistant left and he hired a new assistant but she was terminated in October, 2007 and after that, he hired temporary employees. He testified that it was his practice to review the prior year's registration application and make additions, deletions, and updates to the document, and use it as the new application which he did for 2007. See Respondent's Exhibit Nine (9) (2007 UFOC). He testified that he first learned that there was a problem with his 2007 registration on October 1, 2009 when he received a telephone call from attorney Dante Giammarco. He testified that he called Sullivan to find why he was not registered and on October 22, 2009, he filed an application with the Department. He testified that in 2008, he had an outside company make the CD-ROM registration application and the company used an old CD with other materials on it to make the copy. He testified that he did not receive Sullivan's 2008 telephone message that there was a problem with the CD.

LaPointe testified he offers different franchise plans that are based on the ability to generate a certain amount of income a year. See Respondent's Exhibit 15. He testified that some franchisees lost business because customers could no longer afford to out-source cleaning and other ones performed poorly so no longer are franchisees. He testified that he can not afford recession. He testified that he believes that 33 to 35 of the 39 franchisees with which he entered into contracts with while unregistered would accept rescission. He testified that he believes that a majority of his franchisees are underperforming and would prefer to walk away with the money from recession as opposed to keeping their franchise. See Respondent's Exhibit 16 (list of 39 franchisees).[1] He testified he didn't know he was unregistered in 2007, 2008, and 2009.

[1] After hearing, the Respondent submitted a revised spreadsheet without objection from the Department so it is marked and admitted as Respondent's Exhibit 16A.

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, 1049 (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. Dept. of Environmental Management,* 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. 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 at 759 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* at 763-766. 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); *Parenti v. McConaghy*, 2006 WL 13114255 (R.I. Super.). 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. Statutes

R.I. Gen Laws §19.28.1-5 states as follows:

> It is unlawful for any person to offer or sell a franchise unless the offer is registered under this act or is exempt from registration under § 19-28.1-6.

R.I. Gen. Laws § 19-28.1-18 states in part as follows:

> Enforcement
> ***
> (c) When it appears to the director that any person has violated or is about to violate a provision of this act or a rule or order under this Act, the director may do any or all of the following: (1) Issue an order directing the person to cease and desist from continuing the act or practice . . .
>
> (d) The director may impose an administrative assessment against a person named in an order issued under § 19-28.1-18(a) or (c) or 19-28.1-19. The amount of the administrative assessment may not exceed five thousand dollars ($5,000) for each act or omission that constitutes a basis for issuing the order. The administrative assessment may only be imposed: (1) Following an opportunity for a hearing under § 19-28.1-25 if the notice delivered to all named persons includes notice of the director's authority to impose an administrative assessment under this section, or (2) As part of an order issued under § 19-28.1-18(a) or (b) or 19-28.1-19, if the order is stipulated to by each person subject to the administrative assessment.
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> (e) When the director prevails in an action under this act, he or she is entitled to recover the costs, expenses and experts fees incurred incident to the action.

R.I. Gen. Laws § 19-28.1-32 states as follows:

> Filing of documents - A document is filed when it is received by the director.

D. Arguments

The Department argued the Respondent was first registered in February 1999 and periodically filed late renewal applications until 2007 when its 2007 application was not received by the Department and its 2008 application was deficient thus resulting in it being unregistered for a period of 30 months (before being registered in 2010) during which time it entered into 39 franchise contracts. The Department argues that it is not responsible to notify each franchisor when its registration lapses because that is an unrealistic burden on the Department and a franchisor's obligation. The Department argued that the Respondent has provided no proof that it could not afford to offer rescission to its franchisees and such a claim runs afoul of the franchise statute's requirements that a franchisor have adequate financial resources and proof of funding sources to perform its obligations under franchise agreements. Thus, the Department argues that the Respondent was unregistered as a franchisor and violated R.I. Gen. Laws § 19-28.15 and seeks appropriate sanctions for such violations.

The Respondent argued that it was unregistered because the Department failed to notify it of its status because the Department moved its offices, a Securities' staff member retired,[2] and it changed from paper applications to CD-ROM filings. The Respondent argues that its 2008 disc was readable and that it should have been notified in writing of any deficiency in its 2008 application and that the Department cashed its 2008 check. The Respondent argued that the Department failed to notify the Respondent of its deficiencies under R.I. Gen. Laws § 19-28.1-9(c) which requires the Department to make a good faith effort to make notice. The Respondent argued that if forced to offer

[2] Sullivan testified to the Department's move in 2008 and the retirement of Steven Kagan in 2008 whose job Sullivan now performs.

rescission that it would be forced into bankruptcy and money would be transferred from the Respondent, an on-going business, to inactive businesses. The Respondent argued that its matter is different from other Department settlements in that those settlements were for fewer transactions so $1,000 administrative penalty per transaction was the most common penalty. The Respondent argued that the Department should grant emergency retroactive registration under R.I. Gen. Laws § 19-28.1-6(10).

E. Applicable Periods

It is undisputed that the Respondent in this matter was not registered as a franchisor during the time in question. There are different arguments regarding what sanctions should be imposed or why sanctions should not be imposed. The time can be broken down into these three (3) groupings:

a. May 1, 2007 to July 28, 2008

It is agreed that the Respondent entered into 25 franchise contracts during this time. The Respondent was registered in 2006 with its registration expiring April 30, 2007. The Respondent was well aware of the expiration of its registration in that it had been registered since 1999 and indeed in 2005 attested to not having offered any sales of franchises after its registration expired in 2005. See Department's Exhibit Four (4) and Respondent's Exhibits 13 and 15. Even if the Respondent had only first registered in 2006, it is the Respondent's obligation under the statute to maintain its registration.

The Respondent forwarded a check in October, 2007 which was not cashed by the Department. The fact that the Respondent's check was not cashed should have indicated to the Respondent that its registration was not approved. The Respondent argues that the Department should forward a notice of abandonment to registrants but registrants are

already on notice of their expiration date since it is in the statute. Furthermore, there is no statutory provision for the Department to provide such a notice and even if one had been forwarded in 2007, the Respondent already knew about its expiration since it forwarded a check. The Department is not responsible for not receiving a check. See R.I. Gen. Laws § 19-28.1-32 (a document is filed when it is received by the director).

There is a long history of Department licensees seeking to excuse their failure to comply with the basic statutory requirement of filing a renewal application. This most elemental of licensing requirements is not an obligation on the part of the Department but rather is a licensee's or registrant's duty. See *In the Matter of John Gower*, DBR No. 01-L-0237 (2/7/02); *In the Matter of Robert E. DeBlois*, DBR No. 98-L-0044 (4/2/99); and *In the Matter of Joseph DiLorenzo*, DBR No. 97-L-0013 (2/2/98). As the Department found in a similar case regarding failure to renew:

> As the holder of a License from the Department, Respondent has an affirmative duty to investigate and understand what his obligations are in order to maintain that License in good standing. The Hearing Officer is dismayed to hear Respondent argue that somehow the Department should advise Respondent of his obligations. The Department cannot and should not be charged with "babysitting" licensees who fail to read and follow the most basic of requirements. Respondent and Respondent alone is charged with the duty to maintain and protect his interest in his License. *In The Matter of Joseph DiLorenzo*, DBR No. 97-L- 0013, 2/2/98, pp. 5-6.

b. May 1, 2009 to October 22, 2009

It is agreed that there are four (4) unregistered transactions during this period. While the Respondent raises several issues (discussed below) with its 2008 application, even assuming that the Respondent had been registered from 2008 to 2009, said registration would have expired on April 30, 2009. The same analysis for 2007 to 2008 registration period applies to this period.

c. July 28, 2008 to April 30, 2009

It is agreed that the Respondent entered into (10) franchise contracts during this period. On July 28, 2008 the Department received the Respondent's registration application on CD-ROM. Sullivan's testimony was that two (2) files on the disc were unreadable and the FDD was incomplete and that she left a voice mail for LaPointe on October 10, 2008 regarding the deficiencies in the application.

The Department's Exhibit Eight (8) is a facsimile that LaPointe sent the Department attaching his 2007 application. Its cover sheet is dated October 14, 2008 while the facsimile machine time stamp is dated October 14, 2009. LaPointe testified that he never received Sullivan's telephone message of October 10, 2008. Tr2 65.[3] He testified that it was not until October, 2009 when he found out from Giammarco that he was not registered that he spoke to Sullivan and found out the disk was unreadable. Tr2 59. Sullivan testified that she received the facsimile in 2009. Tr1 40.

LaPointe testified that he sent the fascimile on October 14, 2009 and the 2008 date was a typographical error. Tr2 56. However, he then reviewed the document and found that the document's second page time stamp said October 14, 2008 and that the third page date is partially obliterated but looks like 2008. On questioning from the Department regarding whether he knew in 2008 he was unregistered, LaPointe testified that in 2008 he was speaking with Sullivan about 2007 so was shocked to find out in 2009 he was unregistered. He testified that he was confused as to the issue of why if he first learned of being unregistered in October, 2009, he would have sent information in October, 2008 to Sullivan regarding his 2007 application. Tr3 30-32.

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[3] Tr2 refers to the transcript of the second day of hearing with 65 referring to the page number. The other volumes will be similarly referenced if necessary.

If LaPointe sent the facsimile in 2008 then it would seem he spoke with Sullivan regarding the unreadable disk and found out the 2007 application was never received so then forwarded the 2007 application. But in November, 2009, he sent a copy of the uncashed 2007 check so it would make sense that he sent at the same time (albeit a month earlier) in October, 2009, a copy of the 2007 application after his October, 2009 conversation with Sullivan. However, the facsimile time stamp on pages two (2) and three (3) appear to be dated 2008 as is the handwritten date on the cover sheet.

The Respondent argues that Sullivan's telephone message was not a good faith effort to communicate an application deficiency pursuant to R.I. Gen. Laws § 19.28.1-9(c).[4] However, the testimony is that LaPointe preferred telephone calls and that he apparently spoke to Sullivan in October, 2008 and faxed Department's Exhibit Eight (8). Even if he did not speak with Sullivan and the facsimile was forwarded in October, 2009, LaPointe still is obligated under the statute to maintain Respondent's registration. *Supra.*

F. The Respondent's Arguments

a. Notice

The Respondent argues that LaPointe received no written notice of deficiency for three (3) years, that the Department cashed his 2008 check, that previous late filings are irrelevant, that it was his assistant's fault, and that the Department was understaffed and

[4] R.I. Gen. Laws § 19-28.1-9 states in part as follows:

> General registration provisions. – (a) A registration application must include the disclosure document, the filing fee, and the consent to service of process. The director may require the filing of audited financial statements examined and reported upon by an independent certified public accountant and prepared in accordance with generally accepted accounting principles and of additional documents or disclosures.
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> ***
>
> (c) Except as provided in subdivision (2), if no order under § 19-28.1-18 or 19-28.1-19 is in effect, a franchise registration application is effective on the thirtieth business day after filing of the application of the last amendment to the application or at an earlier time ordered by the director unless the applicant requests postponement of effectiveness of the application or the director has made a good faith effort to communicate why the application does not meet the requirements of this act.

made clerical errors. R.I. Gen. Laws § 19-28.1-1 *et seq*. does not require the Department to notify franchisors when their registration expires. Indeed, the statute clearly informs registrants when their registration expires.[5] It is the responsibility of a registrant to maintain an active registration with the Department and this burden cannot be shifted because a business has poor support staff, or believes the Department is understaffed, or has outsourced the making of a CD to a third party.

Separate and apart from the notice of expiration, the Respondent also argued that the notice its 2008 application deficiency was inadequate under the statute. If LaPointe did forward said facsimile in October, 2008, he received Sullivan's voice mail message. Even if he did not, he still received notice of the deficiency. While the Department has changed its method of communication since 2008 regarding notices of deficient applications, it does not follow that the notice given in 2008 was inadequate under the statute. It merely demonstrates that the Department decided to use a better method of communication.

b. Scienter

The Respondent argues that there must be some degree of scienter for exposure under this Act but provides no statutory cite for this argument. Scienter is not required under the statute for proof of a violation of said statute. Indeed, this is a regulatory statute and not a criminal statute. See R.I. Gen. Laws § 19-28.1-5 (above). Thus, the failure to register as required under the statute is the statutory violation. The Respondent

[5] Sullivan testified that she receives approximately 800 renewals a year (Tr2 34) so clearly the vast majority of registrants are able to comply with this basic statutory requirement. While the fact that other registrants are able to comply with renewal requirements does not establish that a registrant must comply with said requirements – rather the statute requires that - such compliance serves to underscore the deficient nature of the Respondent's argument.

argues that the inquiry should be whether LaPointe knew he was making unregistered sales and not whether he knew he was making sales. There is no statutory basis for such an argument. Not only is there no provision in the statute for violations to be "willful" or "knowing," such provisions would not even support the Respondent's argument.

For example, consider the definition of "willfully" in another State licensing statute, the Rhode Island Securities Act, R.I. Gen. Laws § 7-11-101(25), which defines "willfully" as "intentionally committing the act which constitutes a violation; there being no requirement that the actor also be aware that he or she is violating any provision of this chapter or any rule or order under this chapter." Thus, the act just needs to be completed. Intent is irrelevant. Thus, even when the statute refers to a willful or knowing violation (which the Franchise Act does not), it is only referring to whether the act has been completed. Thus, the inquiry is whether the sales were completed.

In addition, this is an administrative proceeding and not a criminal proceeding so it is logical that there is no requirement that the act be done with a "bad purpose" but rather that it be a voluntary act. See *Carmody v. Rhode Island Conflict of Interest Commission*, 509 A.2d 453 (R.I. 1986) (discussing the use of the terms knowing and willful in the context of civil penalties upon municipal officials and finding that not even all criminal statutes require a bad intent but rather that the act itself be voluntary; these terms are not even used in this statute). The Respondent's argument is without merit.

c. R.I. Gen. Laws § 19-28.1-6(10)

R.I. Gen. Laws § 19-28.1-6 provides exemption from registration for those entities that have a high net worth or a long period of stability. The Respondent argues that the Department director should exercise his discretion under R.I. Gen. Laws § 19-

28.1-6(10) or use his equitable and emergency powers to grant registration exemption for the time period at issue. R.I. Gen. Laws § 19-28.1-6(10) provides as follows:

> § 19-28.1-6 Exemption from registration. – The following transactions are exempt from the provisions of § 19-28.1-5:
> ***
> (10) The offer and sale of a franchise that the director by rule or order exempts when registration is not necessary or appropriate in the public interest or for the protection of prospective franchisees.

R.I. Gen. Laws § 19-28.1-5 (see above) prohibits the sale of a franchise without registration. Thus, for an entity to be exempt from registration that exemption must be granted prior to a sale being offered. There is no provision in the statute for retroactive approvals and/or such emergency powers.[6] All administrative agencies powers are derived from statute and an agency cannot do what is not provided for in law. Recently the Rhode Island Supreme Court addressed the issue of the statutory powers of an administrative agency when a plaintiff sought the Court to toll statute of limitations for the filing of a claim. The Court found as follows:

> The plaintiff urges this Court to expand the statutory language to embrace the doctrine of equitable tolling, which would permit the filing of untimely disability claims. However, to do so would conflict with § 42-35-15(g)(2) of the Administrative Procedures Act. An administrative agency is a product of the legislation that creates it, and it follows that "[a]gency action is only valid, therefore, when the agency acts within the parameters of the statutes that define [its] powers." *In re Advisory Opinion to the Governor,* 627 A.2d 1246, 1248 (R.I.1993) (citing *F. Ronci Co. v. Narragansett Bay Water Quality Management District Commission,* 561 A.2d 874, 879 (R.I.1989)). Our examination of this unambiguous statute does not reveal even a remote suggestion that equitable tolling is available to save untimely claims, and we decline to hold otherwise. We reach this conclusion mindful that the General Assembly has expressly provided for the tolling of certain statutes of limitations in several instances. [footnote omitted] It has vested judges with the authority to toll certain statutes. By contrast, the General Assembly has not done so with respect to the instant statute. *Iselin v. Ret. Bd. of Employees' Ret. Sys. of Rhode Island,* 943 A.2d 1045, 1050 (R.I. 2008).

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[6] For example, the director is allowed to issue summary suspensions pursuant to R.I. Gen. Laws § 19-28.1-19. There are no similar provisions for other emergency approvals or retroactive approvals.

Similarly, the Respondent urges the undersigned to find statutory authority where none exists (equitable and emergency powers and retroactive approvals). Indeed, equitable grounds are not applicable to administrative hearings so to find for the Respondent on the basis of a fairness argument would be reversible error. *Nickerson v. Reitsma*, 853 A.2d 1202 (R.I. 2004). Additionally, a government entity and its representatives do not have any implied or actual authority to modify, waive, or ignore applicable state law. *Romano v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 767 A.2d 35 (R.I. 2001).

Indeed, the undersigned is at a loss to understand the retroactive approval argument. The Respondent did not comply with the basic registration renewal requirements that 800 registrants are able to do a year. Tr2 34. The exemption statute applies to different types of franchise applications in that it grants the director power to exempt registration prior to sales being offered when registration is not required to protect the public or the franchisees. Such authority does not apply to late renewals that a franchisor filed and would not apply to the Respondent's registration as it is required for the protection of the public and franchisees. The only reason the Respondent requests retroactive approval is to excuse its non-compliance with statutory requirements. The Respondent did not argue that it actually would fall under this exemption (if requested prior to offering sales) with the reason being that there is no basis for the Respondent to actually fall under the exemption.

In addition, the purpose of the Franchise Act is to protect prospective franchisees.[7] To grant an unauthorized retroactive approval not only is not statutorily

[7] R.I. Gen. Laws § 19-28.1-2 states as follows:

permitted but would contravene the very purpose of registration: protecting the franchisees. Thus, allowing a franchisor to enter into contracts while not registered and then to allow retroactive approval for such activities defeats the statutory purpose of registration and the exemption.[8]

The Respondent has requested the Department ignore its failure to renew and take responsibility for basic licensing requirements and for the Department to ignore statutory requirements and allow retroactive approval. This argument is without merit.[9]

d. Rescission

The Respondent apparently believes the Department can decide whether to order rescission. The statute already provides for rescission if a franchisor was unregistered at time of entering into a contract. There is nothing for the Department to determine regarding rescission. Rather the Department has a long-standing policy regarding notifying franchisees of their right to rescission if applicable.[10]

R.I. Gen. Laws § 19-28.1-21 provides as follows:

> Private civil actions. – (a) A person who violates any provision of this act is liable to the franchisee for damages, costs, and attorneys and experts

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> Legislative intent. – The legislature finds that franchisees may suffer substantial losses when the franchisor does not provide complete information regarding the franchisor and the franchise relationship. The legislature also finds that many franchisees lack bargaining power and purchase a franchise when they are unfamiliar with operating a business, the franchised business and with industry practices in franchising. The act seeks to assure that each offeree receives the information necessary to make an informed decision about the offered franchise. Further, it is the intent of this chapter to prohibit the sale of franchises when there is a likelihood that the franchisor's promises will not be fulfilled.

[8] As an aside, if the statute was found to apply to this situation – late renewals by the Respondent – not only is that not allowed in statute but it would be unfair to the hundreds of registrants who timely renew and are able to comply with basic statutory requirements to file renewals.

[9] When the Supreme Court had the authority (unlike the Department) to grant retroactive approval for an attorney to practice *pro hac vice* in the State, the Court declined to do as that would condone past transgressions and put an imprimatur of approval of what could construed as the unauthorized practice of law. See *In Re Ferrey*, 774 A.2d 62 (R.I. 2001). Similarly, even if the Department had the authority to grant such retroactive approvals, there would be no reason to do so.

[10] Indeed, this matter was continued for several weeks for the Department to advise the Respondent over what would be acceptable to the Department in terms of the Respondent notifying its franchisees of their right of rescission as provided for by statute.

fees. In the case of a violation of §§ 19-28.1-5, 19-28.1-8, or 19-28.1-17(1) – (5), the franchisee may also sue for rescission. No person shall be liable under this section if the defendant proves that the plaintiff knew the facts concerning the violation.

(b) Every person who directly or indirectly controls a person liable under this section, every principal executive officer or director of the liable person, every person occupying a similar status or performing similar functions, and every agent or employee of a liable person, who materially aids in the act or transaction constituting the violation, is also liable jointly and severally with and to the same extent as the person liable under this section, unless the agent, employee, officer, or director proves he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the fact by reason of which the liability is alleged to exist.

The Respondent argues that it could face financial ruin if forced to offer rescission. Besides the financial ruin argument being speculative and at odds with statutory financial stability licensing requirements,[11] the statute does not evaluate whether rescission should be offered but rather already allows it when a franchisor was not registered. There is nothing for the Department to evaluate.[12] Rather the issue is whether the Department should order the Respondent to notify its franchisees of their statutory

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[11] R.I. Gen. Laws § 19-28.1-9 states in part as follows:

General registration provisions. – (a) A registration application must include the disclosure document, the filing fee, and the consent to service of process. The director may require the filing of audited financial statements examined and reported upon by an independent certified public accountant and prepared in accordance with generally accepted accounting principles and of additional documents or disclosures.

(b) If the franchisor fails to demonstrate to the director the franchisor's financial ability to fulfill its initial obligations to franchisees, the director may require an escrow of funds paid by the franchisee or subfranchisor to the franchisor or its affiliate until the franchisor performs its initial obligations and the franchisee has commenced operations. The director may allow alternatives to escrow.

[12] For example, the Respondent argues that it is inequitable to order rescission in light of the franchisees' profits or lack of performance or lack of harm. Of course, equity is not a consideration in an administrative proceeding. However, the decision to allow rescission was already decided by the General Assembly. Rescission is allowed when a franchisor was not registered regardless of profits, performance, or harm (indeed, the harm that was most likely considered by the General Assembly was that if rescission is not provided for then unregistered franchisors benefit from ignoring their statutory obligations by entering into contracts not allowed by law).

The Respondent also argues that rescission is unconstitutional. However, a determination of unconstitutionality of the statute that provides for rescission is a not an issue that is properly before an administrative agency. See *Easton's Point Ass'n v. CRMC*, 522 A.2d 199 (R.I. 1987). See also *Petruska v. Gannon University*, 462 F.3rd 294 (3rd Cir. 2006).

right to rescission. The Department would be remiss in enforcing its statutory obligations consistently and uniformly to all franchisors if it did not order such notice to be given. The Respondent's argument is without merit.

G. Sanctions

Previous settlements similar to this matter have provided for a $1,000 per unregistered transaction and notice of rescission rights. The Respondent has argued that these settlements are distinguishable from this matter in that they were voluntary and concerned unregistered franchisors with much lower numbers of unregistered transactions. In other words, the Respondent argues that since its transactions were of a greater number than those settlements, it should have a lesser penalty.

The Respondent also points to a real estate matter *In the Matter of John Gower*, DBR 01-L-0237 (February 7, 2002) in which a real estate licensee that failed to renew his license was penalized $13,750 for approximately 120-150 unlicensed sales. Respondent argues that no rescission was ordered in that matter. Of course, the real estate licensing statute (R.I. Gen. Laws § 5-20.5-1 *et seq.*) does not provide for rescission in the case of unlicensed transactions most likely because a real estate licensee is not the actual person making the sale as a real estate sale would be between the owner and buyer of the property. In this matter, the seller is the registrant who is making the sale. In addition, the real estate statute only provides for penalties up to $1,000 per violation as opposed to the Franchise Act which allows penalties of up to $5,000 per violation.

As the Respondent points out Gower did not blame anyone for his failure to renew. Indeed, the Gower hearing was solely on what was the appropriate sanction. This is not the situation in this matter. Instead, the Respondent sought to muddy the waters by

using the 2008 deficiency issues to argue that its entire period of non-registration should be excused and ignored despite its obvious failure to timely renew in 2007 and 2009 (assuming Respondent was registered in 2008 as LaPointe testified he believed). When the Department settles a matter, a licensee or registrant takes responsibility for its actions and accepts the consequences. In this matter, the Respondent has refused to accept any responsibility and argued that its financial position justifies non-payment of an administrative penalty.[13]

In determining the appropriate penalties, the undersigned considered Section 16 of *Central Management Regulation 2 – Rules of Procedure for Administrative Hearings.*[14] Said section provides that the hearing officer shall look to past precedence of the Department and consider mitigating and aggravating circumstances in determining the appropriate penalty. In this matter, the Respondent did not have any prior disciplinary actions and did notify the Department when asked of all the unregistered transactions. However, the Respondent tries to avoid responsibility by trying to use any questions arising about its 2008 application to disclaim responsibility for not renewing in 2007 and 2009. In addition, the failure to hold a registrant accountable for failing to register would undermine

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[13] Such arguments are troubling in light of the hundreds of registrants a year that timely renew and maintain their financial soundness.

[14] Said section provides as follows:

> Section 16 *Penalties*
>
> (A) In determining the appropriate penalty to impose on a Party found to be in violation of a statute(s) or regulation(s), the Hearing Officer shall look to past precedence of the Department for guidance and may consider any mitigating or aggravating circumstances.
>
> (1) Mitigating circumstances may include, but shall not be limited to, the following: the Party's licensing history, i.e. the absence of prior disciplinary actions; the Party's acceptance of responsibility for any violations; the Party's cooperation with the Department; and the Party's willingness to give a full, trustworthy, honest explanation of the matter at issue.
>
> (2) Aggravating circumstances may include, but shall not be limited to, the following: the Party's prior disciplinary history; the Party's lack of cooperation and/or candor with the Department; the seriousness of the violation; whether the Party's act undermines the regulatory scheme at issue; whether there has been harm to the public; and whether the Party's act demonstrates dishonesty, untrustworthiness, or incompetency.

this regulatory scheme and would render registration requirements voluntary. Previous settlements have provided penalties of $1,000 per unregistered contract. The statute provides for up to $5,000 per violation. The recommended penalty (below) is well below $5,000 per violation and the total averages out to less than $1,000 per violation. Thus, the administrative penalty is consistent with previous settlements - made without hearing - and indeed the Respondent was on notice regarding these settlements and possible penalties.

Rescission is provided for in law. The Department has consistently ordered its registrants to notify their franchisees of their statutory rights. Not to order the Respondent to provide such notice not only is inconsistent with precedent but serves to undermine the regulatory scheme.[15]

Therefore, pursuant to R.I. Gen. Laws § 19-28.1-18, the following administrative penalties are imposed 1) for the 25 unregistered transactions between May 1, 2007 to July 28, 2008, a penalty of $12,500; 2) for the ten (10) unregistered transactions between July 29, 2008 and April 30, 2009, a penalty of $1,000; and 3) for the four (4) unregistered transactions between May 1, 2009 and October 22, 2009, a penalty of $2,000 for a total penalty of $15,500. In addition, the Respondent shall notify all 39 of the franchisees with which it entered into contracts with during its unregistered period of their right to rescission. The Respondent shall comply with the Department's requirements of notice and shall submit to the Department within thirty (30) days of this decision, a copy of the notice to be sent and then shall forward said notice to the 39 franchisees within ten (10) days of the approval of the notice by the Department and provide proof of such forwarding to the Department.

[15] Indeed, arguably the Department can notify franchisees of their statutory rights without the necessity of requiring the registrant to do so.

VI. FINDINGS OF FACT

1. On or about on July 30, 2010, an Order to Show Cause was issued by the Department to the Respondent.

2. A prehearing conference was held on August 17, 2010 and hearings held on October 21 and 26, and November 8, 2010. Briefs were timely filed by March 4, 2011.

3. The Respondent did not file a timely renewal of its 2007 expiration of registration. Its late renewal was never received by the Department.

4. The Respondent filed a late 2008 renewal on July 28, 2008. The Department was unable to read the disk and provided notice by a voice mail message in October, 2008.

5. The Respondent filed a new application on October 22, 2009 (after the expiration date of April 30, 2009).

6. The Respondent was unregistered with the Department from April 30, 2007 until October 22, 2009 during which time the Respondent entered into 39 franchise contracts.

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 over this matter pursuant to R.I. Gen. Laws § 19-28.1-1 *et seq.* and R.I. Gen. Laws §§ 42-35-1 *et seq.*

2. The Respondent violated R.I. Gen. Laws § 19-28.1-5 by entering into said 39 contracts while unregistered.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the penalties outlined above be imposed on Respondent.

Dated: June 1, 2011

Catherine R. Warren
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 June 2011

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 9th day of June, 2011 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid to Harris K. Weiner, Esquire, 321 South Main Street, Providence, RI 02903 and by hand delivery to Ellen Balasco, Esquire and Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI.