

**STATE OF RHODE ISLAND
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND**

Pitino Fine Foods, Inc. d/b/a	:	
El Destacamento,	:	
Appellant,	:	
	:	DBR No. 24LQ003
v.	:	
	:	
City of Providence, Board of Licenses,	:	
Appellee.	:	

DECISION

I. INTRODUCTION

On March 15, 2024, the City of Providence, Board of Licenses (“Board”) issued a decision against Pitino Fine Foods, Inc. d/b/a El Destacamento (“Appellant”) essentially revoking its Class BVX (extended hours) license and permanently reducing its hours of operation for its liquor licenses. On March 18, 2024, pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board’s decision to the Director of the Department of Business Regulation (“Department”). The undersigned is designated by the Director of the Department to hear the appeal. The appeal hearing was held on April 17, 2024. The parties were represented by counsel who rested on the record.¹

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-1 *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.*

¹ The undersigned received the transcript of hearing on May 1, 2024.

III. ISSUES

Whether the Appellant engaged in the violations as found by the Board, and if so, what are the appropriate penalties.

IV. MATERIAL FACTS

Based on the Board's certified record, the Appellant's violations and sanctions were as follows: At the Board hearing, the City and the Appellant stipulated that the violations set forth in the Board's show cause petition had been established without the requirement of a formal hearing before the Board:

1. January 13, 2024
 - a. Breach of the conditions on which the license was issued - R.I. Gen. Laws § 3-5- 21;
 - b. Permitting the laws of the state to be violated in the neighborhood- R.I. Gen. Laws § 3-5-23;
 - c. Entertainment without a license - Providence C.O. 14-193;
 - d. Bottle sales of alcohol - R.I. Gen. Laws § 3-8-14.

2. February 11, 2024
 - a. Breach of the conditions on which the license was issued - R.I. Gen. Laws § 3-5- 21;
 - b. Permitting the laws of the state to be violated in the neighborhood - R.I. Gen. Laws § 3-5-23;
 - c. Entertainment without a license - Providence C.O. 14-193;
 - d. Excessive noise - Providence C.O. 16-93.

3. March 1, 2024
 - a. Breach of the conditions on which the license was issued - R.I. Gen. Laws § 3-5- 21;
 - b. Permitting the laws of the state to be violated in the neighborhood- R.I. Gen. Laws § 3-5-23;
 - c. Entertainment without a license - Providence C.O. 14-193;
 - d. Excessive noise - Providence C.O. 16-93.

The Board found the following violations: 1) R.I. Gen. Laws § 3-5-21 (3 counts); 2) R.I. Gen. Laws § 3-5-23 (3 counts); and 3) 3-8-14, Providence Code of Ordinances 14-193 (3 counts) and 16-93 (3 counts). Additionally, the Board noted that the Appellant's violation history contained two (2) prior instances of entertainment without a license and bottle service which occurred on April 7, 2023 and October 20, 2023. For those two (2) violations, the Appellant received a warning and a \$1,000.00 fine for the initial violation in April and a \$1,000.00 fine and a five (5) five day reduction of hours for the second violation in October. It was not disputed by the parties that the zoning applicable to the Appellant's premises provides that entertainment is not permitted within that zone.

In 2022, the Board adopted rules and regulations in relation to operations and procedures for licensing. At hearing, the Board found that under said rules and regulations, for a third violation of entertainment without proper zoning, the rules imposed a permanent reduction to hours of operation to 11:00 pm weekdays and 12:00 pm on weekends. For a third violation of bottle service, the Board found the rules imposed a reduction of hours for a period not to exceed ninety (90) days. The Board found that the Appellant's violations represented its fifth violation for entertainment without a license and the third bottle service violation in less than one (1) year. Therefore, the Board permanently reduced the Appellant's hours of operation to 11:00 p.m. on weekdays and 12:00 a.m. on weekends.²

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*

² It is understood that this appeal only addresses the reduction of hours of operation for the liquor license and not the victual license or any other license.

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).

B. The Appeal before the Department

The Department has broad and comprehensive control over the traffic in alcohol. Indeed, the Department’s power of review is so broad that it has been referred to as a “state superlicensing board.” *Baginski v. Alcoholic Beverage Comm’n.*, 4 A.2d 265, 267 (R.I. 1939). Thus, the Director has the authority under R.I. Gen. Laws 3-7-21, “to make any decision or order he or she considers proper.”³ The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); 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). The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board’s decision. Thus, this appeal is not bound by the Board’s reasons for its decision but whether the Board presented its case before the undersigned. The

³ R.I. Gen. Laws § 3-7-21 provides in part as follows:

Appeals from the local boards to director. (a) Upon the application of any petitioner for a license, or of any person authorized to protest against the granting of a license, including those persons granted standing pursuant to § 3-5-19, or upon the application of any licensee whose license has been revoked or suspended by any local board or authority, the director has the right to review the decision of any local board, and after hearing, to confirm or reverse the decision of the local board in whole or in part, and to make any decision or order he or she considers proper, but the application shall be made within ten (10) days after the making of the decision or order sought to be reviewed.

undersigned will make her findings on the basis of the evidence and will determine whether that evidence justifies said decision.

As the Department has statewide authority and indeed the statutory intent is to ensure statewide consistency, 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). Thus, the unevenness in the application of a sanction does not make it unwarranted in law. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). However, a sanction must be proportional to the violation and if there is an excessive variance in a sanction than it will be found to be arbitrary and capricious. *Jake and Ella's* 2002 WL 977812 (R.I. Super.). In reviewing local authorities' decisions, the Department ensures that local authorities' sanctions are not arbitrary and capricious and that statewide such sanctions are consistent and appropriate (otherwise sanctions would be arbitrary).

In order to impose discipline, cause must be found. R.I. Gen. Laws § 3-7-6 provides that applications for retail liquor licenses may be denied for cause. *Chernov Enterprises, Inc. v. Sarkas*, 109 R.I. 283 (1971) found that cause shall mean, “we have said that a *cause*, to justify action, must

be *legally sufficient*, that is to say, it must be bottomed upon substantial grounds and be established by legally competent evidence.” *Id.* at 287 (italics in original).

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). Thus, in order to sanction a liquor license, there must be substantial grounds established by the preponderance of legally competent evidence.

C. Relevant Statutes

R.I. Gen. Laws § 3-5-21 provides 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:

(1) Breach by the holder of the license of the conditions on which it was issued;

or

(2) Violation by the holder of the license of any rule or regulation applicable;

(4) Breach of any provisions of this chapter.

(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.

R.I. Gen. Laws § 3-5-23 provides in part as follows:

(b) If any licensed person permits the house or place where he or she is licensed to sell beverages under the provisions of this title to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood . . . he or she may be

summoned before the board, body, or official which issued his or her license and before the department, when he or she and the witnesses for and against him or her may be heard. If it appears to the satisfaction of the board, body, or official hearing the charges that the licensee has violated any of the provisions of this title or has permitted any of the things listed in this section, then the board, body, or official may suspend or revoke the license or enter another order.

D. Arguments

The Appellant argued the Board's sanctions do nothing for the safety of the community. In the alternative, it argued that a pullback of hours for 90 to 120 days would be sufficient after which, the Appellant could be put on a short leash with 30 day probation periods so that if there are any further violations, the License can be revoked. It argued that a permanent reduction of hours results in it not being able to re-establish the hours in the future as there would be no appeal rights to the Department or the ability to put in a new application. It argued that the permanent reduction of hours is an end run around revocation.

The City and Board agreed the extended hours license was not formally revoked but that the reduction of hours is a technical revocation. They represented that with only a revocation of the extended hours license, the Appellant still could open to 1:00 a.m. every night.

The Board and City argued that the Department supports progressive discipline, and this is what the Board did based on its rules. They argued the Appellant has had prior entertainment without a license violations, and entertainment is not permitted by zoning, so the Appellant would know those were violations. They argued that the Appellant's violations were well within its control. They argued the sanctions were not a revocation, but a permanent reduction of hours. They represented they understood the Appellant's argument about how with a permanent reduction of hours, there would not be a chance for an appeal of any denial of opening later in the future. However, they argued that this progressive discipline was merited with the Appellant's violations all within a short time.

E. Whether There Were Violations of R.I. Gen. Laws § 3-5-21

The evidence was undisputed that on January 13, February 11, and March 1, 2024, the Appellant had entertainment without a license so that the Appellant violated R.I. Gen. Laws § 3-5-21 on three (3) different occasions by violating the applicable rule and regulation of licensing and violated R.I. Gen. Laws § 3-5-23 on three (3) different occasions by allowing the laws of the state to be violated. On January 13, 2024, the Appellant also violated R.I. Gen. Laws § 3-5-21 and R.I. Gen. Laws § 3-5-23 by offering bottle service in violation of R.I. Gen. Laws § 3-8-14.⁴

F. Prior Sanctions

The parties were unsure when the Appellant began operating. It submitted its application for its liquor license on August 8, 2021. Certified record. The Appellant indicated it believed it opened in 2021; however, the Board and City indicated they thought it was either late 2022 or early 2023.

The Appellant had two (2) prior instances of entertainment without a license and bottle service which occurred on April 7, 2023 and October 20, 2023. The Appellant received a warning and a \$1,000.00 fine for the initial violation in April and a \$1,000.00 fine and a five (5) five day reduction of hours for the second violation in October.

G. What Sanctions are Justified

The Board based its progressive discipline on its 2022 rules that provide in part as follows:

16. Violations in the sole control of the Licensee. The Board of Licenses, absent a finding that the Licensee has shown good cause for the violation, shall abide by the following minimum penalties for the following violations which are in the sole control of the Licensee. Beginning with violations that occur on or after January 1, 2020, any violations and/or sanctions shall be recorded as part of the violation history of the licensee and shall be limited to a three (3) year look back period (from the date of the imposition of penalty) for purposes of any progressive discipline imposed by the Board.

- a. Entertainment without the Proper Zoning.
 - i. First Violation - Warning.

⁴ The Board also found excessive noise which presumably was part of entertainment without a license.

- ii. Second Violation - Reduction of hours of operation for a period not to exceed ninety (90) days.
- iii. Third Violation - Permanent reduction of hours of operation to 11:00 pm on weekdays and 12:00 pm on weekends.

- d. Bottle Service.
 - i. First Violation Warning.
 - ii. Second Violation - Reduction of hours of operation for a period not to exceed fifteen (15) days.
 - iii. Third Violation - Reduction of hours of operation for a period not to exceed ninety (90) days.
 - iv. Fourth Violation - Permanent reduction of hours of operation to 11:00 pm on weekdays and 12:00 pm on weekends.

The Department's statutory mandate and role as a superlicensing authority informs its decisions on ensuring that sanctions are not arbitrary and capricious. In *Pakse*, the Department and Superior Court upheld the progressive discipline imposed on said licensee for repeated underage violations. The Court found that the local authority was authorized to impose a reasonable sanction that would deter the licensee from repeatedly violating the law, and the Department found that the local authority's imposition of a two (2) day suspension for the first offence with progressively harsher sanctions for the second and third offense, and revocation for the fourth was not arbitrary and capricious because it was based on the premise that the licensee's continued (repeated) violations posed a danger to the community. Thus, the Court upheld the Department's conclusion that revocation represented a reasonable punishment after the logical progression of suspension sanctions related to repeated violations posing a public danger.

In contrast to *Pakse*, the Superior Court overturned the Department in *Jake and Ella's* finding that a license revocation was arbitrary and extreme. In that matter, the licensee had two (2) after-hour violations with the first violation receiving a monetary sanction and the second violation receiving a revocation. The Court found that the Department ignored the concept of proportionality that was expected to be applied so that there was an abuse of discretion. The Court

found that sanctions need to be reasonably related to the severity of the conduct and in considering the type of sanction to be imposed, factors such as real/potential danger to the public, the nature of any previous violations sanction, the type of violations, and other relevant facts should be considered. In that matter, the local authority jumped from a monetary fine to a revocation for identical violations without a finding that the violations were egregious and extreme.

The Department has consistently reviewed local decisions in light of the concept of progressive discipline as well as proportionality in terms of types of violations unless the violation is so egregious as to warrant immediate revocation. Thus, the Department ensures that the sanctions that are imposed are proportional to the violations and that progressive discipline is followed as appropriate. Nonetheless, as noted in *Pakse*, the mere unevenness in the application of a sanction does not render its application unwarranted in law but an excessive variance would be evidence of an action that was arbitrary and capricious.⁵ In other words, the sanctions must be proportional to the violations, but they are not (or cannot) always be identical.

In terms of progressive discipline, as discussed above, the imposition of sanctions is not based on a mechanical grid and must be proportional (e.g. appropriate progressive discipline). Thus, if a licensee received a ten (10) day suspension for disorderly conduct and then violated conditions of licensing by one (1) after-hour violation, it does not follow that the sanction must be higher than the ten (10) day suspension for the prior disorderly violation, but rather the sanction would be more than if it would be for a first violation.

The Board's adoption of sanctions based on number and type of violations with a three year look back provision (based on R.I. Gen. Laws § 5-3-21 look back provision) is a considered

⁵ Citing to *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1973).; *Wise v. U.S.*, 404 F. Supp. 11 (D. MD 1975).

approach to ensuring that progressive discipline is imposed for various violations as discussed in *Pakse* and *Jake and Ella's*.⁶ The undersigned is mindful of previous Department decisions that modified sanctions imposed by the Board for failing to engage in progressive discipline so that in one case a liquor licensee whose only prior discipline was a warning had its extended hours license revoked and its hours reduced for at least six (6) months after three (3) instances of entertainment without license in one (1) week. Thus, in *WGIC d/b/a Beve v. City of Providence, Board of Licenses*, DBR No. 19LQ008 (5/28/19), the Department modified the sanctions to account for progressive discipline by imposing administrative penalties and a two (2) day suspension of the liquor license. Similarly, in *Secreto, LLC v. City of Providence, Board of Licenses*, DBR No.: 15LQ010 (8/11/24), the Department modified the revocation of license in order to apply progressive discipline in relation to several violations on a night in March and then two (2) different nights in May. There had been an overcapacity violation which merited a longer suspension than the entertainment without a license and hours of operation violations. That decision imposed a five (5) day suspension of the liquor license for three (3) instances of entertainment without a license.

Here, the Board has permanently reduced the Appellant's hours. The parties all agreed the permanent reduction of hours really acts as a revocation of the Appellant's extended hours license. The Department will treat this appeal as an appeal of the revocation of the extended hours license as well as of the permanent reduction of hours.

In its rules, the Board separated out the types of violations so that the bottle service and entertainment without a license are not grouped together as violations of R.I. Gen. Laws § 3-5-21

⁶ The undersigned notes that the Board might also have included the possibility of administrative penalties in its listing of possible sanctions.

and/or R.I. Gen. Laws § 3-5-23 but are categorized by specific violations with specific possible sanctions depending on the number of violations. By its rules, the Board is putting its licensees on notice of how it perceives violations and the appropriate sanctions for what it calls violations within a licensee's control. In other words, the licensee chooses to have entertainment without a license, chooses to have bottle service, or chooses to open later than allowed.

The Board's rules appear to be more stringent than *Beve* or *Secreto*'s sanctions; though, those cases imposed a suspension of those appellants' liquor licenses as opposed to a reduction in hours. However, the reduction of hours eventually acts as a revocation of a late night license. A sanction must be proportional to the violation. It may be that the Board's sanctions under the rules are not always automatic, but in some situations could act as what could be the highest sanction that would be imposed for a certain type of violation depending on the circumstances (e.g. a second violation almost three (3) years later rather than a month later).⁷

Like the Board, the undersigned considers the bottle service violation as the third violation of bottle service. There was one in April, 2023, one in October, 2023, and now the third one on January 13, 2024. Under the Board's rules, the third bottle service would merit a reduction of hours not to exceed 90 days. However, this is the Appellant's fifth entertainment without a license violation which under the rules, merits a permanent reduction of hours after the third violation.

These violations all occurred within one (1) year. There were three (3) instances of entertainment without a license in three (3) months in an area for which no entertainment is allowed. The Appellant is aware that no entertainment is allowed in the area, and that it does not

⁷ Administrative penalties can also be added into the mix for penalties depending on the circumstances of the violations.

have an entertainment license. These types of violations that occur so close together justify a higher sanction than perhaps three (3) similar violations spread out over three (3) years.

Due to the closeness in time of the violations and the fact that the Board's rules for sanctions acted as a *de facto* revocation of the Appellant's extended license, the undersigned recommends modification of the sanctions as follows:

1. Due to the repeated statutory violations in a short time, the Appellant's extended hours license is revoked.

2. The Appellant's hours are reduced to 11:00 p.m. on weekdays and 12:00 a.m. on weekends for 60 days dated from March 15, 2024 based on the number of violations within one (1) year.

3. Pursuant to R.I. Gen. Laws § 3-5-21(b), an administrative penalty of \$4,000 is imposed on the Appellant for these four (4) offenses (three (3) entertainment without license; one (1) bottle service). These are considered second offenses as there was a first offense in 2023 under the three (3) year look back provision within the statute for which the Board imposed penalties.

VI. FINDINGS OF FACT

1. On March 15, 2024, the Board issued a decision revoking the Appellant's Class BVX (extended hours) license and permanently reducing its hours of operation for its liquor license.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board's decision to the Director of the Department.

3. A *de novo* hearing was held on April 17, 2024 before the undersigned sitting as a designee of the Director. The parties were represented by counsel who rested on the record.

4. 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 § 3-2-1 *et seq.*, 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 and R.I. Gen. Laws § 3-5-23. The pertinent violations for this matter related to entertainment without a license and bottle service.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Board's sanctions be modified as delineated above. The Appellant shall pay its administrative penalty by the 31st day after the execution of this decision.

Dated: May 21, 2024



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: May 21, 2024


Elizabeth Kelleher Dwyer, Esquire
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 21st day of May, 2024 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid and by electronic delivery to the following: Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, R.I. 02903; Louis A. DeSimone, Jr., Esquire, 1554 Cranston Street, Cranston, R.I. 02920; and Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

Megan Mihara
