

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

Vibe Lounge and Hookah Bar, Inc.,	:	
Appellant,	:	
	:	
	:	DBR No. 21LQ004
v.	:	
	:	
City of Pawtucket, Board of Licenses,	:	
Appellee.	:	

ORDER RE: MOTION FOR LITIGATION EXPENSES

I. INTRODUCTION

Pursuant to R.I. Gen. Laws § 3-7-21, Vibe Lounge and Hookah Bar, Inc. (“Appellant”) filed an appeal with the Department of Business Regulation (“Department”) of the City of Pawtucket, Board of Licenses’ (“City” or “Board”) decision taken on May 11, 2021 to revoke its Class BV liquor license (“License”). The Appellant requested a stay which was conditionally granted by order of the Department dated May 19, 2021 (“First Order”) with a second conditional stay order issued on June 22, 2021 (“Second Order”). A hearing was held on July 13, 2021 with the parties represented by counsel. A decision (“Decision”) was issued on September 21, 2021. This Decision is incorporated by reference herein. On September 22, 2021, the Appellant filed a motion for litigation expenses pursuant to R.I. Gen. Laws § 42-92-1 *et seq.*, the Equal Access to Justice Act (“EAJA”), to which the Board objected. A hearing on the motion was held on November 17, 2021.

II. JURISDICTION

The Department has jurisdiction pursuant to R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 42-92-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. ISSUE

Whether the Appellant's motion for reasonable litigation expenses in relation to the hearing and Decision should be granted or not.

IV. RELEVANT STATUTE

R.I. Gen. Laws § 42-92-3 provides as follows:

Award of reasonable litigation expenses. (a) Whenever the agency conducts an adjudicatory proceeding subject to this chapter, the adjudicative officer shall award to a prevailing party reasonable litigation expenses incurred by the party in connection with that proceeding. The adjudicative officer will not award fees or expenses if he or she finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself. The adjudicative officer may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust. The award shall be made at the conclusion of any adjudicatory proceeding, including, but not limited to, conclusions by a decision, an informal disposition, or termination of the proceeding by the agency. The decision of the adjudicatory officer under this chapter shall be made a part of the record and shall include written findings and conclusions. No other agency official may review the award.

(b) If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses shall be made by that court in accordance with the provisions of this chapter.

R.I. Gen. Laws § 42-92-2(7) provides that "[s]ubstantial justification" means that the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact."

V. DISCUSSION

Before turning to the EAJA statute, it is helpful to review the relevant legal considerations at play in the Decision. In this matter, the Appellant appealed to the Department a decision by the Board to revoke its Class BV liquor license. As discussed in the Decision, the appeal of a decision local liquor licensing authority to the Department is part of the statutory liquor licensing scheme.

In keeping with the Department's statewide oversight and mandate to "establish a uniformity of administration of the law for purpose of promoting temperance throughout the state," the Department has broad statutory authority to review liquor appeals. *Baginski v. Alcoholic*

Beverage Commission, 4 A.2d 265, 268 (R.I. 1939). See also *Tedford et al. v. Reynolds*, 141 A.2d 264 (R.I. 1958). *Baginski* held that since the Department¹ is a “superlicensing board,” it has the discretion to hear cases “*de novo* either in whole or in part.” *Baginski*, at 268. Since the Department is charged with ensuring statewide uniformity, it follows that the statutory scheme grants the Department the authority to revise or alter decisions of local boards. *Id.* See also *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (Department’s jurisdiction is *de novo* and the Department independently exercises the licensing function).

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.). See also *Stage Bands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.). 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

¹ At that time the alcoholic beverage commission.

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).

Nonetheless, the revocation of a liquor license is a relatively rare event and is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety. See *Stage Bands* (disturbances and a shooting on one night justified revocation) and *Pakse Market Corp.* (upholding revocation of license when had four (4) incidents of underage sales within three (3) years). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside justified revocation).

In order to impose discipline such as a revocation or suspension, 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).

The Court revisited the issue in *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d 269 (R.I. 1984). In discussing the cause standard of R.I. Gen. Laws § 3-7-6, the Court found,

In determining whether the statutory standard now under consideration is so vague as to offend due process, we are mindful of the principle that vague legislative standards may be saved if the needed specificity has been supplied by judicial interpretation. (citation omitted). The requisite judicial gloss was supplied in [*Chernov*] wherein the court emphasized that in authorizing revocation for cause, the Legislature never intended either to confer upon a licensing authority a limitless control or to countenance the of an unbridled discretion. The cause, the court noted, that would justify revocation had to be "legally sufficient"; that is, it must be bottomed upon substantial grounds and established by legally competent evidence. *Id.* at 274.

At hearing in relation to the Decision, the City alleged various violations of the liquor licensing statute by the Appellant on various nights. The City alleged that the Appellant's License could be revoked for a series of infractions including the shooting incident.

A. Arguments

The Appellant argued that after the Board saw the relevant security videos, it did not have substantial justification pursuant to R.I. Gen. Laws § 42-9-2(7) to revoke the Appellant's License.

The Board argued that it prevailed on many of the counts against the Appellant so that while the Board's revocation of the License was overturned by the Department, it prevailed on sanctions against the Appellant.

B. Travel of the Case

On April 23, 2021, there was a shooting outside of the Appellant. That fact was never disputed. The Board revoked the Appellant's License. The Appellant appealed the Board's decision to the Department and requested a stay. At the time of the revocation of the License by the Board, security videos taken outside of the establishment were not available for viewing.

In the First Order, the Department indicated that the other incidences of April 5, 11, and 18, 2021 that the Board also based its revocation on did not appear to rise to the level of revocation. The First Order indicated that if those other violations were proved, they could rise to the level of administrative penalties/and or a term of suspension. The First Order further indicated that the video had not been able to be reviewed and that the issue at hearing would be whether the Appellant could be directly or indirectly responsible for the shooting outside especially as it concerned what happened between the ejection (of the shooter) and the shooting (about two (2) hours after the ejection). See *Vibe Lounge and Hookah Bar, Inc. v. City of Pawtucket, Board of Licenses*, DBR No.: 21LQ004 (5/18/21) (First Order).

The Appellant filed a motion to modify the First Order and by then the parties had access to the security video. This security video was provided to the Department (subject to a protective order). As a consequence, the Department was able to view the security video prior to issuing its Second Order. The Second Order reviewed the security video and spoke of the 100 minute gap between when the shooter was ejected from the Appellant for verbal annoyance and the shooting outside. The Second Order discussed the various applicable cases in relation to revocation and disorderly conduct allegations. It concluded as follows:

It is discretionary to issue a stay in order to maintain the *status quo* pending an appeal. In this matter, it cannot be ascertained which party will prevail without a full hearing on what happened inside and then outside. However, in light of the stipulated facts (e.g. 100 minute gap) and the security videos and *The Vault* and *Van Gogh*, it appears that the Board will have a difficult burden to show the shooting was directly or indirectly linked to something that happened inside the club. *Vibe Lounge and Hookah Bar, Inc. v. City of Pawtucket, Board of Licenses*, DBR No.: 21LQ004 (6/22/21) (Second Order), at 9.

A *de novo* hearing was held on the appeal before the Department at which the parties agreed to the admission of various exhibits and the Board presented witnesses (police officers) and the Appellant presented a witness (its owner). The Board still sought to revoke the License. The Decision delineated the various allegations against the Appellant and found that the Appellant violated certain statutory and regulatory requirements on different nights. The Department found that the Appellant did not engage in any violations in relation to the shooting on April 23, 2021, but on that night, the Appellant violated R.I. Gen. Laws § 3-5-21 since a security staff member did not allow entry to a police officer who had been called in response to the shooting.

In addition, on April 5, 2021, the Appellant violated R.I. Gen. Laws § 3-5-23 (disorderly conduct). On April 11, 2021, the Appellant violated R.I. Gen. Laws § 3-5-21 (condition of license) and § 1.4.18 of the Liquor Regulation (after hours). On April 18, 2021, the Appellant violated R.I. Gen. Laws §3-5-23, R.I. Gen. Laws § 3-5-21, and § 1.4.18 of the Liquor Regulation. The Appellant

did not engage in disorderly conduct on April 11, 2021. The Appellant did not argue that the Board was not substantially justified in bringing the disorderly conduct charges for April 11, 2021.

C. Applicability of the Statute

R.I. Gen. Laws § 42-92-3 provides for the award of “reasonable litigation expenses” in “adjudicatory proceedings” by state and municipal agencies to the prevailing party unless the agency was “substantially justified” in its actions leading to the proceedings.² The statutory definition is that the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact. *Supra*. In *Taft v. Pare*, 536 A.2d 888 (R.I. 1988), the Court relied on the Federal interpretation of the Federal Equal Access to Justice Act in finding that substantial justification means that the agency “must show not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct.” *Id.* at 893 (internal citation omitted).

In *Giannini v. Council of Elementary and Secondary Education*, 2017 R.I. Super. LEXIS 14, the Court did not award attorney’s fees to the prevailing party as it found that the matter involved complex and nuanced issues, and the losing agency’s position had a reasonable basis in law and fact. The Court in *Stanley v. R.I. Exec. Office of HHS*, 2016 R.I. Super. LEXIS 70 found that the Executive Office of HHS was reasonably justified in its statutory interpretation of “family

² R.I. Gen. Laws § 42-92-2(5) provides as follows:

“Party” means any individual whose net worth is less than five hundred thousand dollars (\$500,000) at the time the adversary adjudication was initiated; and, any individual, partnership, corporation, association, or private organization doing business and located in the state, which is independently owned and operated, not dominant in its field, and which employs one hundred (100) or fewer persons at the time the adversary adjudication was initiated.

The parties did not dispute that the Appellant would fall under the definition of party. The underlying Superior Court case to *Rollingwood Acres, Inc. v. Rhode Island Department of Environmental Management*, 212 A.3d 1198 (R.I. 2019) which can be found at 2014 W.L. 7232072 (R.I. Super.) discussed the meaning of “party.” The parties did not dispute that the Appellant had been subject to an agency action. *Preston v. Town of Hopkinton*, 2020 WL 356692 (R.I. Super.).

of size involved” as its position was taken prior to the issuance of a federal case regarding that statute at issue so that the Court declined to award attorney’s fees to the prevailing party. In *Lincoln School District v. Rhode Island Council on Second Education*, 2018 WL 6928660 (R.I. Super.), the Court found against plaintiffs for fees as the agency was substantially justified in its position which was based on an issue of statutory interpretation. See also *Gardner v. Town of Charlestown Zoning Board of Review et al.*, 2020 WL 7685901 (R.I. Super.).

In *Rollingwood Acres, Inc. v. Rhode Island Department of Environmental Management*, 212 A.3d 1198 (R.I. 2019), the Supreme Court overturned a Superior Court decision that upheld an administrative decision declining to award attorney fees to a prevailing party against the Department of Environmental Management (“DEM”). The Court reviewed the administrative agency decision which found that DEM knew or should have known that the ultimate responsibility for the violation was another entity to whom DEM did not issue a notice of violation and that there was a lack of evidence to pursue the alleged violation against the prevailing party. The Court found that DEM only issued the notice of violation to the prevailing party as it was a property owner, and DEM had no knowledge whether it was actually responsible for the violation. See also *Tarbox v. Zoning Board of Review*, 2017 WL 3706499 (R.I. Super.).

When awarding attorney’s fees, the Court has split the award between when a losing agency was substantially justified in its position and when it no longer was substantially justified in its position. Thus, attorneys’ fees were awarded for the successful appeal of an agency decision to Superior Court where the agency director was not substantially justified in overturning a hearing officer’s decision (the agency was substantially justified in bringing the agency action so fees were not awarded for the agency action). *Blais v. Department of Health*, 2016 R.I. Super. LEXIS 82.

C. Whether Fees Should be Awarded

In this matter, there is no dispute that the Board was substantially justified in its position regarding the violations found on the other days (and even the violation not found on April 11, 2021). When the Board revoked the License, it did not have the benefit of the video and revoked the License on the basis of the shooting and the other alleged violations. Joint Exhibit Four (4) from hearing. The Board was substantially justified in pursuing its allegation on April 23, 2021 that the Appellant violated a condition of licensing by impeding police officers in the execution of their duties.

However, by the time of the Department appeal hearing, the Board had the benefit of the video and the stay orders. The First Order indicated that the minor violations would not be a basis for a revocation. The Second Order indicated that the Board would have a “difficult burden” to prove the Appellant was responsible for the shooting.

The issue is whether the Board was substantially justified in pursuing the allegations in terms of the shooting. The hearing before the Department is *de novo*. At the *de novo* hearing, the Board had the benefit of the two (2) stay orders and the video and Court cases regarding a liquor licensee’s responsibility for disorderly conduct as well as numerous Department cases on this very issue. The Appellant argued that the Board knew that it could not revoke its License because of the shooting. However, in order to request a revocation of the License, the Board needed to be able to demonstrate that the Appellant violated the disorderly statute on April 23, 2021.

Thus, the issue is not a question of the sanction requested, but whether the Board was substantially justified in its position that the Appellant was in violation of the disorderly conduct statute due to the shooting on April 23, 2021. The Board must show not merely that its position was marginally reasonable but rather that its position was clearly reasonable, well founded in law and fact, solid though not necessarily correct. In reviewing an EAJA claim, the review looks at the

merits of the underlying action to see if the agency's position is justified. Such an analysis often requires a review of the record of the underlying merits to evaluate whether an agency's position initially was and remained justified. *Rollingwood* at 1205.

The First Order indicated that the security video had not been reviewed and there was an issue in terms of responsibility for the shooting due to the 100 minute gap. However, once the security video was reviewed and the Second Order issued, it was clear that the Board's position in relation to the shooting was clearly not reasonable nor was it well founded in law. The Second Order concluded that it appeared the Board would have a difficult burden to show the shooting was directly or indirectly linked to something that happened inside the club. The Second Order reviewed relevant case law to this kind of issue. The Second Order discussed the evidence (facts) in relation to the shooting in terms of what happened inside and the time gap between the ejection of the patron (shooter) and the shooting. The issue of a liquor licensee being directly or indirectly responsible for this kind of action was not a new issue in relation to liquor licensing. It was not an issue of statutory interpretation that had not previously been addressed. Thus, after the Second Order, the Board's position did not remain justified in either law or fact. *Taft*.³

Thus, under EAJA, the Appellant as the prevailing party in terms of the shooting in relation to the disorderly conduct allegation on April 23, 2021 is entitled to reasonable litigation fees from the issuance of the Second Order onwards.⁴ As the Appellant's expenses after the Second Order

³ While arguably, once the Board reviewed the video, it should have realized that its position in terms of disorderly conduct and the shooting would not be substantially justified, the Second Order clearly indicated the weakness of the Board's legal position in relation to the shooting disorderly conduct allegation.

⁴ As noted previously, the Appellant's motion only related to the revocation of the License in relation to the shooting. It should be noted that the Board argued that the License could be revoked for a series of minor violations. As noted in the First Order, it did not appear that the other alleged violations even if proved would be a basis for revocation. However, the issue for the allegations are not about the sanctions requested but whether the Board was substantially justified in taking the position that the Appellant was in violation of certain statutes and regulation on those other days. The Appellant did not argue otherwise. And except for the April 11, 2021 incident, the Appellant was found to have violated certain statutes and regulation on those other days as well as in relation to the actions of its security staff on

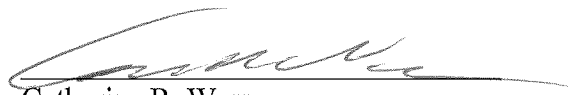
will also relate to preparation for hearing on the other substantially justified allegations, there is an issue of how to separate out the Appellant's litigation expenses that relate to the disorderly conduct allegations of April 23, 2021 from the other allegations that were substantially justified.

VI. CONCLUSION

Pursuant to R.I. Gen. Laws § 42-92-3, the adjudicatory officer is to award the reasonable litigation expenses. No other agency official may review the award. *Rollingwood*.

Prior to any further hearing on what litigation expenses should be awarded in terms of the Board's position on the shooting after the Second Order, the parties are encouraged to see if they can resolve this issue. The undersigned will provide a 30 day window to start the resolution process and request that the parties provide a written status report within 30 days of the date of this order as to what would be reasonable litigation expenses in terms of the disorderly conduct (shooting) allegations of April 23, 2021 taken by the Board against the Appellant after the issuance of the Second Order.

Dated: 1/12/22


Catherine R. Warren
Hearing Officer

April 23, 2021. The Board was substantially justified in all of its other positions taken regarding alleged violations even if they did not rise to the level of revocation as a sanction for said violations.

NOTICE OF APPELLATE RIGHTS

THIS ORDER CONSTITUTES AN INTERLOCUTORY ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-15. 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 12th day of January, 2022 that a copy of the within Order was sent by electronic delivery to the following: Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, peter330350@gmail.com, and Frank Milos, Esquire, City Solicitor, 137 Roosevelt Avenue, Pawtucket, R.I. 02860, Fmilos@pawtucketri.com, and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

