

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION**

**RE: PIRRI, ANGELO
FILE NO. ENF LIC. 00-06**

AAD NO. 00-006/ENE

DECISION AND ORDER

This matter was reached for administrative hearing on August 21, 2001 before the Administrative Adjudication Division for Environmental Matters. Angelo Pirri ("Respondent") appealed the issuance of a Notice of Violation and Order ("NOV") of the Division of Enforcement ("Division"), Department of Environmental Management, citing him with possession of undersize lobsters and imposing a thirty (30) day suspension of his Multi-Purpose Commercial Fishing License and an administrative penalty totaling eight thousand dollars (\$8,000.00). More specifically, the NOV alleges that as a result of a check of Respondent's catch on May 23, 1999, Mr. Pirri was found in possession of sixteen (16) undersize lobsters in violation of R.I. Gen. Laws §20-7-7.1 and the Rhode Island Marine Fisheries Council Regulations ("Regulations") Part 15.11(a). The Respondent was represented by Andrew Bucci, Esq. and the Division of Enforcement was represented by Gary A. Powers, Esq. Mr. Pirri did not attend the hearing. His counsel indicated that he was notified of the time and date for hearing and that the hearing should proceed. Based upon those representations, and the fact that Respondent was adequately represented by counsel and was not required to be present for this administrative hearing, the matter proceeded as scheduled. Counsel for the Division made an oral motion

for default, which was denied by the hearing officer, and the matter proceeded on the merits.

The Division bore the burden of proving, by a preponderance of the evidence, the allegations set forth in the NOV. A prehearing conference was held in this matter on June 1, 2000 and a prehearing conference record was issued on June 6, 2000 wherein the parties agreed to the following:

Stipulations:

The Administrative Adjudication Division has subject matter jurisdiction over the action and personal jurisdiction over the Respondent.

Agreed Exhibits:

- | | |
|------------------------|---|
| Div. 1 Full | Copy of the Notice of Violation dated March 30, 2000 issued as a result of the Respondent's May 23, 1999 violation. (3 pages) |
| Div. 2 Full | Copy of the request dated April 3, 2000 on behalf of the respondent for a formal hearing before the AAD concerning the March 30, 2000 Notice of Violation. (1 page) |
| Div. 3 Full | Copy of R.I. Department of Environmental Management Case Report concerning the Respondent's May 23, 1999 violation. (2 pages) |
| Div. 4 Full | Copy of the request by the investigating officer Sgt. Lees for the suspension or revocation of Respondent's Multi-Purpose Commercial Fishing License arising out of the Respondent's May 23, 1999 violation. (1 page) |
| Div. 5 (a) Full | Original photograph taken on May 23, 1999 of Sergeant Lees measuring one of the Respondent's undersize lobsters |
| Div. 5 (b) Full | Original photograph taken on May 23, 1999 of the Respondent's undersize lobsters |

The hearing was conducted pursuant to the Administrative Procedures Act, R.I. Gen. Laws § 42-35-1 *et. seq.*, R.I. Gen. Laws § 42-17.7-1 *et. seq.*, and the Administrative Rules of Practice and Procedure of the Administrative Adjudication Division for Environmental Matters. At the commencement of the hearing Attorney Bucci asked that the Division's witnesses be sequestered. There was no objection and the request was granted.

Witness Testimony

The Division called Sergeant Dean Lees as its first witness. Sergeant Lees has been employed by the Division of Enforcement for twenty-three (23) years. He holds a bachelor's degree in Natural Resources and an Associate's degree in law enforcement. He currently serves as the marine supervisor for the Narragansett Bay and East Bay area. He is responsible for the enforcement of the fish and game laws of the State of Rhode Island.

On May 23, 1999 Sergeant Lees was on duty as a marine supervisor and conducting general patrol of the area including Bristol harbor. He noticed a thirty-five foot (35') lobster boat approaching the dock. The vessel was not displaying the colors that it is required to display to indicate the type of buoys the vessel can use. Sergeant Lees continued to watch the vessel as it docked and observed Mr. Pirri disembark from the boat transporting three fish totes off the dock. Sergeant Lees approached Mr. Pirri and inspected the catch. One tote contained crabs, one contained banded lobsters and the third contained unbanded lobsters. The lobsters were then examined by Sergeant Lees and

measured using a standard certified state gauge used routinely by commercial fishermen.

Sergeant Lees described in detail the manner in which the gauge is used to measure lobsters. The gauge was set at 3 ¼" which was the minimum size allowed on the date of the alleged violation. The gauge was hooked into the rear of the eye socket at one end of the lobster and into the rear of the carapace at the other. Sergeant Lees testified that this is the process commonly used to measure lobster length. As a result of these measurements, Sergeant Lees determined that eight unbanded lobsters and eight banded lobsters were undersize for a total of sixteen (16) lobsters under the 3 ¼" minimum size. Sergeant Lees testified that in his experience, fishermen refrain from banding lobsters that they know to be undersize because they are easier to return to the water quickly to avoid detection. There was no direct testimony that the lobsters in Mr. Pirri's possession were unbanded for a nefarious purpose.

Sergeant Lees testified that the Respondent was present while he examined and measured the lobsters. Respondent likewise measured the lobsters in Sergeant Lee's presence and asserted to Sergeant Lees that they met the minimum size requirements. According to Sergeant Lees' testimony, however, Mr. Pirri did not measure the lobsters correctly.

Thereafter, the lobsters were transported to the Colt State Park Office ("Colt Office") in Bristol, Rhode Island where they were again measured by Sergeant Lees and remeasured and photographed by Officer White. There was

no change in the determination that all sixteen (16) lobsters were less than the 3 ¼" minimum size. Finally, the live lobsters were returned to the water in keeping with the standard operating procedure of the Division for the preservation of the state's wildlife. Sergeant Lees thereafter prepared his case report (Div. 3 Full) and a request for suspension of the Respondent's Multi-Purpose Commercial Fishing License (Div. 4 Full) which were submitted to Deputy Chief Thomas Greene for processing.

Despite the vigor of Attorney Bucci's cross-examination, Sergeant Lees' testimony did not waver concerning the measurement of the lobsters and his certainty that they were undersize. Although he conceded that Respondent used the proper gauge to measure the lobsters, had experience as a commercial fisherman, and that Mr. Pirri repeatedly insisted that his own measurements were accurate, Sergeant Lees remained steadfast in his observation that Respondent did not use the proper method of measurement. Sergeant Lees testified that he was confident in this determination as the lobsters were measured at least twice, - once at the dock, again at the Colt State Park Office and some were measured a third time at the Colt Office by Officer White. I found Sergeant Lees to be a credible witness concerning the events of May 23, 1999 and did not find him to be evasive as suggested by Respondent's counsel.

The Division of Enforcement called Officer Daniel White as its next witness. Officer White has been employed by the Department for fourteen (14) years and currently serves as an Environmental Police Officer. On the date in

question, Officer White was on regular patrol of the eastern shore of Rhode Island including the Bristol and Newport areas. He was contacted by Sergeant Lees and asked to report to the Colt Office. As instructed, he proceeded to take photographs of the lobsters and of Sergeant Lees measuring two of the lobsters.

Officer White also gauged several of the lobsters. He could not recall the exact number that he measured, but each one that he did gauge was undersize by approximately 1/16". Officer White detailed the manner in which he measured the lobsters. He too testified that one placed the hook of the gauge in the eye socket of the lobster holding the gauge parallel to the body shell, placing the back hook into the shell at the rear of the carapace. He stressed the importance of placing the hooks in the proper location in order to obtain an accurate measurement. His testimony corroborated that of Sergeant Lees regarding the proper method of measurement and the size of the lobsters under scrutiny. Officer White prepared a written report stating the events (Div. 4 Full).

Under cross-examination Officer White conceded that it is sometimes difficult to obtain an accurate measurement of a lobster. He did indicate, however, that with proper care, some experience and the appropriate placement of the hooks, an exact reading may be obtained. Officer White also indicated that Mr. Pirri was not present at the Colt Office when the lobsters were re-measured and photographed. I found Officer White's testimony credible, deliberate and forthright.

The Division's final witness was Deputy Chief Thomas A. Greene. Deputy Chief Greene has been employed in the Division of Enforcement for thirty-four (34) years. His responsibilities as Deputy Chief include the handling of administrative licensing actions. Typically, when an officer makes an administrative case from alleged violations of statutes or regulations a request for administrative action is forwarded to Deputy Chief Green for his review and determination of the administrative action which the Division will ultimately take. Deputy Chief Greene testified that he reviewed the reports, marked as Div. 3 and 4 Full, and reviewed prior contacts that the Division had with Mr. Pirri. He described Respondent's prior contacts with the Division as follows:

May 29, 1988	Written warning- no name on lobster pots, no pot license
October 17, 1996	Failure to produce license
March 11, 1997	Failure to display pot colors
	Failure to produce license (warning issued)
June 1, 1998	Failure to produce license (dismissed with costs)

Because the quantity of lobsters was closer to nineteen¹, coupled with the Respondent's prior contacts, Deputy Chief Greene characterized the nature of the violation as egregious. He therefore determined that the maximum monetary penalty of five hundred dollars (\$500.00) per lobster should be assessed.

Deputy Chief Greene further concluded that suspension of Respondent's license was warranted and the duration of the suspension should be thirty (30)

¹ Deputy Chief Green referred to the quantity of lobsters identified in R. I. Gen. Laws §20-7-7.1 which sets a thirty day suspension for possession of between ten (10) and (19) lobsters.

days. Asked why a thirty (30) day suspension was imposed, Deputy Chief Greene explained that R.I. Gen. Laws §20-7-7.1 sets forth the length of suspension based on the number of undersize lobsters found in one's possession. Since Mr. Pirri possessed sixteen (16) undersize lobsters, the statute required a thirty (30) day suspension. The NOV was prepared by Deputy Chief Greene and reviewed and approved by Chief Hall.

The Division rested at the close of Deputy Chief Greene's testimony. Mr. Pirri did not attend the hearing and Respondent did not call any witnesses nor did he introduce any exhibits. The hearing officer advised counsel that briefs were not required and counsel opted to submit closing arguments in writing. The closing arguments of the parties were filed timely on September 4, 2001 and the hearing was deemed closed on that date.

Analysis

The division bore the burden of proving the allegations set forth in the NOV by a preponderance of the evidence. The minimum size and manner of measurement of lobsters is set by statute. R. I. Gen. Laws § 20-7-10 (a)(1) provides that lobster length is determined by measuring " from the rear of the eye socket along a line parallel to the center line of the body shell to the rear end of the carapace". Both Sergeant Lees and Officer White testified that they measured the lobsters in a manner consistent with the statute. Each has substantial experience in the measurement of lobsters. The evidence of record reveals that Mr. Pirri has been involved in the industry for a number of years

and that he measured the length of the lobsters with a standard certified state gauge. Respondent insisted to Sergeant Lees that the lobsters were of a legal size. The documentary and testimonial evidence is uncontradicted, however, that Mr. Pirri did not gauge the lobsters in the proper manner, resulting in an inaccurate measurement. This evidence is bolstered by Officer White's subsequent measurement of several of the lobsters at the Colt Office confirming that they were undersize by approximately 1/16". The unrefuted evidence of record establishes that the Respondent was in possession of sixteen (16) undersize lobsters on May 23, 1999.

Based on these violations and the requirements of R. I. Gen. Laws §20-7-7.1, the Division imposed a thirty (30) day suspension of Respondent's license and assessed an eight thousand dollar (\$8,000.00) administrative penalty. R. I. Gen. Laws §20-7-7.1 provides in pertinent part:

- 20-7-7.1 Administrative suspension/revocation of licenses - Penalties _ Appeal -** (a) If a person licensed under this chapter is found, pursuant to § 42-17.1-2, to have violated any of the following offenses, his or her license shall be suspended for the following periods:
- (1) Possession of ten (10) or more undersize lobsters but not more than nineteen (19) in violation of § 20-7-10, one month;
 - ...
 - ...
 - ...
 - (d) In addition to any other sanctions provided by law, any person found, pursuant to § 42-17.1-2, to have violated any of the provisions of this chapter shall pay an administrative penalty of not less than fifty dollars (\$50.00),

nor more than five hundred dollars (\$500.00), for each lobster taken or possessed in violation of the provisions of this chapter.

A reading of the above statute coupled with a finding that Respondent was in possession of sixteen (16) undersize lobsters demonstrates that the imposition of a thirty (30) day suspension was warranted and was not excessive.

I turn next to the proposed assessment of an administrative penalty. The Rules and Regulations for the Assessment of Administrative Penalties (“Penalty Regulations”) apply to all persons subject to enforcement action by the Department under the laws administered by the Director and the rules, regulations and licenses under the Director’s authority. Section 12(c) of the Penalty Regulations provides that once the alleged violation is proved by a preponderance of the evidence, the burden shifts to the violator to prove by a preponderance of the evidence that the penalty was not calculated in accordance with the Penalty Regulations. The Division of Enforcement imposed a penalty of five hundred dollars (\$500.00) for possession of each undersize lobster. The proposed penalty is the highest amount per lobster authorized by statute. Deputy Chief Green testified that this amount was assessed based on the number of undersize lobsters in Mr. Pirri’s possession and the prior contacts that Respondent had with the Department.

Counsel for the Respondent puts forth several arguments as to why the statutory maximum penalty is unwarranted. First, Counsel for Respondent makes a seemingly reasonable assertion that the penalty should be less than

the maximum since any violation was minor. Counsel bases this view on the evidence of record that the lobsters, if undersize, were only short by a very small increment (1/16"). In essence, counsel argues that any violation was de minimis. On close examination, however, that argument must fail since R. I. Gen. Laws §20-7-10 entitled "**Minimum size of lobsters taken -- Egg-bearing females.--**" and RIMFC Regulation 15.11 relating to minimum size for taking lobsters delineate measurements in increments as minute as 1/32". On the date of the alleged violation, the minimum size limit was 3 ¼ ". The Regulations increased the minimum size limit from 3 ¼" to 3 9/32" effective June 1, 2000. It is obvious from governing statutes and Regulations that a measurement of 1/16" is significant in the protection of the lobster resources of the state.

Next, counsel asserts that the evidence reveals that the violation was not willful. In support of this contention counsel cites Sergeant Lees' testimony that Respondent measured the lobsters in Sergeant Lees' presence using the standard certified state gauge and repeatedly insisted that they were of legal size. The implication therefore, is that the violation was the result of mistake or error, not the result of an intentional act on the part of Respondent. Accordingly, counsel argues that the maximum penalty is excessive. The evidence calls into question the degree of willfulness of the violations. Willfulness bears not upon a finding of liability, but is an enumerated factor in the Penalty Regulations that the Director may consider in assessing an administrative penalty. Sergeant Lees made much of the fact that Respondent segregated the lobsters into two groups - one banded and one not. Based on his past experiences, Sergeant

Lees insinuated that Respondent kept the unbanded lobsters separate, in order to dispose of them quickly if necessary, knowing them to be undersize. The evidence of record does not support such a conclusion, however, as an equal number of undersize lobsters were banded. The evidence presented preponderates against a finding of willfulness.

Finally, counsel asserts that Mr. Pirri's past contacts with the Department do not rise to a level to warrant assessment of the statutory maximum penalty. He points out that Respondent was cited three times for failure to have his license in his possession. Two of those incidents resulted in a warning and the third was dismissed. The "contacts" on which the Division relies span eleven years (1988-1999).

The possession of sixteen undersize lobsters is a serious offense. Nonetheless, the past contacts with the Division as outlined in Deputy Chief Greene's testimony coupled with a lack of willfulness are an insufficient basis on which to impose the maximum penalty allowed by law. The evidence of record does support a substantial penalty. Accordingly, the penalty is reduced to three hundred dollars (\$300.00) per lobster for a total of four thousand eight hundred dollars (\$4,800.00). Had Respondent appeared and testified, his testimony may have provided this hearing officer with additional material evidence to further challenge the penalty assessment.

Findings of Fact

After review of all the documentary and testimonial evidence of record I make the following findings of fact:

1. Angelo Pirri holds a Rhode Island Multi-Purpose Commercial Fishing License #MULA 0121.
2. On May 23, 1999 Angelo Pirri carried three fish totes off a thirty-five foot (35') lobster boat docked at Bristol Harbor.
3. Sergeant Dean Lees approached Mr. Pirri on the dock and proceeded to inspect the contents of the three fish totes.
4. One tote contained crabs, one contained banded lobsters and the third tote held unbanded lobsters.
5. Sergeant Lees examined the lobsters and measured each one using a standard certified state gauge used routinely in the commercial fishing industry.
6. The minimum allowable size for lobsters on May 23, 1999 was three and one quarter inches (3 ¼").
7. Sergeant Lees measured each lobster from the rear of the eye socket along a line parallel to the center line of the body shell to the rear end of the carapace.
8. After the measurements were completed, Sergeant Lees determined that sixteen (16) lobsters were under the minimum allowable size of 3 ¼".
9. Eight of the undersize lobsters were banded and eight were not.
10. Respondent also measured the lobsters in the presence of Sergeant Lees using a standard certified state gauge and repeatedly insisted that the lobsters were of minimum size.
11. Mr. Pirri measured the lobsters incorrectly.
12. Sergeant Lees transported the lobsters to the Colt State Park Office in Bristol, Rhode Island to be remeasured and photographed.

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13. At the Colt State Park Office, Sergeant Lees was assisted by Officer Daniel White.
14. Sergeant Lees remeasured the lobsters and again concluded that each of the sixteen (16) were undersize.
15. Officer White measured several of the lobsters using the standard certified state gauge and concluded that they were under the minimum size by approximately 1/16".
16. Officer White measured from the rear of the eye socket along a line parallel to the center line of the body shell to the rear end of the carapace.
17. Sergeant Lees thereafter prepared a case report and a request for suspension of Mr. Pirri's Multi-Purpose Commercial Fishing License and forwarded the report to Deputy Chief Thomas Greene.
18. In determining the appropriate monetary penalty, Deputy Chief Greene reviewed the case reports and prior contacts between Angelo Pirri and the Division of Enforcement.
19. Mr. Pirri had the following contacts with the Division of Enforcement prior to May 23, 1999:
- | | |
|------------------|--|
| May 29, 1988 | Written warning- no name on lobster pots, no pot license |
| October 17, 1996 | Failure to produce license |
| March 11, 1997 | Failure to display pot colors |
| | Failure to produce license (warning issued) |
| June 1, 1998 | Failure to produce license (dismissed with costs) |
20. Based on the quantity of undersize lobsters possessed by Respondent and his prior contacts with the Division, Deputy Chief Greene characterized the violation as egregious.
21. Deputy Chief Greene recommended a penalty of five hundred dollars (\$500.00) per lobster.
22. The recommended penalty is the maximum administrative penalty authorized by statute.
23. Deputy Chief Greene also recommended a license suspension of thirty (30) days because R. I. Gen. Laws §20-7-7.1 (a) (1) sets a thirty (30) day

suspension for possession of between ten (10) and nineteen (19) undersize lobsters.

24. The Notice of Violation was prepared by Deputy Chief Greene and approved by Chief Stephen Hall.
25. A Notice of Violation was issued to Angelo Pirri on March 30, 2000.
26. A request for hearing was filed with AAD on behalf of Angelo Pirri on April 3, 2000.

Conclusions of Law

After review of all the evidence, applicable statutes and regulations I conclude the following as a matter of law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Respondent.
2. The Division proved by a preponderance of the evidence that on May 23, 1999, respondent was in possession of sixteen (16) undersize lobsters in violation of RIMFC Regulations Part 15.11(a).
3. The Division proved by a preponderance of the evidence that Respondent violated R. I. Gen. Laws §20-7-7.1(a)(1) by possessing sixteen lobsters measuring less than 3¼" in length.
4. R.I. Gen. Laws §20-7-7.1(a)(1) mandates a thirty (30) day suspension in this matter.
5. The thirty (30) day license suspension is warranted and is not excessive.
6. R.I. Gen. Laws §20-7-7.1(d) authorizes an administrative penalty ranging from not less than fifty dollars (\$50.00), nor more than five hundred dollars (\$500.00), for each lobster taken or possessed in violation of any provision of Chapter 7.
7. The evidence introduced at hearing does not establish that Mr. Pirri's actions were willful.
8. The statutory maximum monetary penalty of five hundred dollars (\$500.00) per lobster is excessive and not warranted.

9. A monetary penalty of three hundred dollars (\$300.00) per lobster is reasonable and warranted.

Based on the foregoing Findings of Fact and Conclusions of Law it is hereby

ORDERED

1. The violations set forth in the Notice of Violation are **SUSTAINED**.
2. The proposed suspension of Respondent's Multi-Purpose Commercial Fishing License, MULA # 0121 is **SUSTAINED**.
3. Respondent's Multi-Purpose Commercial Fishing License, MULA # 0121 is suspended for a period of thirty **(30) days commencing at 12:01 a.m. on January 7, 2002 and ending at 11:59 p.m. on February 5, 2002.**
4. The proposed administrative penalty is **REDUCED**.
5. Pursuant to R. I. Gen. Laws §20-7-7.1(d) an administrative penalty is assessed against Respondent in the amount of three hundred dollars (\$300.00) per lobster for a **total of four thousand eight hundred dollars (\$4,800.00).**
6. Within thirty days from the date of this Decision and Order Respondent shall pay an administrative penalty of four thousand eight hundred dollars (\$4,800.00) in the form of a bank certified check made payable to "General Treasurer, State of Rhode Island", and shall be forwarded to

Office of Management Services
R. I. Department of Environmental Management
235 Promenade Street, Third Floor
Providence, Rhode Island 02908

Attention: Glenn Miller

Entered as a Recommended Decision and Order this 20th day of
November, 2001.

Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, Rhode Island 02908
(401) 222-1357

Entered as a Final Agency Order this 20th day of November, 2001.

Jan H. Reitsma
Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: Andrew A. Bucci, Esquire, 115 Cedar Street, Providence, RI 02903 and Gary Powers, Esquire, DEM Office of Legal Services, Division of Fish and Wildlife, Oliver Stedman Government Center, 4808 Tower Hill Road, Wakefield, RI 02879 and via interoffice mail to Gerald McAvoy, Esquire, Executive Legal Counsel, Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this _____ day of November, 2001.

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If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws §42-35-15.