

DISTRICT OF COLUMBIA
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ALCOHOLIC BEVERAGE CONTROL BOARD
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MEETING

IN THE MATTER OF:

McCormick & Schmick Restaurant
Corp. t/a McCormick & Schmick Show Cause
Seafood Restaurant Hearing
1652 K Street, NW
Retailer CR - ANC-2B
License No. 26432
Case #14-CC-00094

(Sale to Minor Violation)

April 8, 2015

The Alcoholic Beverage Control Board
met in the Alcoholic Beverage Control Hearing
Room, Reeves Building, 2000 14th Street, N.W.,
Suite 400S, Washington, D.C. 20009, Chairperson
Ruthanne Miller, presiding.

PRESENT:

RUTHANNE MILLER, Chairperson
DONALD BROOKS, Member
MIKE SILVERSTEIN, Member
HECTOR RODRIGUEZ, Member
JAMES SHORT, Member

ALSO PRESENT:

FERNANDO RIVERO, OAG

1 P-R-O-C-E-E-D-I-N-G-S

2 12:19 p.m.

3 CHAIRPERSON MILLER: All right. Let's
4 see, okay, the last case of the morning, thank
5 you all for being patient, that is Case No. 14-
6 CC-00094, McCormick & Schmick Seafood Restaurant
7 located at 1652 K Street, N.W., License No.
8 26432, in ANC-2B.

9 MR. O'BRIEN: Madam Chair, this is Mr.
10 Rivero's case. I see he is not in the room at
11 the moment.

12 CHAIRPERSON MILLER: Okay. Do you
13 want to --

14 MR. O'BRIEN: Want me to go look for
15 him?

16 CHAIRPERSON MILLER: Yes.

17 MR. O'BRIEN: Okay. Here he comes.

18 CHAIRPERSON MILLER: Oh, there he is.
19 Thank you. Okay.

20 MR. RIVERO: Fernando Rivero for the
21 District of Columbia.

22 CHAIRPERSON MILLER: Okay.

1 MR. O'BRIEN: Stephen O'Brien for the
2 licensee and I'm accompanied by Melody Casbarian,
3 C-A-S-B-A-R-I-A-N, who is the Regional Director
4 for the McCormick & Schmick Restaurant.

5 CHAIRPERSON MILLER: Okay.

6 MS. CASBARIAN: Hi.

7 CHAIRPERSON MILLER: Hi. All right.
8 So this is a Show Cause Hearing. Do you have any
9 preliminary matters?

10 MR. RIVERO: We do. The parties have
11 a stipulation. The licensee stipulates to a
12 violation of D.C. Code 25-781. And because we
13 have a factual stipulation, the parties will
14 present oral argument only today as to the
15 penalty.

16 CHAIRPERSON MILLER: Okay. I just
17 want to understand the stipulation. Okay. Is it
18 a stipulation that you violated this law or is it
19 a stipulation to specific facts that --

20 MR. RIVERO: It's a stipulation that
21 the licensee violated D.C. Code 25-781, which
22 prohibits sale of alcoholic beverages to persons

1 under the age of 21.

2 CHAIRPERSON MILLER: So, okay, but I
3 just -- you are stipulating that there was a sale
4 to a minor?

5 MR. RIVERO: Right.

6 CHAIRPERSON MILLER: You are not
7 stipulating to circumstances or anything like
8 that?

9 MR. RIVERO: No, they are not really
10 necessary.

11 CHAIRPERSON MILLER: Okay.

12 MR. RIVERO: Once the licensee admits
13 the violation, the facts are not really relevant
14 at that point.

15 CHAIRPERSON MILLER: Okay. You --

16 MR. RIVERO: The violation has been
17 admitted.

18 CHAIRPERSON MILLER: -- agree?
19 Obviously. Do you agree?

20 MR. O'BRIEN: Yes.

21 CHAIRPERSON MILLER: Okay.

22 MR. O'BRIEN: Yes. To clarify, we

1 stipulate that on June 16, 2014 --

2 CHAIRPERSON MILLER: Okay.

3 MR. O'BRIEN: -- the licensee sold
4 alcoholic beverages to minors.

5 CHAIRPERSON MILLER: Okay.

6 MR. O'BRIEN: Still preliminarily,
7 unlike the last case or like the last case, the
8 licensee is guilty. But unlike the last case,
9 the licensee has a lot to say with regards to the
10 appropriate penalty.

11 CHAIRPERSON MILLER: Okay.

12 MR. O'BRIEN: That's where we are.

13 CHAIRPERSON MILLER: Okay. Are there
14 any Board --

15 MR. O'BRIEN: So the Board may proceed
16 as if testimony represented that the sale was
17 made.

18 CHAIRPERSON MILLER: Yes. Any Board
19 Members have questions or concerns, at this
20 point? Okay. Good. Who is going to go first?

21 MR. RIVERO: The Government.

22 CHAIRPERSON MILLER: The Government.

1 MR. RIVERO: It's our burden.

2 CHAIRPERSON MILLER: Yes, okay.

3 MR. RIVERO: Because the licensee has
4 stipulated to the violation under the provisions
5 of Title 25 prohibiting the sale of alcoholic
6 beverages to minors, what remains is for the
7 parties to present oral argument as to the
8 penalty in this case.

9 Here, the parties positions are
10 starkly divergent.

11 The licensee may argue that this
12 violation should be treated under the penalty
13 provisions of Title 25 of the DCMR as a first
14 primary tier violation within two years.

15 The Government's position is that the
16 violation is a second primary tier violation
17 within two years. Not a first.

18 The Board is permitted to take notice
19 of its statutes and regulations and also of the
20 administrative file the Alcoholic Beverage
21 Regulation Administration keeps on the
22 establishment's License No. 26432.

1 Consistent with the law, the licensee
2 received a warning letter for a sale to minor
3 that took place on May 19, 2011, and thus that
4 sale was not treated as a violation.

5 Thereafter, the licensee committed a
6 sale to minor violation. Now, the actual sale,
7 according to the Agency records, took place on
8 May 18, 2012. A Waiver Consent Order signed by
9 the licensee admitting to the violation attaches
10 the date of August 20, 2012 as the date of
11 admission of the violation. That document was
12 signed on July 27, 2012.

13 Moreover, the licensee agreed to pay
14 a fine and, in fact, paid a fine of \$3,000 on
15 August 10th, prior to August 20, 2012, its
16 deadline, according to the Consent Order.

17 Given all of these varying dates, the
18 Government proceeds from the factual premise that
19 the adjudication of the violation took place on
20 August 20, 2012, is the operative date.

21 This is so because the licensee, by
22 signing the document on July 27, simply agreed to

1 an admission of a violation at a particular point
2 in time. That date being August 20, 2012.

3 Now, there being no prior violation on
4 the actual date of the sale May 18th, what existed
5 was at most the allegation of such a sale, then
6 the designation of the violation that took place
7 took place when it was adjudicated. That was the
8 -- the designation was the adjudication and that
9 adjudication was that in-house resolution, that
10 Waiver Consent Order.

11 Please note that had the licensee
12 attempted to delay the point of adjudication by
13 any period of time for any reason, such a delay
14 would have had no legal consequences, assuming no
15 Statute of Limitations. This is because the
16 penalty provisions of Title 25 of the D.C. Code
17 and Title 23 of the District of Columbia
18 Municipal Regulations attach legal consequences
19 to the frequency of the second and subsequent
20 violations, not to the first.

21 Finally, the adjudication of the first
22 violation serves an important function, notice to

1 the licensee. The licensee must be placed on
2 notice initially that it must commit no violation
3 for a period of two years after its initial
4 offense. That important notice function can
5 never take place on the date of the actual
6 events, which brings us to this case, the second
7 violation.

8 In the instant case, all that
9 currently exists is a date of sale to which the
10 parties have stipulated June 16, 2014. There is
11 as yet no adjudication. Today is April 8, 2015.
12 Thus, the licensee may argue if the Government
13 counts the date of adjudication and not the date
14 of sale as the legally consequent date, then the
15 sale that took place, in this case, June 16, 2014
16 when adjudicated on April 8, 2015 is more than
17 two years away from the last adjudication of
18 August 20, 2012.

19 Thus, the licensee would have this
20 Board treat the sale in this case as a first
21 offense and set a fine accordingly. An important
22 premise in the licensee's argument is the

1 provision in the law that treats a second
2 violation as a first if it is separated from the
3 first violation by more than two years.

4 Although it appears to have a ring of
5 logic to it, this argument is contrary to the
6 manner in which this Board has reasonably
7 interpreted its penalty provisions and also
8 contrary to the intent of enforcing an escalated
9 penalty scheme.

10 First, I cite the statute. D.C. Code
11 25-830 states that penalty provisions are
12 separated into two tiers and that primary tier
13 violations also include sales to minors, the
14 offense in this case.

15 It further specifies that a second
16 violation of the same tier "shall be treated as a
17 repeat violation for the purposes of imposing an
18 increased penalty." Although the same code
19 provision goes on to specify the escalating
20 penalties for repeated primary tier offenses, our
21 analysis must move to D.C. Code 25-781, because
22 that provision of the law deals specifically with

1 sales to minors.

2 And under common principles of
3 statutory construction, a specific provision
4 prevails over a general provision.

5 CHAIRPERSON MILLER: Yes.

6 MR. RIVERO: Now, I can give you the
7 Latin name for that principle, but I'm going to
8 go ahead and skip it.

9 CHAIRPERSON MILLER: What is it?

10 MR. O'BRIEN: Yes, I would like to
11 know it.

12 MR. RIVERO: The Latin principle is
13 *lex specialis derogat legi generali*.

14 CHAIRPERSON MILLER: Thank you.

15 MR. O'BRIEN: Thank you.

16 MR. RIVERO: D.C. Code 25-781 states
17 as follows: Upon finding that a licensee sold to
18 a minor, "In the preceding two years" upon the
19 first violation, the Board shall fine the
20 licensee no less than \$2,000 and so on. Upon the
21 second violation, the Board shall fine the
22 licensee not less than \$3,000 and so on.

1 The fight in this case, Board Members,
2 is all about the phrase in the preceding two
3 years.

4 The reading that might be favored by
5 the licensee would, in effect, create an
6 incentive for any person to delay adjudication so
7 that more than two years pass from the date of
8 the last adjudicated violation, thus creating a
9 handy and quick get out of jail card or as I
10 would say a get out of more serious penalty
11 provisions card.

12 A reading of an escalating penalty
13 scheme that, in effect, negates the very
14 escalating scheme that is the purpose of that
15 statute produces what I would call an absurd
16 result with the statutory scheme working against
17 itself.

18 Courts in the District of Columbia
19 when looking at the facial language of a statute
20 will not stop there if the facial language of the
21 statute would produce an absurd result. I would
22 cite *Cass v. District of Columbia*, 829 A.2d 480

1 (D.C. 2003) citing People's Drug Stores,
2 Incorporated v. District of Columbia, 470 A.2d
3 (D.C. 1983).

4 Moreover, Courts in the District of
5 Columbia will grant deference to a Government
6 Agency's interpretation of its enabling statute
7 so long as that interpretation is reasonable and
8 not contrary to the legislature's intent. I cite
9 District of Columbia v. American University in
10 Dubai, 2 A.3d 175 (D.C. 2010), citing Public
11 Service Commission v. Wilson, 389 Md.27 (2005)
12 and NOVA University v. Education Licensure
13 Commission, 483 A.2d 1172 (D.C. 1984).

14 Here, the Government argues and urges
15 this Board to read the phrase in the preceding
16 two years in the same manner as in the general
17 statute on escalating penalties, which is found
18 again at D.C. Official Code 25-830(c)(1)(B). The
19 provision reads:

20 (c)(1) "For primary tier violations, the
21 penalty shall be no less than the following:

22 (A) For the first violation, no less

1 than \$1,000;

2 (B) For the second violation, 'within
3 two years' no less than \$2,000;" and so on.

4 The phrase within two years permits a
5 finding or adjudication that a violation took
6 place within two years of a prior adjudication.
7 And that is what we have in this case.

8 The licensee's first violation is
9 dated August 20, 2012. Within two years of that
10 date, in fact on June 16, 2014, the second
11 violation took place. There is no, I repeat, no
12 fundamental due process concern, because the
13 licensee here has been on notice since August 20,
14 2012 to conduct himself in such a manner as to
15 not commit a wrongful act for a period of two
16 years from that date.

17 While the licensee's argument would
18 have force if the prohibition in this case
19 contained any ambiguity, there is nothing
20 ambiguous about the prohibition on sale to
21 minors.

22 Finally, since the Board promulgates

1 its regulations and those regulations do not
2 support the licensee's interpretation, the last
3 place to look is in the D.C. Council's own
4 passage of the statute in question.

5 The legislative history is not clear
6 on the wording of the phrase at issue here in the
7 preceding two years. The law though was amended
8 by Bill 17-983 of the Alcoholic Beverage
9 Enforcement Act of 2008 and it became law on May
10 1, 2009.

11 The committee report from the
12 Council's Committee on Public Works and the
13 Environment merely notes that the addition of a
14 Schedule of Fines for sales to minors, sale to
15 minor violations, was instigated as a result of
16 testimony received and discussions with
17 stakeholders.

18 The legislative history then does not
19 contradict the approach that the Government urges
20 here. And it also does not support the
21 licensee's approach.

22 I will end with an unintended

1 consequence of what may be the licensee's
2 argument. Let's say that the licensee does not
3 do anything to delay the adjudication, as
4 happened in this case, let's also say that the
5 delay may be due to the time it takes the
6 Government to bring the matter before the Board,
7 as might have happened in this case.

8 If the Board holds with the licensee's
9 possible interpretation, then, in effect, the
10 Board is penalizing the Government and giving it
11 a strict two year deadline to bring these cases
12 if it intends to recommend the escalating
13 penalties of D.C. Code 25-781.

14 On top of being absurd, the law in the
15 District has stated that the Government is not
16 penalized for failure to adhere to deadlines
17 absent an explicit statutory consequence. We
18 cite *Officer of Foreign Assets Control v. Voices*
19 *in the Wilderness*, 382 F.Supp.2d (D.D.C. 2005),
20 which is citing *Brock v. Pierce County*, 476 U.S.
21 253 (1986).

22 In this case, there isn't even an

1 explicit statutory deadline, neither is there any
2 affirmative misconduct by the Government or any
3 prejudice to the licensee by taking the
4 Government's approach here.

5 Thus, for the foregoing reasons, the
6 Government recommends that this Board take its
7 traditional approach and treat the violation in
8 this case as a second violation within the
9 preceding two years and to apply a penalty
10 consistent with secondary -- second violations
11 under D.C. Code 25-781. Thank you.

12 CHAIRPERSON MILLER: Thank you. I
13 just want to ask a couple of questions. I don't
14 know if others want to before we hear from Mr.
15 O'Brien, because you said a lot.

16 MR. RIVERO: I know.

17 CHAIRPERSON MILLER: So it might be
18 hard to remember all that. Okay. So this is my
19 -- you know, I didn't know that you were going to
20 be arguing this, but this is one of my basic
21 questions. And that is I understand what you are
22 saying about the literal meaning of within two

1 years or whatever and the sale to minor penalty
2 statute.

3 My question is I thought you were also
4 referring back to the regular civil penalty
5 schedule which uses the language, for instance,
6 the licensee found in violation of a secondary
7 tier violation for the fourth time or whatever.
8 And my memory, though it could be wrong, I
9 thought you had argued in the past with respect
10 to that provision, that that meant adjudication
11 to adjudication, because it talks about found in
12 violation, found.

13 And today, I thought that you were
14 saying something different. And I'm not even
15 sure to what extent it matters in this argument,
16 because we are talking about the sale to minor
17 statute, but if you are following me, I want to
18 get clarification --

19 MR. RIVERO: I understand.

20 CHAIRPERSON MILLER: -- from you.

21 MR. RIVERO: I'm pointing to the
22 language within two years.

1 CHAIRPERSON MILLER: Right. Okay.

2 MR. RIVERO: In 25-830 and I'm not
3 pointing to anything else.

4 CHAIRPERSON MILLER: Okay. So you are
5 not making --

6 MR. RIVERO: No.

7 CHAIRPERSON MILLER: -- argument that
8 applies to the other statute?

9 MR. RIVERO: Right. I'm urging that
10 this Board read the phrase in the preceding two
11 years --

12 CHAIRPERSON MILLER: Right. Which is
13 different language.

14 MR. RIVERO: -- in the same way as the
15 phrase within two years.

16 CHAIRPERSON MILLER: Okay. So that's
17 different language.

18 MR. RIVERO: Correct.

19 CHAIRPERSON MILLER: Then my other
20 question goes to the Consent Form, all those
21 dates on the Consent Form. It sounded like he
22 admission, I thought you said the date of

1 admission was August 20, 2012.

2 MR. RIVERO: That's correct.

3 CHAIRPERSON MILLER: Signed July 27th.
4 How do they sign a Consent Form before they
5 admit?

6 MR. RIVERO: There is nothing -- the
7 parties just agree that the violation is
8 adjudicated as of a certain date. There is not
9 an agreement that the violation took place. It's
10 just an admission of a violation. So it's an
11 agreement to an adjudication date, is what that
12 is.

13 CHAIRPERSON MILLER: That's what that
14 stands for --

15 MR. RIVERO: Yes.

16 CHAIRPERSON MILLER: -- an
17 adjudication date?

18 MR. RIVERO: So the agreement of the
19 adjudication date it's August 20, 2012. And the
20 order essentially gave the licensee until that
21 time to pay the fine that it agreed to pay.

22 CHAIRPERSON MILLER: Oh, okay. Okay.

1 So that's why it is a later date.

2 MR. RIVERO: Right.

3 CHAIRPERSON MILLER: Okay.

4 MR. RIVERO: And in the Board's
5 records, in the Board's own files, the date
6 August 20, 2012 is the operative date.

7 CHAIRPERSON MILLER: What's the
8 operative date?

9 MR. RIVERO: August 20th.

10 CHAIRPERSON MILLER: Of what?

11 MR. RIVERO: 2012.

12 CHAIRPERSON MILLER: For adjudication
13 purposes?

14 MR. RIVERO: For the adjudication,
15 right.

16 CHAIRPERSON MILLER: But that's not
17 the date you are saying we look at for the two
18 year period. You are saying that it's the --
19 which date? May? Which date is the date that it
20 was sold to --

21 MR. RIVERO: The sale took place in
22 May.

1 CHAIRPERSON MILLER: Right.

2 MR. RIVERO: Which is not relevant.
3 What is relevant is the adjudication date for
4 purposes of the Government's argument. That's
5 the date I'm asking you --

6 CHAIRPERSON MILLER: What's the two
7 year period we measure from?

8 MR. RIVERO: That's -- you're correct,
9 you measure from August 20, 2012.

10 CHAIRPERSON MILLER: Okay. August 20.

11 MR. RIVERO: I'm asking the Board to
12 focus on not the sale date, because -- no, not
13 the sale date. August 20th.

14 CHAIRPERSON MILLER: Okay. August 20,
15 2012 to the date of the occurrence, of this one?

16 MR. RIVERO: All right. If you take
17 August 20th --

18 CHAIRPERSON MILLER: Yes.

19 MR. RIVERO: -- and you go out two
20 years --

21 CHAIRPERSON MILLER: Right.

22 MR. RIVERO: -- you get to August 20,

1 2014.

2 CHAIRPERSON MILLER: Right. Okay.

3 MR. RIVERO: The sale took place in
4 June prior to the date I just -- the end date I
5 just mentioned. So it took place within the two
6 year period.

7 CHAIRPERSON MILLER: Okay. Okay. Got
8 it. Thank you. All right. Do others have
9 questions right now? All right. Mr. O'Brien?

10 MR. O'BRIEN: I'm reminded of what I
11 was told happened as a famous Supreme Court
12 advocate in the '40s, John Davies, who argued a
13 proposition in front of the Court and one of the
14 Justices leaned down and said didn't you argue
15 exactly the opposite last year here? And I
16 thought he had a great answer was "Wisdom all too
17 often never arrives, but should not be rejected
18 merely because it comes late." That's simply a
19 response to what was hearsay.

20 May I tell you what we are not talking
21 about here today? When the Board accepts an
22 offer that proposes a suspension, and stays part

1 of the suspension, the -- for a year, the year
2 runs from the date of the Board's Order.

3 So in a hypothetical case, a violation
4 occurs on January 1. On April 1, the Board
5 imposes a penalty that includes a stayed
6 suspension. There is no dispute that the one
7 year stayed that is the period of probation runs
8 from April 1 on. But that has nothing to do with
9 what we are talking about here today. Zero.

10 We are talking here about what the
11 statute says. And the statute is 25-781 and a
12 particular subsection (f). And I did earlier
13 give to legal staff a copy of that that had some
14 highlighting.

15 CHAIRPERSON MILLER: Oh.

16 MR. O'BRIEN: I don't know if I sent
17 it through.

18 CHAIRPERSON MILLER: It was just
19 reviewed. Let me locate it. Yes, that's it.

20 MEMBER SILVERSTEIN: Yes, it's right
21 here.

22 CHAIRPERSON MILLER: I have one, too.

1 Okay. Yes, we have them.

2 MR. O'BRIEN: Now, what this says is
3 upon a finding that a licensee has violated the
4 sale to minor, in the preceding two years, upon
5 the first violation, there is a penalty, that's
6 (1) or (2) says upon the second violation. So
7 the word here, the operative words are violated
8 and violation.

9 Now, it is undisputed that the
10 preceding sale to minor took place on the 18th of
11 May 2012, that's the previous sale to minor. It
12 is undisputed that the instant sale to minor took
13 place, transpired on June 16, 2014, more than two
14 years afterwards.

15 Now, the plain language of the statute
16 controls, as Mr. Rivero noted and I'm not quite
17 sure why we are talking about 25-830, where there
18 is an explicit penalty provision in 781(f).

19 Okay. The Government's reading of this, which I
20 think the Chair's questions identified well, is
21 that for purposes of the proceeding violation, we
22 are going to define violation as the date of

1 adjudication.

2 But for purposes of the instant case,
3 we are going to define violation as the date of
4 the occurrence.

5 In other words, the word violation has
6 two different definitions in 25-781(f), that's
7 the Government's argument. The Government's
8 argument is that we -- in 781(f) we will define
9 violation when we want to start the clock as the
10 date of adjudication, but we will define
11 violation when we want to stop the clock as the
12 date of the actual occurrence.

13 They can't have it both ways. The
14 statute -- counsel talked about the legislative
15 history. The statute is clear and the plain
16 language of the statute controls the violation is
17 selling or serving alcohol to a minor, that's the
18 violation.

19 And there were two years between these
20 two violations. The -- we talked about --
21 counsel talks about an absurd result. I made a
22 little note there. To say that the word

1 violation in (f) has two different definitions, I
2 suggest with respect is an absurd reading of the
3 statute. There is a principle and I was never an
4 alter boy, so I can't give you the Latin on it,
5 but that says that a word used in a statute shall
6 be interpreted consistently.

7 And that's our bottom line. You can't
8 have it both ways. You, meaning the Government
9 in this case.

10 If violation means, as we urge, the
11 date of the incident, more than two years
12 elapsed. If we are going to say violation means
13 the date of ultimate adjudication, okay, we will
14 take August 2012. We are now here in May --

15 MEMBER RODRIGUEZ: April.

16 MR. O'BRIEN: April. Thank you, Mr.
17 Rodriguez. April of 2015, more than two years
18 later. Either way, it is more than two years.
19 So our position in this case is that you have a
20 two year reset. The two years elapsed. And this
21 is to be penalized by the Board as the statute
22 commands:

1 (f)(1) "Upon the first violation, the Board
2 shall fine the licensee not less than \$2,000, not
3 more than \$3,000, and suspend the license for
4 five consecutive days; provided, that the five
5 day suspension may be stayed by the Board for one
6 year."

7 I would observe that first violations
8 routinely are offered staff settlements with a
9 \$3,000 fine and a five day suspension, all five
10 days stayed for one year and that's what we would
11 ask the Board to impose in this instance.

12 Less the Board think that we are not
13 paying attention to the underlying issue, a sale
14 to minor, my guest here would like to tell the
15 Board what she has done with respect to
16 monitoring sale to minors since she took over
17 monitoring this particular store among others in
18 August of 2014, which was two months after the
19 last violation.

20 MS. CASBARIAN: Absolutely.

21 MEMBER SILVERSTEIN: Can you identify
22 the --

1 MS. CASBARIAN: I'm sorry?

2 CHAIRPERSON MILLER: You want her to
3 identify herself again?

4 MR. O'BRIEN: I'm sorry, I introduced
5 her earlier. Melody Casbarian.

6 MS. CASBARIAN: Melody Casbarian. I'm
7 the Regional Director from the location on K
8 Street. Since I took over in August 2014, the
9 first thing that I did was make sure that
10 everybody was TIPS-certified in the house,
11 meaning bartenders, servers, bouncers,
12 cocktailers and hosts. So anybody that can touch
13 a beverage or come in contact with a guest.

14 Every single employee has been --
15 knows that we card everybody. We no longer -- we
16 are -- our policy as a company is 30 years and
17 younger. We now card everybody. Every line-up
18 at lunch and at dinner, all employees that are
19 going to be serving guests, bartenders, servers
20 and cocktailers all sign a form that they agree
21 that they are going to card every individual that
22 orders an alcoholic beverage.

1 We also hired a group called the BARS
2 Program, which is just a company that comes in to
3 card, to see if we are carding. So they either
4 give you a red card or a green card. We do that
5 at least once a month. From the time of August
6 to the time of now, we have gotten only green
7 cards, meaning that we have carded everybody that
8 has come in contact with our employees. We have
9 taken it very, very seriously.

10 CHAIRPERSON MILLER: Thank you.

11 MR. RIVERO: To the extent that this
12 testimony on the record, the Government does not
13 object.

14 CHAIRPERSON MILLER: Okay. Oh, we
15 didn't swear you in. Okay.

16 MR. O'BRIEN: It's not testimony.
17 It's an argument.

18 CHAIRPERSON MILLER: Mr. O'Brien, are
19 you saying that the statute should read the dates
20 from adjudication of the last offense to the date
21 of the violation of the current offense?

22 MR. O'BRIEN: No. I'm saying just the

1 opposite.

2 CHAIRPERSON MILLER: It's the
3 opposite?

4 MR. O'BRIEN: That's the Government's
5 argument.

6 CHAIRPERSON MILLER: That's the
7 Government's argument?

8 MR. O'BRIEN: That when we start the
9 clock violation means the later date of
10 adjudication.

11 CHAIRPERSON MILLER: Yes.

12 MR. O'BRIEN: But to stop the clock,
13 the --

14 CHAIRPERSON MILLER: Okay.

15 MR. O'BRIEN: -- two year clock, it
16 means the earlier date of the offense. But
17 that's the Government's argument.

18 I'm arguing 180 degrees to the
19 opposite, that violation means violation.

20 CHAIRPERSON MILLER: Violation to
21 violation?

22 MR. O'BRIEN: Violation to violation.

1 CHAIRPERSON MILLER: Okay.

2 MR. O'BRIEN: That's what the statute
3 says.

4 CHAIRPERSON MILLER: Okay. So I think
5 that the trickiness in the statute is that it
6 talks about a finding of a violation and upon a
7 finding that a licensee has violated. So that's
8 where that adjudication concept comes in. I
9 mean, the way I see it, I think I mean, I can see
10 why you both are arguing different ways, because
11 it depends what in the preceding two years
12 modifies. Does it modify a finding in the
13 preceding two years or does it modify has
14 violated subsections (a), (b) or (c) in the
15 preceding two years?

16 MR. O'BRIEN: Madam Chair?

17 CHAIRPERSON MILLER: Yes?

18 MR. O'BRIEN: It says upon finding,
19 which is present tense, that the license has
20 violated it in the last two years.

21 CHAIRPERSON MILLER: That's an
22 adjudication, right? Upon a finding that they

1 violated.

2 MR. O'BRIEN: No. The instant,
3 present tense, would be upon you finding it now
4 that it was violated within the last two years.
5 It certainly does not say upon that -- upon a
6 finding or upon an adjudication less than two
7 years ago. The upon finding means today, what
8 you are doing today.

9 CHAIRPERSON MILLER: Okay.

10 MR. O'BRIEN: You are saying what
11 happened within the last two years. Brother
12 Rivero says well, you adjudicated in the last two
13 years. I say no, that's not adjudication. It's
14 the violation just like the statute says. The
15 violation is when they do something wrong.

16 But if you want to do that --

17 CHAIRPERSON MILLER: Yes.

18 MR. O'BRIEN: -- which I don't agree
19 with and say no violation doesn't mean violation,
20 it means adjudication. All right. Then we are
21 going to have an adjudication today, more than
22 two years. And as counsel very fairly has noted,

1 we did nothing to delay this. And the idea that
2 somebody could manipulate the system to
3 artificially increase the time is not a case
4 before this Board, because we didn't do that.

5 CHAIRPERSON MILLER: So wait a minute.
6 I haven't had lunch, so I'm sorry, are you saying
7 violation to violation?

8 MR. O'BRIEN: Yes.

9 CHAIRPERSON MILLER: Okay.

10 MR. O'BRIEN: Violation to violation
11 and I'm saying the violation is --

12 CHAIRPERSON MILLER: And the --

13 MR. O'BRIEN: -- the violation.

14 CHAIRPERSON MILLER: -- violation is
15 the date of occurrence?

16 MR. O'BRIEN: It's the violation. One
17 violated -- they violated the law on May 18, 2012
18 when they handed the drink to the minor. They
19 violated it again --

20 CHAIRPERSON MILLER: Okay.

21 MR. O'BRIEN: -- on June 16th.

22 CHAIRPERSON MILLER: Right. Okay.

1 Got it. And, Mr. Rivero, you are reading it as
2 adjudication to violation?

3 MR. RIVERO: Right. The -- when the
4 Government perceives from the basic idea that
5 what we have here is an escalating penalty
6 scheme. So the law has to be read in such a way
7 as to actually affect an escalating penalty
8 scheme, right?

9 CHAIRPERSON MILLER: Okay. But let me
10 ask you this. Okay. But if you have a violation
11 date, something occurs on a certain date and
12 something occurs on another date, you can't
13 really -- they can't -- nobody can manipulate
14 those days. Those are the days --

15 MR. RIVERO: This is why --

16 CHAIRPERSON MILLER: -- that they
17 happened.

18 MR. RIVERO: -- the Government
19 distinguished the first for anything that happens
20 afterwards, in my argument. I distinguish the
21 first violation from everything that happened
22 afterwards. It's on the first violation, from

1 that point, you can't do -- from the point that
2 the violation is found, it was found on --

3 CHAIRPERSON MILLER: Okay. So that's
4 the adjudication date then?

5 MR. RIVERO: Yes. The --

6 CHAIRPERSON MILLER: Found to have
7 been violated.

8 MR. RIVERO: So it was adjudicated on,
9 what was it, August 20.

10 CHAIRPERSON MILLER: Okay. Okay.

11 MR. RIVERO: From that point, okay,
12 there is notice.

13 CHAIRPERSON MILLER: Okay.

14 MR. RIVERO: We have to comport your
15 conduct from that point. And so the concept of
16 notice is also part of the Government's argument.
17 Okay. You have to take care not to do anything
18 between that point and two years out. Do you
19 understand that --

20 CHAIRPERSON MILLER: Yes.

21 MR. RIVERO: -- basic concept? And
22 that's how we read the notion of an escalated

1 penalty scheme to take effect.

2 CHAIRPERSON MILLER: But if you are
3 saying adjudication to violation, that's a
4 shorter period of time then violation to
5 violation, right? So why --

6 MR. RIVERO: Right, it's to the end of
7 two years.

8 CHAIRPERSON MILLER: -- doesn't that
9 help the licensee?

10 MR. RIVERO: If I say from the first
11 instance August 20, 2012, you now have to comport
12 yourself for a period of two years.

13 CHAIRPERSON MILLER: Yes.

14 MR. RIVERO: Within that two year
15 period, a sale took place. That's what I'm
16 saying.

17 CHAIRPERSON MILLER: Okay.

18 MR. O'BRIEN: Madam Chair?

19 CHAIRPERSON MILLER: Yes.

20 MR. O'BRIEN: I'm looking back at the
21 Waiver Consent Order from 2012, the previous
22 episode.

1 CHAIRPERSON MILLER: So we don't have
2 that in front of us, correct?

3 MR. O'BRIEN: I would be glad to have
4 a copy of this made. It should be in the Board's
5 file, but --

6 CHAIRPERSON MILLER: Right, right.

7 MR. O'BRIEN: -- let me read from it.

8 CHAIRPERSON MILLER: Okay. Okay.

9 MR. O'BRIEN: I'm going to skip the --
10 I'm sure the Board is familiar with the form.

11 CHAIRPERSON MILLER: Yes.

12 MR. O'BRIEN: Okay. I mean, if you
13 have a blank, you know, specifically the Board's
14 records indicate that on May 18, 2012 a sale to
15 minor violation occurred. On August 20th the
16 respondent admits the sale occurred on the above
17 date. But the Board's own form says that the
18 violation is the date that the minors were served
19 alcohol.

20 CHAIRPERSON MILLER: Oh, I see. Okay.
21 So the longer period helps the licensee. I get
22 it now. Okay.

1 MR. O'BRIEN: Say again?

2 CHAIRPERSON MILLER: The longer period
3 helps you, because the two years ends sooner.

4 MR. O'BRIEN: Yes. In this case, it's
5 25 months.

6 CHAIRPERSON MILLER: Okay. All right.

7 MR. O'BRIEN: Which is way too soon.

8 CHAIRPERSON MILLER: Yes. Okay.

9 MR. O'BRIEN: But the two years is a
10 fine line that is drawn. I had a case before
11 this Board, I think it was last year, where the
12 licensee had an unauthorized use of a trade name.
13 And it was a \$500 fine. The prosecution/defense
14 agreed that that was the penalty.

15 However, that licensee had nine days,
16 of what I call, backup time, suspended time out
17 there.

18 CHAIRPERSON MILLER: Yes.

19 MR. O'BRIEN: And this sale to minor--
20 I'm sorry, this unauthorized trade name occurred
21 about 11 months and two weeks after the last one.
22 And the Board went ahead and imposed, even though

1 the offense was relatively --

2 CHAIRPERSON MILLER: Right.

3 MR. O'BRIEN: -- trivial, okay, \$500
4 fine, but now you have got to serve the nine
5 days. That was the argument I made to the Board
6 that would you -- if you were a Judge, would you
7 revoke somebody's probation because he ran a stop
8 sign? So it works both ways.

9 It falls on both sides, but when you
10 have a bright line, the statute provides the
11 bright line, then that's what we have to go by.

12 CHAIRPERSON MILLER: Okay.

13 MR. O'BRIEN: And that's why we say
14 this is a first violation and why we say it
15 should be treated like the Board treats every
16 other first violation, which is a \$3,000 fine,
17 five days suspended. And yes, I know the
18 suspension will run from the date of the Board's
19 Order. The one year stayed therein would run
20 from the date of the Board's Order.

21 CHAIRPERSON MILLER: Yes.

22 MR. O'BRIEN: I don't think the

1 licensee should be penalized for coming in here
2 and challenging the Government's interpretation
3 of the statute.

4 CHAIRPERSON MILLER: No, I don't think
5 so.

6 MR. O'BRIEN: Okay. Well, that's why
7 I'm saying everybody else gets a \$3,000 -- is
8 offered a \$3,000 fine, five days all suspended --
9 all stayed for one year. And that's the
10 appropriate disposition in this case.

11 CHAIRPERSON MILLER: Okay. Does
12 anybody else have questions? Mr. Short?

13 MEMBER SHORT: I would just like to
14 say McCormick & Schmick on K Street is a family--
15 it has an atmosphere and great ambiance. I
16 sometimes take my children and grandchildren
17 there or they would take me there on Father's
18 Day. And I just can't imagine someone there
19 intoxicated. It just doesn't -- but at any rate,
20 my question is to -- is this going to be the last
21 time, hopefully, with the new policies you have
22 put in place?

1 MS. CASBARIAN: Yes, I guess.

2 MR. O'BRIEN: And that's why I asked
3 Ms. Casbarian to tell you what has been done
4 since she took over this store among the other
5 stores she supervises. This is -- Chief Short is
6 right. It's not the kind of place that the Board
7 normally would have these kind of concerns with,
8 but the fact is we have admitted that we are
9 guilty of it.

10 CHAIRPERSON MILLER: Yes.

11 MR. O'BRIEN: We have to take the rap
12 for it. We've got to take the punishment for it.
13 All we are asking for is the appropriate
14 punishment as provided by the statute.

15 MEMBER SHORT: Repeat that again.

16 MR. O'BRIEN: Say again?

17 MEMBER SHORT: The punishment you are
18 asking for?

19 MR. O'BRIEN: It's the punishment for
20 a first offense.

21 MEMBER SHORT: Which is?

22 MR. O'BRIEN: Which is the Board can

1 impose a fine of between \$2,000 to \$3,000 and the
2 Board can suspend the license for up to five
3 days. The Board, however, can, according to the
4 statute, stay all five of those days. And we
5 know that the stay is for a period of one year
6 for good behavior.

7 Okay. Now, what the Board
8 traditionally or habitually, I should say, does
9 in cases of first offense is offers a \$3,000 fine
10 and a five day suspension, but all five days
11 stayed pending good behavior for a year.
12 Everybody else gets that on a first offense, and
13 that's what these folks should get also.

14 MEMBER SHORT: Thank you. That's all
15 I have, Madam Chair.

16 CHAIRPERSON MILLER: Mr. Rivero?

17 MR. RIVERO: Thank you. To the extent
18 there has been any characterization about the
19 establishment of this case as being decent,
20 respectable, it's not the sort of thing that
21 happens here is completely and legally irrelevant
22 and it should not be taken into account.

1 We could have a licensee on the other
2 side here that has many violations of some other
3 different kinds. So the tenor or the record of
4 the licensee is irrelevant for purposes of this
5 Board's analysis and we would reflect the
6 Government's concern that that information not be
7 used in its analysis. Thank you.

8 CHAIRPERSON MILLER: Others? Mr.
9 Rodriguez?

10 MEMBER RODRIGUEZ: Madam Chair, I have
11 heard presentations by two very great, two very
12 good attorneys. I mean, both arguments are very
13 compelling. I have never heard such compelling
14 arguments. I'm new to this Board and I have
15 never heard such compelling arguments, so I am
16 recommending, Madam Chair, that I have legal --
17 can we -- would it be out of order to request --
18 we have to deal with this now?

19 CHAIRPERSON MILLER: No. We are going
20 to take a look at the language very carefully.

21 MR. O'BRIEN: Not at all.

22 MEMBER RODRIGUEZ: Yes. And this is

1 where I need to --

2 CHAIRPERSON MILLER: And the
3 arguments.

4 MEMBER RODRIGUEZ: -- get a little
5 more coaching here, because the arguments are
6 very extensive here and very well-presented.

7 CHAIRPERSON MILLER: Yes.

8 MEMBER RODRIGUEZ: So I'm recommending
9 that.

10 CHAIRPERSON MILLER: Yes, that's what
11 we are going to do.

12 MEMBER RODRIGUEZ: Whew.

13 CHAIRPERSON MILLER: Okay. Anybody
14 else? Okay. So since we are going to consider
15 this case in closed session, I'm going to take a
16 vote to do so.

17 MR. RIVERO: The Government waives.

18 CHAIRPERSON MILLER: What? What?

19 MR. RIVERO: The Government waives
20 findings of facts and conclusions of law.

21 CHAIRPERSON MILLER: Oh, findings of
22 facts. But you stipulated to that.

1 MR. RIVERO: Right. We don't have
2 anything.

3 CHAIRPERSON MILLER: Okay.

4 MR. O'BRIEN: So actually, arguably we
5 could argue -- what we were arguing today really
6 were conclusions of law.

7 MR. RIVERO: Correct.

8 MR. O'BRIEN: All right.

9 MR. RIVERO: We could present those,
10 but I'm not. I'm waiving.

11 MR. O'BRIEN: I know legal staff is
12 here, the Board is here. I don't think we could
13 put anything in writing that we haven't said
14 today. So I'll also waive.

15 CHAIRPERSON MILLER: Oh, okay. I
16 think we got your stipulation in writing, the
17 date it occurred, that's basically it, that's an
18 STM violation, sale to minor.

19 MR. RIVERO: Right.

20 CHAIRPERSON MILLER: May 18, right,
21 2012?

22 MR. O'BRIEN: Yes, May 18, 2012.

1 CHAIRPERSON MILLER: That's a
2 stipulation, right?

3 MR. O'BRIEN: Well, that's in the
4 Board's records that that's the date of the
5 previous occurrence.

6 CHAIRPERSON MILLER: And you stipulate
7 to it? And you stipulated to the guilt?

8 MR. O'BRIEN: It's --

9 CHAIRPERSON MILLER: Yes.

10 MR. RIVERO: We stipulated to the date
11 of the sale in this case, which is June 16, 2014.

12 CHAIRPERSON MILLER: Oh, I'm sorry.
13 Thank you.

14 MR. O'BRIEN: Yes.

15 CHAIRPERSON MILLER: I know it's
16 there. June what?

17 MR. RIVERO: 16, 2014.

18 CHAIRPERSON MILLER: Okay. That's
19 what I mean.

20 MR. RIVERO: Yes.

21 CHAIRPERSON MILLER: Are you clear
22 about what you stipulated to? I mean, you said

1 it on the record earlier.

2 MR. O'BRIEN: Yes.

3 CHAIRPERSON MILLER: Yes.

4 MR. O'BRIEN: But I'm passing caution.

5 CHAIRPERSON MILLER: I'm sorry.

6 MR. O'BRIEN: Just to make sure I'm
7 clear.

8 CHAIRPERSON MILLER: Okay. So it's --
9 all right. Let's be clear then. Okay. So I
10 understood that you stipulated that a sale to
11 minor occurred now on June 16, 2014.

12 MR. O'BRIEN: '14.

13 CHAIRPERSON MILLER: Yes. Okay.

14 MR. O'BRIEN: I did stipulate to that.

15 CHAIRPERSON MILLER: And the Board
16 will be looking at what is the appropriate
17 penalty to apply, which is a legal determination,
18 keeping in mind the arguments you made today.

19 MR. O'BRIEN: Thank you very much.

20 CHAIRPERSON MILLER: Okay. All right.
21 We are almost done here.

22 As Chairperson of the Alcoholic

1 Beverage Control Board for the District of
2 Columbia and in accordance with Section 405 of
3 the Open Meetings Amendment Act of 2010, I move
4 that the ABC Board hold a closed meeting for the
5 purpose of seeking legal advice from our counsel
6 on Case No. 14-CC-00094, McCormick & Schmick
7 Seafood Restaurant, per Section 405(b)(4) of the
8 Open Meetings Amendment Act of 2010, and
9 deliberating upon this case for the reasons cited
10 in Section 405(b)(13) of the Open Meetings
11 Amendment Act of 2010.

12 Is there a second?

13 MEMBER RODRIGUEZ: Second.

14 CHAIRPERSON MILLER: Mr. Rodriguez
15 seconded the motion. I'll now take a roll call
16 vote on the motion before us now that it has been
17 seconded.

18 Mr. Brooks?

19 MEMBER BROOKS: I agree.

20 CHAIRPERSON MILLER: Mr. Rodriguez?

21 MEMBER RODRIGUEZ: I agree.

22 CHAIRPERSON MILLER: Ms. Miller? I

1 agree.

2 Mr. Silverstein?

3 MEMBER SILVERSTEIN: I agree as well.

4 CHAIRPERSON MILLER: Mr. Short?

5 MEMBER SHORT: I agree.

6 CHAIRPERSON MILLER: Okay. It appears
7 the motion has passed by a 5-0-0 vote.

8 I hereby give notice that the ABC
9 Board will hold this aforementioned closed
10 meeting in the ABC Board conference room pursuant
11 to the Open Meetings Amendment Act of 2010 and
12 issue a decision within 90 days.

13 MR. O'BRIEN: Thank you.

14 CHAIRPERSON MILLER: Thank you.

15 MR. RIVERO: Thank you.

16 MEMBER RODRIGUEZ: Thank you.

17 CHAIRPERSON MILLER: Okay. That is it
18 for the hearings for this morning. What time is
19 our next hearing? 2:30. No, 1:30. We are going
20 to be a little late.

21 So the Board is running just a little
22 bit late. We are just going to go get our lunch,

1 so we probably won't be back before 1:45, even
2 though the next case is scheduled for 1:30.

3 Okay. Thank you.

4 (Whereupon, the Show Cause Hearing in
5 the above-entitled matter was concluded at 1:07
6 p.m.)

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