THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
Brentwood Liquors t/a Brentwood Liquors	Case No.: License No: Order No:	15-CMP-00217 60622 2015-515
Holder of a Retailer's Class A License		
at premises 1319 Rhode Island Ave., N.E. Washington, D.C. 20018		

BEFORE: Nick Alberti, Member
Mike Silverstein, Member
Ruthanne Miller, Member
James Short, Member

ALSO PRESENT: Brentwood Liquors, t/a Brentwood Liquors, Respondent

Louise Phillips, Assistant Attorney General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds Brentwood Liquors, t/a Brentwood Liquors, (hereinafter "Respondent" or "Brentwood Liquors") sold a go-cup in violation of the law. Based on the violation and the licensee's history of prior violations, Brentwood Liquors shall pay a $4,000 fine.

Procedural Background

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on July 15, 2015. *ABRA Show Cause File No., 15-CMP-00217*, Notice of Status Hearing and Show Cause Hearing, 2 (Jul. 15, 2015). The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 1319 Rhode Island Ave., N.E., Washington, D.C., on July 21, 2015, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 15-CMP-00217*, Service Form (Jul. 17, 2015); Service Form (Jun. 11, 2015) The Notice charges the Respondent with one violation, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

Specifically, the Notice described the single charge as follows:

> **Charge I:** **You provided a go-cup to a customer, in violation of D.C. Official Code § 25-741(a) . . .**
>
> On Friday, March 27, 2015, an ABRA Investigator working undercover entered Brentwood Liquors . . . . The investigator requested, purchased and received one 25 ounce can of Icehouse beer and one white Styrofoam cup with a lid from the establishment's clerk.

Notice of Status Hearing and Show Cause Hearing, 2.

Both the Government and Respondent appeared at the Show Cause Status Hearing on September 9, 2015. The parties proceeded to a Show Cause Hearing and argued their respective cases on October 14, 2015.

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

1. Brentwood Liquors holds a Retailer's Class A License at 1319 Rhode Island Ave., N.E., Washington, D.C. *ABRA License No. 60622*. During the hearing, the Respondent stipulated to the facts in the notice (described above) and the investigative report. *Transcript* (*Tr.*), October 14, 2015, at 6, 10, 14; *Case Report No.* 15-CMP-00217, 1-2, Exhibit No. 1. The Respondent further stipulated that the establishment sold a cup with ice and an alcoholic beverage. *Tr.*, 10/14/15 at 10-11.

2. The Respondent requested that the Board consider the fact that the business is not doing well economically and that the business is being forced to leave the premises. *Id.* at 15.

CONCLUSIONS OF LAW

3. The Board has the authority to fine, suspend, or revoke the license of a licensee who violates any provision of Title 25 of the District of Columbia Official Code pursuant to District of Columbia Official Code § 25-823(1). D.C. Official Code § 25-830; 23 DCMR § 800, *et seq.* (West Supp. 2015). Furthermore, after holding a Show Cause Hearing, the Board is entitled to impose conditions if the Board determines "that the inclusion of the conditions would be in the best interests of the locality, section, or portion of the District in which the establishment is licensed." D.C. Official Code § 25-447.

4. In this case, the Board sustains Charge I. Under § 25-741(a), "[t]he licensee under an off-premises retailer's license, class A or B, shall not provide go-cups to customers." D.C. Official Code § 25-741(a). A "go-cup" is defined as "a drinking utensil provided at no charge or a nominal charge to a customer for the purpose of consuming alcoholic beverages off the premises of an establishment." D.C. Official Code § 25-101(23). In this case, the ABRA investigator purchased a 24 ounce beer and obtained a single cup with ice in it. *Supra*, at ¶ 1. In response to Respondent's argument, the Board notes that the mere fact that the cup had ice in it is no defense to the charge. *Tr.*, 10/14/15 at 14. Specifically, by providing a cup with ice to a patron that buys an alcoholic beverage, it cannot be credibly argued that the cup was not for the purpose of consuming the alcohol outside the establishment. Therefore, the Board finds sufficient evidence in the record to sustain the charge.

ORDER

Therefore, the Board, on this 16th day of December 2015, finds that Brentwood Liquors, t/a Brentwood Liquors, guilty of violating § 25-741. The Board imposes the following penalty on Brentwood Liquors:

(1) For the violation described in Charge I, Brentwood Liquors shall pay a fine of $4,000.

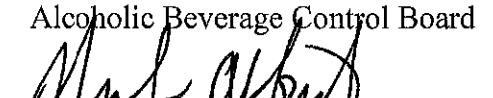
IT IS FURTHER ORDERED that the Respondent must pay all fines imposed by the Board within thirty (30) days from the date of this Order, or its license shall be immediately suspended until all amounts owed are paid.

IT IS FURTHER ORDERED, in accordance with 23 DCMR § 800.1, the violation found by the Board in this Order shall be deemed a secondary tier violation.

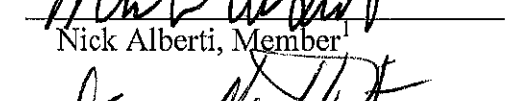
IT IS FURTHER ORDERED that the Board's findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

The ABRA shall deliver copies of this Order to the Government and the Respondent.

District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Member[1]



James Short, Member

In my view, it is important to explain the rationale for the penalty in this case in addition to the finding of liability. Respondent's investigative history reveals that this is the establishment's 7th secondary violation within 4 years. Pursuant to D.C. Official Code § 25-830(d)(1)(2), the penalty shall be no less than $4,000.

It should be noted that this provision is not clear on its face and could be interpreted to mandate a much higher penalty ($30,000 and suspension of the license for 30 consecutive days). I rely on *Riggs National Bank of Washington DC v. District of Columbia*, 581 A2d 1229 (1990) for the conclusion that the penalties set forth in D.C. Code § 25-830 are mandatory, and that the $4,000 penalty is the correct application of the statute in this case. The Court of Appeals stated therein, specifically in consideration of a civil penalty provision, that "the word "shall" in a statute is mandatory unless such a construction is 'inconsistent with the manifest intent of the legislature or repugnant to the context of the statute." *Id.* at *25, quoting Security Trust v Smith,* 93 NM 35, 37, 596 P2d 248, 250 (1979). "'In case of doubt concerning the severity of the penalty prescribed by a statute, construction will favor a milder penalty over a harsher one.'" *Id.* at 29 *citing* 3 N SINGER, SUTHERLAND, STATUTORY CONSTRUCTION § 59.03 at 12; *Government of Virgin Islands v. Douglas,* 812 F2d 822, 833 (3rd Cir. 1987); *Bifulco v. United States,* 447 U.S. at 387, 100 Sct. at 2252.

As I am unaware of any evidence that construction of the statute as mandatory would be inconsistent with the Council's intent, and the Court of Appeals and the rules of statutory construction favor a milder penalty where there is doubt, I conclude that $4,000 is the appropriate penalty in this case.

Ruthanne Miller, Member

I concur as to liability, but dissent to the penalty imposed by the Board.

Mike Silverstein, Member

Pursuant to D.C. Official Code § 25-433(d)(1), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the

[1] Board Member Alberti was not present at the original hearing. He has read the transcripts and other documents comprising the Board's official record and has participated in the Board's deliberation of this matter.

Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719..1 stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. *See* D.C. App. Rule 15(b) (2004).