

Superclub Ibiza, LLC, t/a Ibiza, Case Nos. 14-251-00308, 15-251-00004, Board Order No. 2015-279, 1-2 (D.C.A.B.C.B. May 13, 2015). Subsequently, on June 10, 2015, the Respondent filed a motion for reconsideration requesting that the Board vacate the revocation order.¹ The Board denies the motion, because it fails to comply with 23 DCMR § 1719.4, as well as the other reasons described below.

Arguments of the Parties

1. The Respondent raises the following arguments in its motion: (1) the Board should excuse the Respondent's failure based on its diligent efforts to locate the license and the order was not served on counsel until May 18, 2015; and (2) accepting the surrender of the license three weeks after the deadline does not prejudice the Government. *Pet. for Recon.*, at 1-2 (Jun. 10, 2015). As factual support, the Respondent claims that Aldo Truong made "diligent efforts" to locate the license, including: (1) searching the venue on May 13, 2015; (2) contacting all of the employees; (3) learning a few weeks later that the license was in the possession of an employee; (4) meeting with the employee to retrieve the license; and (5) obtaining the license on June 8, 2015, from the employee. *Id.* at 2.

2. In reply, the Government requests that the Board deny the motion. *District of Columbia's Opposition to Petitioner's Petition for Reconsideration*, at 1 (Jun. 12, 2015) [*Opposition*]. First, the Government notes that the Respondent waited four weeks after the OIC's surrender deadline to search, locate, and surrender the license. *Id.* Second, the motion does not comply with the rules regarding motions for reconsideration. *Id.* In particular, the motion fails to include the required affidavit for new matters provided by 23 DCMR § 1719.4, which, if it had been submitted, should have explained the failure of the Respondent to possess the license on the date of the hearing. *Id.* at 2.

FINDINGS OF FACT

The Board makes the following findings of fact:

3. On May 13, 2015, the Board held a Show Cause Status Hearing attended by the Government, the Respondent's managing member, Aldo Truong, and his counsel. *Transcript (Tr.)*, May 13, 2015 at 2. At the hearing, the parties presented an OIC. *Id.* at 3. During the hearing, the Government indicated that the OIC presented to the Board was ". . . contingent on confirmation that the Agency does not in fact . . . possess the license." *Id.* The Government was then informed that the license was ". . . at the property." *Id.*

¹ At the outset, it may be questionable whether the Board could even grant such relief. It has long been recognized that the when a defendant breaches its plea agreement, the Government has the right to ". . . seek specific performance of the agreement or treat it as unenforceable." *United States v. Cimino*, 381 F.3d 124, 128 (2d Cir. 2004). In this case, because the agreement includes a revocation provision, "specific performance" could put the Respondent in the same situation that it faces now. Moreover, even if the agreement were set aside, the Respondent could also be charged with violating a Board Order under D.C. Official Code § 25-823(6), which also could lead to a fine, suspension, or revocation of the license.

4. Based on this confirmation, the Government stated, “[g]iven that the license is at the property . . . the Licensee will surrender the license for cancellation by close of business on Friday.” *Id.* at 4. The Government then confirmed that this date was “May 15.” *Id.* The Board Chairperson then asked the Respondent whether they agreed to surrender the license for cancellation by the close of business on “. . . Friday, May 15.” *Id.* The Respondent, through counsel, answered in the affirmative and agreed to the term. *Id.* at 5. The Board then voted unanimously to approve the Board Chairperson’s motion to accept the OIC with the condition that “the Licensee will surrender the license for cancellation by close of business [on] May 15th.” *Id.*

5. Board Order No. 2015-266 described the OIC, and the Board signed the Order on May 13, 2015. *In re Superclub Ibiza, LLC, t/a Ibiza*, Case Nos. 14-251-00308, 15-251-00004, Board Order No. 2015-266, 1, 3-4 (D.C.A.B.C.B. May 13, 2015). The OIC states, “[t]he Respondent shall surrender its Retailers Class CN License for cancellation by the Board by close of business on May 15, 2015 . . . the Respondent . . . waives its right to a Show Cause Hearing and appeal.” *Id.* at 3. The order further stated that “[t]he failure to comply with these conditions may result in the immediate revocation of the Respondent’s license.” *Id.*

6. Despite the discussion on the record at the status hearing, the Respondent failed to surrender the license to the Alcoholic Beverage Regulation Administration (ABRA) on May 15, 2015. The Respondent admits that it surrendered its license in an untimely manner. *Pet. for Recon.*, at 3. If one begins counting on May 16, 2015, and ends on the date of submission of the license, June 9, 2015, then the Respondent surrendered the license twenty-five days or three and half weeks after the deadline. *Infra*, at ¶ 6(d).

7. On May 27, 2015, in Board Order No. 2015-279, the Board signed an order indicating that the Respondent had not surrendered its license as of May 27, 2015. *In re Superclub Ibiza, LLC, t/a Ibiza*, Case Nos. 14-251-00308, 15-251-00004, Board Order No. 2015-279, 1-2 (D.C.A.B.C.B. May 27, 2015).

8. The Board takes administrative notice of ABRA’s records, which indicate the following:

- a. Board Order No. 2015-266, which described the OIC, was emailed to the Respondent’s counsel and placed in the mail on May 18, 2015. *Email from Sarah Fashbaugh, Community Resource Officer* (May 18, 2015) (Subject: Board Order – Ibiza).
- b. Based on the date of service of Board Order No. 2015-266, the motion for reconsideration period related to this Order expired on May 28, 2015. *Supra*, at ¶ 1. No motion for reconsideration related to Board Order No. 2015-266 was filed within ten days of service of Board Order No. 2015-266.
- c. Board Order No. 2015-279, which contained the Board’s revocation order, was sent by mail to the establishment on May 29, 2015. *Email from Sarah Fashbaugh, Community Resource Officer* (May 29, 2015) (See handwritten note on page).

- d. The Respondent delivered ABRA License Number 074456 to ABRA on June 9, 2015.
- e. The Board received the current motion for reconsideration on June 10, 2015. *Pet. for Recon.*, at 4.
- f. There is no record that the Respondent ever informed the Board that it could not comply with the May 15, 2015, deadline set by Board Order No. 2015-266 either before May 15, 2015, or before June 10, 2015.
- g. There is no record that the Respondent ever requested an extension of time to comply with Board Order No. 2015-266.

9. The Board’s revocation of the Respondent’s license prevents the Board from issuing a license to the Respondent or its members for five years from the date of revocation. D.C. Official Code § 25-821(c).

10. The Board does not credit the factual support provided by the Respondent in its motion, because they are not supported by any citation to corroborative evidence or sworn affidavits, and amount to nothing more than conclusory assertions. *Supra*, at ¶ 1.

CONCLUSIONS OF LAW

11. The Board affirms its prior revocation order, because (1) the motion for reconsideration does not comply with the affidavit requirement of § 1719.4; and (2) the OIC authorized the revocation of the license based on the failure to comply with its terms.

12. In this case, the Respondent has the burden of proof, because it is the proponent of the motion for reconsideration requesting relief from the OIC. D.C. Official Code § 2-509(b) (“In contested cases . . . the proponent of a rule or order shall have the burden of proof.”).

I. THE MOTION IS DENIED BASED ON THE FAILURE TO COMPLY WITH § 1719.4.

13. The Board agrees with the Government that the motion should be denied based on the Respondent’s failed to comply with § 1719.4.

14. Under § 1719.4, a valid motion for reconsideration that raises new issues must meet the following conditions: (1) it must be accompanied by an affidavit; and (2) it must affirm that the petitioner “could not by due diligence have known or discovered the new matter prior to the date the case presented . . . for decision.” 23 DCMR § 1719.4 (West Supp. 2015).

15. Here, the petition was not accompanied by an appropriate affidavit, as required by § 1719.4. *Supra*, at ¶ 10; *see generally Pet. for Recon.*, 1-4. As noted by the Government, the Respondent was required to submit an affidavit explaining why the Respondent was not aware of

the location of the license, even though it relies on a new matter not raised during the hearing. *Supra*, at ¶ 2. Therefore, the motion does not satisfy § 1719.4 and should be denied.²

16. While the Board is satisfied that its reasoning in Section I is sufficient to address the motion, the Board further relies on the following:

II. THE RESPONDENT FAILED TO SATISFY THE CONDITION OF THE OIC; THEREFORE, THE BOARD WAS AUTHORIZED TO IMPOSE THE REVOCATION TERM CONTAINED IN THE OIC.

17. There is no question that the Respondent failed to timely surrender its license as required in the OIC, which, in turn, permitted the Board to exercise the revocation provision of the Order.

18. Section 1604.5 authorizes the Board to accept OICs before the issuance of a decision by the Board. 23 DCMR § 1604.5 (West Supp. 2015). In this case, the OIC required the Respondent to surrender the license by May 15, 2015, or face the possibility of immediate revocation. *Supra*, at ¶ 5.

19. It is not in dispute that the Respondent failed to comply with this condition. *Supra*, at ¶ 6. It is further not disputed that the Respondent acknowledged that it would comply with the condition at the status hearing on May 13, 2015, and, even if the Board were to accept the Respondent's version of the facts, that the Respondent knew on May 13, 2015, that it had lost the license. *Supra*, at ¶¶ 1, 4. Despite this knowledge, the Respondent decided to let the deadline pass without filing any motions or otherwise informing the Board that it could not comply with the OIC until three and half weeks after the deadline contained in the OIC. *Supra*, at ¶¶ 6-8(b), (d), (f). Under these circumstances, the Respondent clearly violated the OIC, which justified the issuance of a revocation order as indicated in Board Order No. 2015-266.

III. THE OIC BECAME ENFORCEABLE ONCE APPROVED BY THE BOARD ON MAY 13, 2015.

20. The Board also emphasizes that the OIC became effective as to the parties once approved on May 13, 2015.

a. An OIC is enforceable at the time of approval and does not depend on the issuance of an order.

21. An OIC becomes effective and enforceable at the time of approval, regardless of whether an order has been issued by the Board.

22. In *Confederate Memorial Association*, the court made three observations about a court's power vis-à-vis settlements. *Confederate Mem'l Ass'n, Inc. v. United Daughters of Confederacy*,

² It is also questionable as to whether the motion raises any claim of legal error that would impact the revocation decision. 23 DCMR § 1719.3 (West Supp. 2015) ("A petition for reconsideration shall state briefly the matters of record alleged to have been erroneously decided . . .").

629 A.2d 37, 39-40 (D.C. 1993). First, “trial courts have the power to enforce settlement agreements in cases pending before them.” *Id.* at 39.³ Second, a trial court may summarily enforce a settlement when a “. . . binding settlement bargain is conceded or shown, and the excuse for nonperformance is comparatively unsubstantial.” *Id.* Third, the trial court may enforce a settlement agreement even though it is “. . . not incorporated into a court order.” *Id.*

23. While the Board is not a trial court, it can exercise similar authority when appropriate. An administrative agency may exercise powers not expressly stated in the law when they are “. . . fairly implied from . . . statutory language . . .” *Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n*, 378 A.2d 1085, 1089 (D.C. 1977). In the past, the court has approved an agency operating under implied powers in circumstances related to “. . . the regulation of the parties and proceedings before them” and when necessary to uphold “well established rules of procedure generally applicable to agency adjudications.” *Ramos v. D.C. Dep't of Consumer & Regulatory Affairs*, 601 A.2d 1069, 1073-74 (D.C. 1992).

24. The Board’s authority to accept and enforce OICs comes from the D.C. Administrative Procedure Act, which states, “[u]nless otherwise required by law, other than this subchapter, any contested case may be disposed of by stipulation, agreed settlement, consent order, or default.” D.C. Code § 2-509(a); 23 DCMR § 1501.1 (West Supp. 2015). The Board’s regulations classify a show cause action as a contested case, and § 1604.5 authorizes the Board to accept OICs offered by the Government and licensees. 23 DCMR §§ 1600.3; 1604.5 (West Supp. 2015).⁴

25. In this case, the Board has the express power to dispose of cases by approving and accepting OICs. Yet neither the D.C. Administrative Procedure Act, Title 25, nor Title 23 describe how to address a situation where an OIC contains a condition with a deadline; yet, the condition is violated before service of the Order.

26. In such circumstances, the Board finds it unacceptable, unfair, and unjust to simply overlook this type of violation. Simply put, turning a blind eye in such circumstances would give violators the power to ignore a lawful settlement at will, and risk allowing violators to obtain the “full benefit of their bargain” while “strip[ping] the other party of all its rights.” *Mallof v. D.C. Alcoholic Beverage Control Bd.*, 43 A.3d 916, 922 (D.C. 2012). Consequently, in order to effectuate the express power to accept settlements and ensure the orderly and fair administration of OICs, the Board requires the powers articulated in *Confederate Memorial Association*.⁵

³ See also *Autera v. Robinson*, 419 F.2d 1197, 1201 n.17 (D.C. Cir. 1969) (“a valid settlement agreement, once reached, cannot be repudiated by the parties, and after a binding settlement agreement has been made, the actual merits of the settled controversy are without consequence.”).

⁴ It should also be noted that once approved, OICs are subject to limited judicial review. See also 23 DCMR § 1604.6 (West Supp. 2015) (“An offer submitted by the parties and accepted by the Board shall constitute a waiver of appeal and judicial review.”).

⁵ It should also be noted that it is common practice in administrative proceedings for parties to make promises and affirmations to the tribunal on the record during hearings. Allowing parties to repudiate or violate those promises until service of an order opens the door to parties misleading the tribunal, as well as undermining the solemnity that should be ascribed to statements made to the tribunal on the record.

27. Therefore, as in *Confederate Memorial Association*, the Board has the power to enforce OICs, as well as the power to make OICs effective upon approval, regardless of whether an order has been served.⁶

a. The OIC became effective upon approval on May 13, 2015.

28. It is of no consequence that the Order describing the OIC was served upon counsel on May 18, 2015. *Supra*, at ¶ 1. As noted above, the power to enforce a settlement does not depend on whether it is incorporated into an order. *Confederate Mem'l Ass'n, Inc.*, 629 A.2d at 39. In this case, at the May 13 hearing, the Government indicated that the OIC required the Respondent to surrender the license by May 15, 2015. *Supra*, at ¶ 4. The Respondent affirmed that it agreed with this condition on the record. *Id.* The Board then voted unanimously to approve the OIC at the hearing based on this agreement. *Id.* At this point, per *Confederate Memorial Association*, the Respondent was bound to comply with the agreement upon approval, not ignore it.

b. The Board has the authority to exercise the revocation section of the OIC based on the Respondent's failure to comply with the Order's terms.

29. Upon violation of the OIC, the Board was well within its right to revoke the Respondent's license in accordance with the Order. As noted above, the Board is entitled to summarily enforce a settlement based upon the demonstration of a violation and the excuse for the violation is "comparatively unsubstantial." *Confederate Mem'l Ass'n, Inc.*, 629 A.2d at 39.

30. In this case, the Respondent conceded that it submitted the license at least three weeks after the deadline and provided an unsubstantiated excuse that it lost the license. *Supra*, at ¶¶ 1, 6, 10. Yet, the Respondent knew on May 13, 2015, that the OIC required submission by May 15, 2015. *Supra*, at ¶ 4. Even if the Respondent suffered amnesia between May 13, 2015, and May 18, 2015, the Board's Order served on May 18 indicated that the license had to be surrendered three days earlier. *Supra*, at ¶ 5. Further, if we accept the Respondent's factual recitations as to its search for the license as true, it was well aware on May 13, 2015, that it did not have the license. Rather than wait for the Government or the Board to chase it down, the Respondent could have notified the Board of its issues regarding compliance with the Order, requested an extension, or petitioned for another form of relief (e.g., withdrawal of plea) during the reconsideration period. *Supra*, at ¶ 8(b), (f). Nevertheless, the Respondent chose not to avail itself of these opportunities, ignored the deadline contained in the OIC, and left the Board to its own devices, which resulted in the issuance of the revocation order. *Supra*, at ¶ 7. Under these circumstances, where the Respondent failed to abide by the terms of the OIC and the excuse for the violation involves the Respondent's irresponsible disregard of its legal obligations, the Board is entitled to enforce the agreement as indicated in the OIC Order. *Supra*, at ¶ 5.

⁶ These powers do not just apply to licensees that violate their OICs, but also the Government. *White v. United States*, 425 A.2d 616, 618 (D.C. 1980) (noting that the "government has a duty to fulfill its promises in a plea bargain.")

IV. THE RESPONDENT’S FAILURE TO FILE A TIMELY MOTION FOR RECONSIDERATION RELATED TO BOARD ORDER NO. 2015-266 BARS RECONSIDERATION OF THAT ORDER.

31. Under § 25-433(d)(1), the Respondent had ten days to file a motion for reconsideration upon service of Board Order No. 2015-266. D.C. Official Code § 25-433(d)(1). Similar to other reconsideration periods, the time period related to filing a motion for reconsideration under Title 25 of the D.C. Official Code is jurisdictional. *See e.g., Farrow v. J. Crew Grp. Inc.*, 12 A.3d 28, 32 (D.C. 2011) (finding the 10-day period in Rule 59(e) jurisdictional).

32. Nevertheless, no motion for reconsideration related to Board Order No. 2015-266 was received during the ten day reconsideration period related to this Order. *Supra*, at ¶ 8(a)-(b). Had the Respondent filed a timely motion for reconsideration related to Board Order No. 2015-266, the Board could have held a hearing, considered modifications of the Order, or otherwise redressed the Respondent’s grievances related to that Order that should have been apparent to the Respondent as of the date of the status hearing. *Supra*, at ¶ 1; *see also Aziken v. D.C. Alcoholic Beverage Control Bd.*, 29 A.3d 965, 969 (D.C. 2011) (“[a]dministrative and judicial efficiency require that all claims be first raised at the agency level to allow appropriate development and administrative response before judicial review.”); *Davis & Associates v. Williams*, 892 A.2d 1144, 1151 (D.C. 2006) (“some compelling reason must be shown to excuse a party from failure to exhaust administrative remedies”). Therefore, the Respondent is not entitled to reconsideration of Board Order No. 2015-266.

V. ANY FAILURE TO SERVE THE REVOCATION ORDER ON THE RESPONDENT’S COUNSEL DOES NOT MERIT DELAYING THE ISSUANCE OF THIS ORDER.

33. In its motion for reconsideration, the Respondent indicates that it has not been served with Board Order No. 2015-279, which contained the revocation order. *Pet. for Recon.*, at 1 n.1. Even if any service requirements were not followed, no remedy pursuant to § 1703.8 is required. Under § 1703.8, the “[f]ailure to serve all parties of record, or their designated representatives, may result in the Board delaying action on the matter at issue until such time as service is properly accomplished.” 23 DCMR § 1703.8 (West Supp. 2015). In this case, there is no need to delay a decision in this case, because the Respondent has filed a motion for reconsideration on other grounds, has not requested proper service, has not requested an extension, or otherwise indicated that it does not have the order; therefore, there is no reason to delay the issuance of this Order.

VI. REVOCATION IS A FAIR AND JUST REMEDY AND IN THE BEST INTERESTS OF THE PUBLIC.

34. In its motion, the Respondent requests that the Board consider potential prejudice to allegedly innocent “investor members,” because they will be prohibited from holding a license

for five years under D.C. Official Code § 25-821.⁷ *Pet. for Recon.*, at 3. The Board is unmoved. If the Council wanted the Board to consider a license holder's level of involvement in the operations before applying the exclusion provision, it could have written such a factor into the statute. Instead, as a matter of policy, the District has decided that all license holders, regardless of the involvement in the operations, must be held responsible for the establishment's failure to comply with the law. To hold otherwise, would counter the intent of § 25-821 and reduce the incentive of license holders to comply with the law, ensure the safe sale and service of alcoholic beverages, and otherwise respect the quality of life of the community.

ORDER

Therefore, the Board, on this 15th day of July 2015, hereby **DENIES** the Motion for Reconsideration filed by the Respondent. The revocation of the Respondent's license is **AFFIRMED**.

The Respondent is **ADVISED** that its failure to comply with Board Order No. 2015-266 shall be considered in any future character and fitness review conducted by the Board pursuant to D.C. Official Code §§ 25-301(a)(1) and 25-301(a-1).

A copy of this Order shall be sent to the Respondent and the Government.

⁷ Even if it were relevant, the Respondent does not identify these investor members or otherwise present factual support for its proffer that some members had no involvement in the operations.

District of Columbia
Alcoholic Beverage Control Board

Ruthanne Miller, Chairperson



Nick Alberti, Member

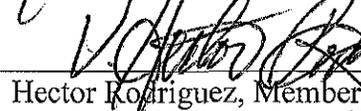


Donald Brooks, Member

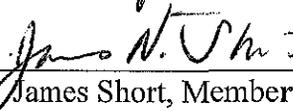
Herman Jones, Member



Mike Silverstein, Member



Hector Rodriguez, Member



James Short, Member

Pursuant to 23 DCMR § 1719.1, any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the 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).