DISTRICT OF COLUMBIA

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ALCOHOLIC BEVERAGE CONTROL BOARD

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MEETING

IN THE MATTER OF:	
S&W D.C. LLC t/a Smith & Wollensky	
112 19th Street NW	**Motion Hearing**
License No. #60001	
ANC 2B	

FEBRUARY 11, 2015

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

PRESENT:

RUTHANNE MILLER, Chairperson

DONALD BROOKS, Member

NICK ALBERTI, Member

HECTOR RODRIGUEZ, Member

MIKE SILVERSTEIN, Member

JAMES SHORT, Member

HERMAN JONES, Member

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

4:41 p.m.

CHAIR MILLER: Okay, we're back on the record. We have one more case in the afternoon, and that is Case No. 14-CC-00121, Smith & Wollensky, located at 112 19th Street, Northwest, License No. 60001 in ANC 2B, and this is a Motions Hearing.

Smith & Wollensky filed a Motion for Reconsideration, for findings that Petitioner committed an egregious violation of D.C. Code Section 25-781. This was filed in opposition to that motion.

So, we'll let the parties introduce themselves for the record.

MR. KLINE: Yes, good afternoon. Andrew Kline on behalf of the Licensee.

Madam Chair, I think that what we're here before the Board on today is actually Case No. 13-CC-00076, just so the record is clear, because our Motion for Reconsideration was filed in the older case.

CHAIR MILLER: Okay.

MR. KLINE: So, I just want the record not to be confused, and so that we're clear.

CHAIR MILLER: Okay, so, on our agenda, it was listed -- I mean, on our calendar is was listed 00121, and I see on your motion, it's 00076. So, that's what we're on --

MR. KLINE: Correct.

CHAIR MILLER: -- is that right? Okay, 00076, okay, thank you for correcting that.

MR. KLINE: Absolutely.

MR. MIRKOVIC: My name is Ned Mirkovic. I'm the general manager of the Smith & Wollensky at 1112 19th Street, Northwest, Washington, D.C.

CHAIR MILLER: Could you just --

MR. KLINE: Madam Chair, we had a letter that was filed previously, and I just realized now, as I stated that, it's actually

filed in the other case, but the other case had originally been scheduled for hearing today, and that letter authorized Mr. Mirkovic to represent Smith & Wollensky in the -- here, on behalf of the licensee, on both of the dates, or on here.

CHAIR MILLER: Okay, all right, could you spell the last name, please?

MR. MIRKOVIC: M-I-R-K-O-V-I-C.

CHAIR MILLER: Okay, Mirkovic? Is that it?

MR. MIRKOVIC: Mirkovic.

CHAIR MILLER: Mirkovic, okay, Mirkovic, got it. Thank you. All right, sorry about that.

MR. MIRKOVIC: It's okay.

CHAIR MILLER: Okay, all right. Ms. Gephardt, did you introduce yourself?

MS. GEPHARDT: Chrissy Gephardt on behalf of the Office of the Attorney General for the District of Columbia.

CHAIR MILLER: Mr. Kline, did you

represent yourself -- introduce yourself?

MR. KLINE: Yes, Andrew Kline, on behalf of the Licensee. I did.

CHAIR MILLER: Okay, so, you have a Motion in Opposition and so, we'll hear from each of you, whenever you're ready.

MR. KLINE: Yes, thank you, Members of the Board, and thank you for hearing on -- an argument on this Motion today.

Just by way of background, there are two sale to minor violations that have been before the Board. One of them is currently pending, which we -- the case that was originally scheduled for hearing today, and there is a prior sale to minor charge in this case that we're talking about today, which is 13-CC-00076.

Just the reason that we're here is because of procedurally, the way this case proceeded, in the event that a Licensee is found responsible in the second case, this

high-end steakhouse is looking at a total of a nine-day suspension minimum and several thousand dollar fines.

So, the issues in this case for this Licensee get to be pretty important, because his business cannot really operate on a daily basis without an alcohol license, and it's detrimental to the business. It doesn't affect the real issues, but I just give you that by way of background, as to some explanation as to why we've gone through all this trouble with filing motion and the citations and what have you.

The issue before the Board is this. As the Board is aware, the District of Columbia enacted an amendment to the ABC licensing law, which requires a written warning on first offense, sale to minor charges, except in case where there is an egregious violation.

Specifically, what the language says in D.C. Code 25-830(e)(1) is except for

an egregious violation, as may be later defined by ABC rulemaking, no licensee shall be found to be in violation of a first-time violation of 25-781 Sale to Minors, unless the licensee has been given written warning or received a citation for the violation or have enforcement proceedings before the Board during the four years preceding the violation.

Now, in this case, 13-00076, there was no violation within the prior four years, and what the statute did is, it said that the Board would, by rulemaking, which I know most of you were aware of because we've lived through this for many, many years, by rulemaking, would establish what an egregious violation is.

Now, that was passed by rule in 23 DCMR 807, which says that the Board may give warnings for first-time sale to minor offenses, excluding egregious sale to minor violations.

Egregious shall be defined as the

sale to minor violation where the licensee one, sold or served an alcoholic beverage to a minor who was unable to produce a valid identification, after a request from the licensee to do so, two, intentionally sold an alcoholic beverage to a minor, or three, can be established to have had a pattern of prior alcoholic beverage sales or service to minors.

So, those are the three instances which are egregious. I know the Board at this point, is very aware -- well aware of those three circumstances under which a warning is not required.

Now, the regulation says 'maybe give warnings', but the statute says 'shall give warnings', and the statute is what controls, as that's the law that's gone to Congress and been reviewed.

So, the law of D.C. is that there shall be warnings, except where there is an egregious violation.

Now, the facts of this case 13-

00076, they're really pretty simple, is the undercover operatives went in, they each ordered beers, they were not carded, and they were served.

There is nothing in the report to indicate that any of the other factors are present. There isn't any indication that anyone was asked to produce an ID, in fact, the facts are actually contrary to that, they weren't asked for an ID, or that anyone knew that they were underage and that it was intentionally sold, nor is there anything like a pattern.

I don't think there's really any issue that this first offense is not an egregious violation.

Now, what happened after that, after the incident which gave rise to the charge, there was the Board's standard waiver consent order, which was sent to the ABC and it says, you know, you can -- you can accept this and you can either pay a $2,000 fine with

a five-day suspension, four-days stayed, one day served, or pay a $3,000 fine and have all five days stayed.

Now, the Government argues that when the licensee signed this form, that they waived their rights to context whether the charge was egregious, and that's really the crux, I think of the issue that's before you today.

These proceedings are governed by the Administrative Procedures Act of the District of Columbia. The Administrative Procedures Act is the Act that contains really, what are the Constitutional protections of people that are affected or might be affected by acts of the Government. It's essentially due process. It's what due process is all about, giving people notice as to what it is that they might be facing, what the charges are and then having the hearing, a contested case type hearing before the Board.

So, we're talking about due process rights, when we're talking about the Administrative Procedures Act.

Now, it is clear that one can certainly waive the right to a hearing. We don't contest that at all.

However, the case law is very, very clear, that in order for a waiver of one's due process rights to be effective, the waiver must be voluntary, knowing and intelligently made.

Now, and I cite a couple cases. These are Supreme Court cases, D.H. Overmyer Company versus Frick. It's a 1972 case, for the record 45 U.S. 174, also Fuentes versus Shevin, 407 U.S. 67. Those of us that went to law school, some of these cases, we know them because they're really poor constitutional law due process cases.

Now, what is the -- voluntary is not an issue. I mean, no one is saying that someone held a gun to this licensee's head and

made them sign this form, and made them waive the right to a hearing.

The issue is knowing. That's really the issue, and the other thing is that you understand what your rights are, and you knowingly waive them, you understand what it is that you're waiving.

Now, this form is deficient. It doesn't really tell the licensee that it's waiving.

Now, what went on here? What went on here is apparently, the Board made some finding that this fell into one of the three categories of an egregious violation. We don't even know which one. No one ever told us. Even at this late date, there has been notice to the licensee that, "We made a finding that you committed an egregious violation. Here is why we made that finding," one of the three issues.

"You have a pattern. It's clear it was intentional, or you asked for an ID,

one wasn't produced and you sold anyway." We don't know what it was.

There was a finding that was made. We have no idea what that finding was.

Now, without that information, the licensee is at a loss to be able to contest. But even more importantly than that, what's really missing from this form is not that we found an egregious violation. But what's missing from this form is, we found one, two or three, absent that finding, you would have been entitled to a warning, if you contest it, you're entitled to a hearing. It's really very, very simple.

Now, I believe, and I think the Board will probably agree with me, that this process, consent order the process, the stop settlement process, was set up to simplify matters, to be able to have licensees make decisions about the simpler violations, without dealing with an attorney, to be able to look at these forms and say, "Yes, okay,

well, I guess we did it. We'll take our medicine, sign the form and pay the fine."

A licensee wouldn't know by signing this form, by reading this form that they have been found to have either served, after checking an ID and -- or asking for and not been given -- having been given an ID, or that they've engaged in a pattern, or that they were found to have -- willfully found, to someone underage. They would have no idea that that's what the Board found.

So, we would submit that that's what's required for knowing waiver, not just, "Here is a form, sign it," and not be told that the Board made a determination that affected their rights.

Now, in this case, that determination deprived the licensee of its right, under the statute, and it is a right under the statute, to get a written warning, in the absence of an egregious violation.

As I said, the facts of the report

establish, we believe conclusively, that there was no way that one could find, that a reasonable person could find that this licensee, in this case, committed an egregious violation. So, we would submit we're entitled to a warning.

In closing, what I would ask you to do is put yourself in the shoes of the licensee. Pick up the waiver consent form, forget everything that you've learned, which is a lot during all of your years on the Board, about this process, about what the word 'egregious' means, and read this form and ask yourself this question.

Does anything on this form tell you that the Board made a finding that deprives you of your right to written warning? The terms 'written warning' don't even appear on this form.

So, with that, we would submit that any waiver in this case was not knowing, was therefore, not effective, and should not

be considered as the basis for not looking at the underlying facts and re-determining in this case, whether there has been any waiver that would prevent the Board from doing so.

At the conclusion, we would ask that the Board vacate the previous consent order and provide the required written warning to the licensee for the first sale to minor charge. Thank you.

CHAIR MILLER: Thank you. Ms. Gephardt?

MS. GEPHARDT: Yes, so, what we have here is very clearly the morning after -- that this is a morning after case, which is a classic case of Petitioner wanting to go back and trying to litigate the case.

The original consent order, as you've seen, clearly states, this is a sale to minor violation according to the state, and it says to settle the matter and to avoid the time and the expense of litigation, should the matter proceed to a Show Cause Hearing, up at

the top it says, "A sale to minor first egregious offense."

As he said, it's not that it's unclear. You know, it's not that the person is not able to read this and understand, necessarily, that this person, Catherine Tsoukalas, CFO signed it, dated it, paid the fine, a little bit of, "Let's put this behind us. Let's pay this." We have to assume she read -- she read this in full, so, egregious offense.

If this was something that she thought was odd or offensive or something that she might want to think about, she might say, "Wait a minute. Egregious? This wasn't egregious. I want to go to a hearing. This is -- I don't even know what they mean by this." She had every right to go to a hearing.

The other thing that Mr. Kline talks about is that there is no mandate that ABRA give licensees a written warning, in

terms of -- not necessarily a written warning.

I mean, what I'm saying is, they just need to give some sort of a citation or proceeding that -- or a warning that this has happened, and this is what he said, according to 25-830(e)(1).

So, I believe that, you know, in this case, the person is being advised of their rights, that there is due process, that -- you know, that their rights are not being trampled upon, that they have the option of going to a hearing.

In this case, the individual decided that -- the establishment decided that they were going to waive those rights, pay that fine, sign on the dotted line and again, I believe this is a case of regret, and in looking back they say, "Oh, wait a minute. This is signing something that said it was an egregious offense. Oh goodness. Well, we better go figure this out."

So, I just think that -- I think

that Petitioner is looking for ways to come up with a reason to try to relay their case, because the case of the sale to minor. And that's all I have. Thank you.

CHAIR MILLER: Okay, are there Board questions? All right, go ahead, Mr. Alberti.

MEMBER ALBERTI: Yes, so, Mr. Kline, just so I understand. I think there are kind of two parts to your motion.

I mean, I know that you have one outcome for this, but there really are kind of two parts to it.

One, you're arguing -- first of all, you're arguing that this is not an egregious violation.

MR. KLINE: Correct.

MEMBER ALBERTI: You're arguing that, right? But even -- and you're also arguing, even if it had been an egregious violation, the licensee did not knowingly consent to this order. Is that correct?

MR. KLINE: Not precisely.

MEMBER ALBERTI: All right, correct me then.

MR. KLINE: Because if it was an egregious violation, and there are facts to support the finding of an egregious violation, we have no quarrel.

I mean, at that point, it really doesn't matter, in terms of signing this waiver of consent order. They could have done that, if there were an egregious violation, or they could have gone to hearing and the Board would have a finding, presumably, that they were in violation, and at that point, they would have had a penalty, all right.

So, the whole argument stems on the fact, or rests on the fact, that there are not facts before the Board, there are not facts in the report, that support a finding of an egregious violation, okay.

So, I'm happy to take your questions.

MEMBER ALBERTI: Well, I'm confused, because you made a point of these cases that talked about -- that talked about someone admitting to a violation without knowing -- knowingly having knowledge of the law, knowing -- a waiver of rights --

MR. KLINE: Correct.

MEMBER ALBERTI: -- without knowledge.

MR. KLINE: Correct.

MEMBER ALBERTI: So, why --

MR. KLINE: The knowledge that's missing here. The knowledge that is not here, and that is not contained on this form, which we believe the Agency has an obligation, to tell the licensees before they sign this form, is that in the absence of a finding of an egregious violation, they're entitled to a written warning.

They, by signing this form -- the effect of signing this form is waiving their right to a written warning.

MEMBER ALBERTI: All right, so --

MR. KLINE: But they were never told that.

MEMBER ALBERTI: So, if in the hypothetical, you would conceive, you know -- if we had a case before us, we'd concede that those actions are egregious, you would still argue that this waiver was signed without knowledge?

MR. KLINE: Yes, but it's sort of no harm, no foul at that point.

MEMBER ALBERTI: Well, true, but if that's -- but all I'm trying to understand here --

MR. KLINE: Oh, sure --

MEMBER ALBERTI: And I understand the components of your motion.

MR. KLINE: Yes, but Mr. Alberti, a client -- a defendant, a respondent is entitled to due process, whether they're guilty or not.

So, I'm not arguing that -- I

certainly would not argue, "Well, they're guilty and they're not entitled to due process."

Even if it were an egregious offense, then the licensee is still entitled, because the other alternative is, they have the right to a hearing, all right.

If it's an egregious offense, then they either accept the punishment or they get a hearing. If it's not an egregious offense, then they get a written warning.

So, yes, I would argue the same thing, even if the facts supported. The only thing that would do at that point would be allow the licensee to litigate, whether it as an egregious offense or not.

MEMBER ALBERTI: Okay.

MR. KLINE: Because that, they're entitled to litigate. I mean, they're entitled to assert that it's not an egregious offense. The facts aren't there. It doesn't support it.

The Board has to make a finding. Remember, the Board has got to make a finding --

MEMBER ALBERTI: I understand.

MR. KLINE: -- and the finding is always subject to attack or appeal, by the party that's affected by the finding. That's the Administrative Procedures Act.

MEMBER ALBERTI: So, when was this filed?

MR. KLINE: This motion?

MEMBER ALBERTI: Yes, this motion.

MR. KLINE: Roughly two weeks ago. Thank you, January 23rd.

MEMBER ALBERTI: January 23rd, 2015?

MR. KLINE: Right.

MEMBER ALBERTI: Okay, thank you. I have no further questions right now. I may come back and ask additional questions.

MR. KLINE: And that was within 10 days of our learning that the Board -- not

from the Board, but learning for the first time, that the Board had made a finding that --

MEMBER ALBERTI: Okay, so, that was my other question. So, who learned?

MR. KLINE: I learned on behalf of the licensee.

MEMBER ALBERTI: Okay, so, it was within 10 days of your or -- I think what you're saying is within 10 days of the licensee learning --

MR. KLINE: That they had --

MEMBER ALBERTI: -- that they had --

MR. KLINE: -- waived their right --

MEMBER ALBERTI: -- potentially lost their rights.

MR. KLINE: Well, at that point, they had lost them.

MEMBER ALBERTI: All right.

MR. KLINE: Assuming --

MEMBER ALBERTI: All right, okay, that's your contention.

MR. KLINE: Assuming that there are facts to support --

MEMBER ALBERTI: I'm not arguing the 10 days. I just to know --

MR. KLINE: Okay.

MEMBER ALBERTI: So, it was after January 1st, that this all sort of culminated and knowledge by the licensee, that, "Oh, maybe I shouldn't have done that." Is that right?

MR. KLINE: I mean, you can put it that way, but I -- there wasn't any reason -- there wasn't, at that point, any reason to know why they shouldn't have done it.

MEMBER ALBERTI: Well, I mean, there might have been a reason until June 26, 2014, when they had their second violation for the sale to -- well, second allegation of a sale to minor.

MR. KLINE: Right, and to be

clear, attached to our motion -- and let's -- I mean, let's put this in plain English.

MEMBER ALBERTI: Yes.

MR. KLINE: Just to have it --

MEMBER ALBERTI: Yes, yes, let's do that.

MR. KLINE: Okay, the second violation comes down the pike, and well, wait a minute, why didn't they get a warning on the first one, and you'll see attached to our motion is an email from Ms. Gephardt, which is the only notice this licensee has received on this, for Smith & Wollensky, the reason that they did not receive a warning for Case No. 13-CC-00076 is because the Board determined that the facts of the case were egregious.

MEMBER ALBERTI: So, okay, and when was -- when were they served with a Notice of Show Cause Hearing for the Case No. 14-CC-00121?

MR. KLINE: I'm not sure exactly. The notice is dated 12/3/2014.

MEMBER ALBERTI: I've got September 26th, 2014. That's what I'm hearing. Service of the notice was September 26th, 2014.

MR. KLINE: I'm not sure that's quite possible, when the notice is dated 12/3/2014.

MEMBER ALBERTI: Well, somewhere around that date. So, it was prior -- somewhere in that time frame, they would have gotten notice.

MR. KLINE: Some time before the first of the year.

MEMBER ALBERTI: Okay.

MR. KLINE: The notice that I'm looking at is dated 12/3/2014, signed by the Chair. So, I don't know how --

MEMBER ALBERTI: Okay.

MR. KLINE: -- it could have been served in September?

MEMBER ALBERTI: Pardon?

MS. GEPHARDT: Yes, I see the same

thing.

MEMBER ALBERTI: Okay, so, maybe my -- maybe the date I was given is wrong. Okay, fine.

MR. KLINE: I'm not sure it matters for purposes of our discussion, but some time between September and December, yes, they were served with the second notice.

MEMBER ALBERTI: All right. Was it signed?

MR. MIRKOVIC: Yes.

MEMBER ALBERTI: I mean, I have Case No. -- let me make sure I have the right case here. Case No. 14-CC-00121, right, and it's signed by Mr. Mirkovic?

MR. MIRKOVIC: Yes.

MEMBER ALBERTI: Yes, it's signed by Mr. Mirkovic on 9/26/2014.

MR. KLINE: Could be. I mean, it just seems odd to me that that's before the date of the notice.

MEMBER ALBERTI: All right.

MR. KLINE: But we all sometimes find problems.

MEMBER ALBERTI: I don't know, but we have service.

MR. KLINE: Yes, there's no disputing that.

MEMBER ALBERTI: Okay, all right, fine, and at that time, Mr. Mirkovic may have learned somewhere shortly after there, that this -- if proven -- if proven, that event, that second event would carry with it, a really severe fine because of -- okay, thank you.

MR. KLINE: We don't dispute that at all.

MEMBER ALBERTI: Thank you. I understand. Just want to make sure. All right, thank you.

CHAIR MILLER: Others? Mr. Jones?

MEMBER JONES: Thank you, Madam Chair. Mr. Kline, I just want to confirm.

So, the basis in the -- the

foundational principle upon which you're making your argument and assertions are not unique to the facts of this particular case, or are they?

MR. KLINE: I can't --

MEMBER JONES: Sorry, let me clarify.

MR. KLINE: Okay.

MEMBER JONES: This could be applied to other licensees, if they fell into this same scenario that you just described, and I'm specifically -- referring specifically to what you're considering to not be present in the notification received by or sent from ABRA, in terms of the waiver document?

MR. KLINE: Potentially, yes.

MEMBER JONES: Okay, but --

MR. KLINE: But I think it only gets to be important if there are not underlying facts to support -- as we contend there are not in this case, to support a finding of an egregious violation.

MEMBER JONES: Understood.

MR. KLINE: And that's the only time it really gets to be relevant. Otherwise, it's the second -- it was -- the first one was egregious. The Board would have been right, not to instruct the staff to give a written warning, and there would be -- you know, if there were subsequent violations, they would be subsequent violations.

So, it seems to be constrained to whatever cases may have been, if the Board mis-applied the regs, in terms of finding an egregious violation, which we think the Board did in this case.

MEMBER JONES: Okay, and I'd just say, I'm trying to find a way to say this, so it doesn't come out the wrong way.

But I think you -- I think you, as an attorney for many licensees, would argue that we -- our findings of an egregious violation, you would have contention with that, based on that your interpretation of the

facts surrounding individual licenses -- licensees, and the nature of our findings in those cases.

MR. KLINE: I can't say that. I don't know of too many cases, like I can't really think of any offhand, frankly, where --

MEMBER JONES: Good, go ahead.

MR. KLINE: -- the Board did not give a warning on an -- and I'm talking about the ones that I've been exposed to. I'm sure there must be cases.

But I'm not aware of cases where the Board didn't give a warning on a first offense, that I can think of offhand, and I certainly can't think of any where a warning was not given, and we contested it, other than administratively.

I had a few, where we contacted, you know, the office and said, "Wait a minute. This is a first offense. Why didn't we get a warning?" It's like, "Oh, yes, yes, you're right. You're supposed to get a warning," and

then it's corrected.

But I'm not aware of any where we had to come in and say, "What do you mean? You know, we're supposed to get a warning and we didn't get one."

MEMBER JONES: Okay, fair enough. Okay, that's all I have.

CHAIR MILLER: Others? Okay, Ms. Gephardt, do you -- what is your legal opinion on this case, whether or not the offense was egregious?

MS. GEPHARDT: Honestly, the reason I didn't address that was because at this point, it doesn't matter, because you know, there's no point in going back into the case, because it's not -- based on my argument, we can't go back into the case, because it's been adjudicated. It's done. It's over. I mean, the case is --

CHAIR MILLER: So, if it were -- go ahead.

MS. GEPHARDT: They've paid the

fine. They've signed on the dotted line, it's like any other case, and you can't go back and try the facts again.

CHAIR MILLER: So, you consider that adjudicated.

So, if the facts were to -- would be that it wasn't egregious, and the Board erred in sending that for settlement, your position is it doesn't matter, is that right?

MS. GEPHARDT: Exactly.

CHAIR MILLER: It doesn't matter if the Board made a mistake, in sending to staff settlement, by making a finding that it was egregious.

MS. GEPHARDT: I honestly have to be honest with you. I haven't had a chance to thoroughly review the facts of that case, because I think I'm focused on this other case.

CHAIR MILLER: But I'm just going on your theory. I mean, your theory is --

MS. GEPHARDT: My theory is that -

-

CHAIR MILLER: -- it doesn't matter.

MS. GEPHARDT: -- it doesn't matter that this case -- that case is over.

CHAIR MILLER: So, it doesn't matter if somebody's rights were violated, their due process rights were violated, and they got -- they're going to get stuck with a big fine because the Board made a mistake in characterizing it as egregious.

It just doesn't matter because too bad, they signed the dotted line. Is that your position?

What would your position be if -- well, let me ask you. Are you aware that there is an opinion by the Office of the Attorney General on our website, which goes exactly to this point? August 30th, 2013, we were advised concerning the District's alcoholic beverage sale to minor law. Are you aware of that opinion?

MS. GEPHARDT: I have seen the opinion.

CHAIR MILLER: The opinion starts out with the -- that our office presented this. I'll just read this first paragraph.

"An undercover minor walks into a bar with an ABRA investigator to conduct a routine compliance check in accordance with the District's underage drinking prevention program."

"The minor orders a Heineken beer. The server fails to ask for identification and provides the minor with the beer."

"The minor touches the bottle and an investigator confiscates the drink. The licensee has no prior history of violating the District's sale to minor law," and then the question goes as to whether or not this could be considered egregious or whether a warning is mandatory in this case.

The conclusion was that it is not egregious and a warning is mandatory.

MS. GEPHARDT: Like I said, I really haven't -- I'd have to go back and read it, because you're more familiar with it than I am.

MR. KLINE: What page? There is not that much to it. I mean, the facts of -- that you recited, sound like the facts of the case that we're talking about, except there were two undercover operatives.

CHAIR MILLER: That's why I read it.

MR. KLINE: That's the same case.

CHAIR MILLER: That there is an Attorney General opinion right on point.

MS. GEPHARDT: Well, then there were two young people, so it's one of the -- you know, and like I said, I don't know exactly what the made them consider this egregious, but I --

MEMBER ALBERTI: Well, I'll tell you --

CHAIR MILLER: Excuse me, I'll let

you know if you're --

MEMBER ALBERTI: Okay, great.

MS. GEPHARDT: All I can say is that yes, I don't know. I mean, I wasn't there with the student -- I mean, investigator, when they decided that this was going to be an egregious offense, other than what you've just said, that -- I mean, I can only -- I can make an argument that two minors were served, yes, that's egregious and --

CHAIR MILLER: Okay, so you're --

MS. GEPHARDT: -- that clearly states under 21.

CHAIR MILLER: But you haven't taken the time to analyze whether or not the facts of the case rise to the level of egregious?

MS. GEPHARDT: No, because they took the plea deal.

CHAIR MILLER: So, they took the plea deal. Okay, so, let's go to the plea deal.

So, a person -- a person comes in and not with an attorney, and they look at this consent -- this waiver, and it says, "Sale to minor, first egregious offense."

Do you think that they would know that egregious is a legal term and that they knew exactly what they were waiving, but because that 'egregious' term is used in the parenthesis under 'waive of consent order'?

MS. GEPHARDT: I think that if anybody feels uncomfortable with signing something, that you would -- you know, institute your right to go to a hearing, because why would you sign something, especially like this, that affects your rights? Why would you sign something that you don't even know what you're getting yourself into if you didn't understand it?

You know, I mean, you can't babysit people, you can't hold their hand. These are adults, they run businesses.

CHAIR MILLER: So, even if the

Government is wrong in the law, that is the premise for the signing of the waiver, it's got -- your view is, "Well, too bad," because they -- we don't -- you don't think the Government has any obligation to be open about what the law is?

MS. GEPHARDT: Well, I'm not saying I'm not open to what the law is. I just think in this case, it's just -- it's -- the case has been adjudicated.

CHAIR MILLER: Okay.

MS. GEPHARDT: But I'm not saying that in other cases -- if this were a live case that's before the Board and we're having a hearing, and it's up for appeal, well, when people say 'appeal', there is a right to appeal this case. You guys do it all the time.

CHAIR MILLER: So, if an individual signs off without an attorney, and the law is contrary and the law is actually put up on the website by the Office of

Attorney General, it doesn't matter?

MS. GEPHARDT: Well, I mean, like I said, they're classifying it as egregious, but they have every right to contest it. I mean, we're not just saying it's egregious

CHAIR MILLER: Well, let me ask you this. What if the Board -- if the Board made a mistake in sending it to staff settlement, would that be grounds for undoing the result here?

MS. GEPHARDT: Well, at that point, I mean, I don't -- I don't know, at that point, if that's something that -- is that something that ABRA would do at that point? I don't know. I don't know.

CHAIR MILLER: Okay.

MS. GEPHARDT: I don't know, maybe that's -- Martha would be able to answer that. I don't know.

CHAIR MILLER: Okay, all right.

MR. KLINE: Madam Chair, if I may?

CHAIR MILLER: Yes.

MR. KLINE: Ms. Gephardt argues that they have the right to contest that it's been egregious. Well, how do they know that?

I mean, there is nothing in this form that tells the licensee that they have that right, but more importantly, more importantly, nobody is -- there is nothing in this form that tells them what that means, what the implications of that are.

It's as if you got a traffic ticket or something, and you went to MVA and they said, "Yes, sign here and you can pay a $500 fine," but they didn't tell you that you had the right to go to traffic school and you wouldn't have to pay the $500 fine.

I mean, a waiver, in order for it to be effective, and this is a waiver, I mean, the Government argues it's a waiver. We agree, it's a waiver.

But in order for a waiver to be effective, it has to be made knowingly and intelligently. Not without having been given

the facts as to what you're waiving, and the facts were not given here.

What's being waived -- I mean, let's be very clear and parse it very clearly.

What was waived here in our opinion, and particularly given the Attorney General opinion, of which I must confess, I was unaware of. What the licensee waived was its right to a written warning, which is guaranteed under the statute.

The statute says that they shall be given a written warning. By signing this form, it's the Government's position that they waived that right to a written warning, but there is nothing in this form that tells them that that's what they're waiving, and that's our difficulty.

That's why it's not a knowing waiver. They weren't given the facts to intelligently make a decision as to what they were waiving.

MS. GEPHARDT: I don't know that

the Government is required to tell people -- that they did not give them a written warning for their first offense. I don't think that -- I don't think that's required.

MR. KLINE: Well, then read Overmyer versus Frick.

CHAIR MILLER: Did you cite that in your pleading?

MR. KLINE: I cited it actually to the Board on the record before.

CHAIR MILLER: When?

MR. KLINE: On the record before, I gave the citation. It's 405 U.S. 174. It just stands for the proposition that in order for a waiver to be effective, it must be knowing and voluntary.

CHAIR MILLER: Okay, thank you.

MEMBER ALBERTI: I'm thinking there's actually two prongs of Mr. Kline's argument.

I mean, you cannot argue -- you cannot argue that this licensee's rights were

violated, because they weren't told that one of the options was a warning, unless -- unless you contend that the Board made an error, and that is your contention, all right.

But if the Board -- if the Board maintains its position that it did not make an error, then the licensee's rights were not violated because this form, the consent form says, "Hey, you really have a right to -- you have a right to litigation. You have a right to show cause."

All right, and you know, I would argue -- I would argue even if they didn't know that they had a right to warning, it's still there is -- there is -- it's very clear that they have a right to a process in which they can contest this, and I think that's the bottom line.

So, I'm not sure I'm buying that their rights were violated. I mean, I'm looking to what -- whether the Board made -- made your argument -- I think I'm going now,

we -- the discussion of whether the Board should maintain its position on whether this is egregious.

To that point, Ms. Gephardt here is not -- is not here to argue the Board. I mean, the Board has this set of facts before us. We're not in the Show Cause and we're not litigating the facts of this case. It is up to the Board to go back and review the facts of this case. Ms. Gephardt here isn't litigating whether they're -- whether there's a violation of an egregious offense.

That's not her role here. I mean, the facts are the facts, and the Board, I think needs to rely on the documents that we have, if we consider -- in considering your motion, we need to just rely on the facts that we have before us, when we made our initial decision.

MR. KLINE: And I would respectfully ask the Board under which of the three prongs of 807 did the Board find the

facts in 13-CC-00076 to constitute and egregious violation, as that's defined in the regulations?

MEMBER ALBERTI: Just one moment. Go ahead.

CHAIR MILLER: Mr. Jones?

MEMBER JONES: I would just recommend that given the request that was made that -- and given the time that has passed, we just take the time, sit down and consult with legal, and my recommendation would be to provide written feedback to Mr. Kline, regarding his request at that, to make sure we don't speak inappropriate or out of turn.

MEMBER ALBERTI: I absolutely agree. I think that we owe -- in our final decision on this -- on this motion, we owe the parties clarity on the basis for whatever decision we reach.

MR. KLINE: And I just want to be clear, I mean, Ms. Gephardt cited a number of factors or facts, which in her mind,

constitute an egregious offense.

Well, that's not what is controlling.

MEMBER ALBERTI: I don't think she did. I didn't hear that.

MR. KLINE: Yes, she argued that, well, there were two people. Maybe that's what made it egregious, that there were --

MEMBER ALBERTI: No.

CHAIR MILLER: No, go ahead, Mr. Kline, go ahead. Only one person can speak at a time.

MR. KLINE: I'm sorry, but my point is this. I mean, that's neither here nor there, but that was on the record.

But the point is, it's not my opinion. It's not Ms. Gephardt's opinion. It's not your opinion. What governs is 23 DCMR 807. Egregious isn't a term that floats out here and there. It's defined by the regulations.

CHAIR MILLER: Okay, Mr. Jones?

MEMBER JONES: And I just wanted to clarify, just for my understanding of the positions here.

Simply put, is if there -- this is not saying that we did or didn't, but if the Board erred and it truly isn't an egregious violation, then the argument your putting forth is that the licensee, by signing that waiver, gave up their right to a warning.

However, if the Board did not err, whether you agree with it or not, if the determination is made that the Board did not err and it is an egregious violation, then the signing of the waiver had no impact on whether or not they lost their right to a warning, because they didn't have a right to a warning in that instance.

MR. KLINE: I think I'd have to split the hair a little more carefully.

MEMBER JONES: That's fine. That's what I'm looking for.

MR. KLINE: Which is the licensee

is still entitled to litigate whether the Board was right or wrong.

MEMBER JONES: Understood.

MR. KLINE: You know, if the Board maintains its conclusion --

MEMBER JONES: Right.

MR. KLINE: -- which based on my reading of the report and reading of the regulations, I can't fathom.

But if the Board were to do that, then I think that we have the opportunity, or should have the opportunity to litigate that and say, "All right, well, you know, where are the facts that support one, two or three," in 807.

MEMBER JONES: Understood, but in that hair -- in that splitting of the hair, there is no discussion of warning or no warning. It's litigate or not litigate.

MR. KLINE: Well, I want to make clear that the licensee, I don't -- is not contesting the underlying facts.

In other words, the licensee is not saying that it didn't happen, that the two undercover operatives, underage didn't come into the place and/or weren't served alcohol, in violation of the law.

The licensee has not contended that, which is why they so knowingly signed the --

MEMBER JONES: Right.

MR. KLINE: -- waiver consent order. We got stuck.

MEMBER JONES: Correct.

MR. KLINE: So, we'll take our medicine, but what the licensee would reserve its right to contest is whether those facts constituted egregious behavior as that term is defined in 23 DCMR 807, because if it doesn't constitute egregious behavior, then the licensee is entitled to a warning.

MEMBER JONES: Understood, but going back to the splitting of the hair that you brought forward, if the determination is

made by the Board, that it is an egregious violation, not arguing the merits of the fact that -- I mean, the merits of the case at this point, just trying to understand that if the Board made that determination, then it is the Board's prerogative, as I understand it, to make the determination, and you can argue whether or not you agree with that determination, but that comes from the Board, I think.

MR. KLINE: Right.

MEMBER JONES: Isn't that your understanding?

MR. KLINE: We could appeal it.

MEMBER JONES: Right. Correct, you could appeal it, right.

MR. KLINE: Right.

MEMBER JONES: If that determination is made and the licensee willingly and knowingly signs the waiver at that point, are they -- and this is a question, are they giving up their right to a

warning or are they giving up their right to litigate, in that instance, and it sounds to me like they're giving up their right to litigate or argue or appeal the Board's decision.

They're not giving up their right to a warning, because in that instance, they don't -- they're not entitled to a warning.

MR. KLINE: Correct.

MEMBER JONES: Okay, cool.

MR. KLINE: I believe that's correct.

MEMBER JONES: Thank you. I just want to make sure I was heard. Thank you very much. Appreciate it.

MEMBER ALBERTI: I have one more important question.

CHAIR MILLER: Okay.

MEMBER ALBERTI: So, Ms. Gephardt, I notice that the investigator who wrote the report, Ms. Erin Mathieson, is no longer available. She is no longer employed by ABRA.

MS. GEPHARDT: Right.

MEMBER ALBERTI: And I suspect, given her new position, not available to us.

MS. GEPHARDT: Correct.

MEMBER ALBERTI: So, if we were to -- if we decide to void the waiver and go to a Show Cause hearing, would that prejudice that fact that Ms. Mathieson wasn't present, or available? Would that prejudice your case?

MS. GEPHARDT: No, she was the investigator on that case.

MEMBER ALBERTI: She was available at -- well, I don't know if she was --

MR. KLINE: Investigator Apraku apparently was --

MEMBER ALBERTI: Yes, Investigator is -- he was present. I'm not sure he was present for through the whole affair? He wasn't?

MS. GEPHARDT: I would have to interview him to find out, but you know, depending on what he knows, but she was the

lead --

MEMBER ALBERTI: Right.

MS. GEPHARDT: I would just have to find out what his --

MEMBER ALBERTI: Whether he was -- okay, so, he didn't have sufficient knowledge, would it?

MS. GEPHARDT: I mean, if he doesn't have sufficient knowledge, then I wouldn't be able to --

MEMBER ALBERTI: Okay, thank you.

CHAIR MILLER: Others? Mr. Kline, I wanted to ask you about one your arguments dealing with the Board making a finding in its investigative report -- its decision on investigative reports, and you seem to be distinguishing, I think this case from other cases, that it's basically when the Board makes to send other case, maybe to show cause or to staff settlement, that they're not always findings, or there is a difference.

MR. KLINE: Sure, there is a

difference because normally what happens in every other case that I can think of, the Board reads the report, and they decide -- you decide whether there are facts sufficient there, concerning enough to send it to the Office of Attorney General, for the writing of charges.

It's only in this instance where the finding actually affects the licensee's rights because at that point, once that finding is made, then the license is not entitled to a warning.

The Board has found that it's an egregious violation in accordance with the provisions of 807, and at that point, the licensee doesn't get a warning. Instead what they get is the choice of A, B or C, A contained on the waiver consent order, A and B being a combination of a fine and a suspended -- a fine and a suspension, part of it stayed or not stayed, as the case may be, or going to hearing.

That other choice of a written warning is not on the table.

So, that finding affects the licensee's rights, and it is our position, under the Administrative Procedures Act, that they're entitled, and we believe the Administrative Procedures Act commands it, that they be notified of that finding and given a right to contest it.

Now, I want to assure the Board that this is easily solved. I mean, I don't want the Board to think, "Oh my God, well, this is a big problem." It's really just a simple adding a couple lines to the form and saying, "The Board determined that your violation was egregious, pursuant to the provisions of 23 DCMR 807, therefore, you -- by signing this form, you are waiving your right to a hearing. You can otherwise contest the Board's findings."

I mean, it's pretty simple. It's solved by alteration of language of the form,

and I know that's got to be of concern, because you have an Agency to administer and run, along with adjudicating this and this licensee's rights. So, I wanted to make that clear.

CHAIR MILLER: Are there other questions? So, I think the Board is going to take this under advisement, but I just want to put on the record, because I am upset about this case, and I voted for a warning, and I think that -- I think the statute is clear.

But it was clarified by the Office of Attorney General, and I don't think that a layperson would be able to figure out, by seeing the word 'egregious' up there, that that's a legal term, that would then lead them to think they have a legal right to a warning.

I would agree, I just don't think that that's right, and that they should suffer a penalty because too bad, they signed the bottom line.

So, that's where I am. I don't

think I'm going to change, and I don't expect other Board Members, that necessarily want to speak out at this point, but I do feel strongly that the public should be able to rely on the Government, that when they're offering a settlement form, that the information is there and it's correct for them to be able to rely on it, in coming to a settlement. So, that's where I am, but --

MR. KLINE: Well, I appreciate that, and I would add, and I think it's kind of interesting. I asked five people in our office, all of whom I think are reasonably intelligent, what the word 'egregious' means, and I got five different answers, some of which are close to the ordinary definition.

But you know, the fact that the word 'egregious' appears on this form, I don't think tells anybody, anything.

CHAIR MILLER: And to that point, even Board Members, I think that may have a reaction that something is egregious,

emotionally, or whatever, that's egregious, you know. But we have to go by what the law says is egregious.

MEMBER SILVERSTEIN: Madam Chair?

CHAIR MILLER: Yes.

MEMBER SILVERSTEIN: I'd like to add that the law outlaws the sale of alcohol to minors, that the sale of alcohol to minors is a serious problem, and we've had far too many incidents of traffic accidents and other incidents involving people who are too young or who are illegally consuming alcohol.

The licensee in this case is not a victim, but rather, has committed a crime. The only question here is whether there is a fair and predictable remedy.

The idea that they're being portrayed as a victim, I find offensive, and I have no further comment.

MR. KLINE: May I respond?

CHAIR MILLER: Sure.

MR. KLINE: Mr. Silverstein, there

certainly is no intention to either downplay the significance and the importance of the sale to minors law or portray the licensee as a victim.

We understand and this licensee takes seriously, its obligations, not to serve those underage, and I want that to be very clear, and I probably should have led with that, and I apologize, that I did not.

We understand the seriousness. This is a separate issue, a procedural issue. It does involve the licensee's rights --

MEMBER SILVERSTEIN: Yes, sir.

MR. KLINE: -- but those rights in no way undermine the purpose of the statute.

MEMBER SILVERSTEIN: Deals with a fair and predictable remedy.

MR. KLINE: Yes.

MEMBER SILVERSTEIN: And not victimization of those who sell.

MR. KLINE: Absolutely, thank you.

CHAIR MILLER: Anything else from

Board Members?

Okay, all right, then we're going to take this under advisement.

MR. KLINE: Madam Chair, I would respectfully request, I presume the Board will rule on this relatively quickly, but I would respectfully request that the other case be stayed until we get a ruling in this case, because how the license proceeds in this case -- in that case, will necessarily be affected by what happens in this case.

CHAIR MILLER: Okay, so, we'll consider that, as well.

MR. KLINE: Thank you.

CHAIR MILLER: Okay, all right. Then I think that concludes this hearing. Thank you very much.

MR. KLINE: Thank you.

CHAIR MILLER: We're going to take a vote on deliberating this case in closed session.

As Chairperson of the Alcoholic

Beverage Control Board for the District of Columbia, in accordance with Section 405 of the Open Meetings Amendment Act of 2010, I move that the ABC Board hold a closed meeting for the purpose of seeking legal advice from our Counsel on Case No. 14-CC-00076, Smith & Wollensky, located at 1112 19th Street, Northwest, License No. 60001, in ANC 2B, and deliberating upon this case for the reasons cited in Section 405(b)(13) of the Open Meetings Amendment Act of 2010. Is there a second?

MEMBER BROOKS: Second.

CHAIR MILLER: Mr. Brooks has seconded the motion. I will now take a roll call vote, now, that the motion has been seconded. Mr. Brooks?

MEMBER BROOKS: I agree.

CHAIR MILLER: Mr. Alberti.

MEMBER ALBERTI: I agree.

CHAIR MILLER: Mr. Rodriguez.

MEMBER RODRIGUEZ: I agree.

CHAIR MILLER: Ms. Miller agrees. Mr. Silverstein.

MEMBER SILVERSTEIN: I agree.

CHAIR MILLER: Mr. Short.

MEMBER SHORT: I agree.

CHAIR MILLER: Mr. Jones.

MEMBER JONES: I agree.

CHAIR MILLER: Okay, it appears that the motion has passed by a 7-0-0 vote.

I hereby give notice that the ABC Board will hold this aforementioned closed meeting, in the ABC Board conference room, and we'll certainly issue a decision within 90 days, and we'll issue an order as soon as possible. Okay, thank you very much.

Why don't I read the other ones, since we're here?

As Chairperson of the Alcoholic Beverage Control Board for the District of Columbia, in accordance with Section 405 of the Open Meetings Amendment Act of 2010, I move that the ABC Board hold a closed meeting

on February 18th, for the purpose of seeking legal advice from our Counsel on the matters identified on the Board's agenda for February 18th, as published in the D.C. Register on February 13th, 2015. Is there a second?

MEMBER BROOKS: Second.

CHAIR MILLER: Mr. Brooks has seconded the motion. I will now take a roll call vote on the motion before us, now that it has been seconded. Mr. Brooks?

MEMBER BROOKS: I agree.

CHAIR MILLER: Mr. Rodriguez.

MEMBER RODRIGUEZ: I agree.

CHAIR MILLER: Mr. Short.

MEMBER SHORT: I agree.

CHAIR MILLER: Mr. Jones.

MEMBER JONES: I agree.

CHAIR MILLER: Mr. Alberti.

MEMBER ALBERTI: I agree.

CHAIR MILLER: It appears that the motion has passed by a 6-0-0 vote.

I hereby give notice that the ABC

Board will hold this aforementioned closed meeting, pursuant to the Open Meetings Amendment Act of 2010. Notice will also be posted on the ABC Board hearing room bulletin board, placed on the electronic calendar, on ABRA's website and published in the D.C. Register in as timely a manner as practical.

As Chairperson of the Alcoholic Beverage Control Board for the District of Columbia, in accordance with Section 405 of the Open Meetings Amendment Act of 2010, I move that the ABC Board hold a closed meeting on February 18, 2015, for the purpose of discussing and hearing reports concerning ongoing and planned investigations of criminal or civil misconduct or violations of law or regulations, and seeking legal advice from our Counsel on the Board's investigative agenda for February 18, 2015, as published in the D.C. Register on February 13, 2015. Is there a second?

MEMBER RODRIGUEZ: Second.

CHAIR MILLER: Mr. Rodriguez seconded the motion. I will now take a roll call vote of the motion before us, now that it's been seconded. Mr. Brooks?

MEMBER BROOKS: I agree.

CHAIR MILLER: Mr. Rodriguez.

MEMBER RODRIGUEZ: I agree.

CHAIR MILLER: Ms. Miller agrees. Mr. Short.

MEMBER SHORT: I agree.

CHAIR MILLER: Mr. Jones.

MEMBER JONES: I agree.

CHAIR MILLER: It appears that the motion has passed by a 5-0-0 vote.

I hereby give notice that the ABC Board will hold this aforementioned closed meeting, pursuant to the Open Meetings Amendment Act of 2010. Notice will also be posted on the ABC Board hearing bulletin board, placed on the electronic calendar, on ABRA's website and published in the D.C. Register in as timely a manner as practical.

Okay, so, that concludes our hearings for this afternoon, and we will be back shortly to do our agendas. Thank you.

(Whereupon, the above-entitled matter went off the record at 5:43 p.m.)

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