

DISTRICT OF COLUMBIA
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ALCOHOLIC BEVERAGE CONTROL BOARD
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MEETING

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IN THE MATTER OF: :
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Case #10-CMP-00540 and :
10-251-00282 :
Jasper Ventures, LLC :
t/a K Street :Remand/
1301 K Street, N.W. :Motion
License #72225 :Hearing
Retailer CN :
ANC 2F :
Treatment of Violations Not :
Listed on the Penalty Schedule:
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FEBRUARY 22, 2012

The Alcoholic Beverage Control Board met in Alcoholic Beverage Control Hearing Room, Reeves Building, 2000 14th Street, N.W., 4th Floor, Washington, D.C. 20009, Chairperson Miller, presiding.

PRESENT
RUTHANNE MILLER, Chairperson
NICK ALBERTI, Member
DONALD BROOKS, Member
CALVIN NOPHLIN, Member

MICHAEL SILVERSTEIN, Member
JEANNETTE MOBLEY, Member
ALSO PRESENT
MICHAEL STERN, OAG

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

11:04 a.m.

CHAIR MILLER: So, now call Case Number 10-CMP-00540 and 10-251-00282. It's a remand/motion hearing Jasper Ventures, LLC trading as K Street at 1301 K Street, N.W., License Number 72225 in 2F.

Good morning.

MR. KLINE: Good morning.

MR. STERN: Good morning.

CHAIR MILLER: And would the parties introduce themselves for the record when you're ready.

MR. STERN: Yes, Michael Stern representing the District of Columbia.

MR. KLINE: Good morning. Andrew Kline on behalf of the Licensee.

CHAIR MILLER: Okay. Mr. Stern, I believe it's your motion.

MR. STERN: Yes.

CHAIR MILLER: So, whenever you're ready, we'll hear argument from you first.

1 MR. STERN: Yes. The District of
2 Columbia brings this motion to ask the Board
3 to reconsider the interpretation for its order
4 regarding K Street Ventures. More
5 specifically, what we are asking the Board to
6 reconsider is the conclusions of law on page
7 4 of the order. Specifically, the finding in
8 reference to 25830(f).

9 In the order, the Board decided
10 that 25830(f) does not authorize the Board to
11 count violations that are not listed as
12 primary on the -- in the DCMR for purposes of
13 prior violations leading up to the four
14 violations necessary to revoke a license.
15 Excuse me. Mandatory to revoke a license.

16 However, the Board likewise fined
17 the establishment \$6,000 thereby counting the
18 prior violations that were not primary as
19 primary violations for the purposes of that
20 fine.

21 The District's position is that
22 the precedent and history of the actions of

1 the Board are extremely important in upholding
2 the integrity of the judicial system. The
3 Board -- in ruling the way it did, the Board
4 overruled a previous decision of the Board and
5 historical precedent going back at least six
6 years that I've been practicing before the
7 Board. Whereas, violations of 82312 before
8 there was a five and six and then five and six
9 were always considered primary violations and
10 the reason for that is we look to interpreting
11 the law. We look to the statutory scheme of
12 the statute.

13 It is clear that the most -- the
14 Council said that the most serious violations
15 of law should be considered primary tier
16 violations. There can hardly be any more
17 serious violations than failing to follow your
18 security plan which almost always when it
19 comes to the Board's attention results in
20 injury to the public. Failing to follow a
21 Board order which implies the very integrity
22 of the Board's decision-making process.

1 Failing to -- using the establishment for a
2 disorderly purpose again which is the only
3 chargeable offense when there is violence
4 inside that the establishment does not
5 prevent.

6 All of these things are certainly
7 as serious or any more serious than any other
8 charge listed in the DCMR. So, when you look
9 at statutory scheme, it's clear that these
10 were intended to be treated as primary
11 violations and they have historically always
12 been treated as primary violations by the
13 Board.

14 Now, the Board, in fact, treated
15 these very violations as primary violations
16 when it decided to issue a penalty of \$6,000
17 because the prior primary offenses that the
18 establishment had were all of a similar
19 nature, failing to insure -- or allowing a
20 disorderly establishment and that sort of
21 thing. They were not listed in the DCMR.

22 While 830(f) points specifically

1 to fines, it doesn't mention at all -- points
2 specifically to points in 830(c)(1). However,
3 what it doesn't do is it doesn't negate the
4 applicability of 830(c)(2). It's our
5 contention that both of those sections can
6 apply simultaneously.

7 Our position is that all that
8 830(f) directs you to is the amount of the
9 fine. It doesn't limit what is otherwise in
10 the statutory scheme. That when primary
11 violations occur and there are four of them,
12 the Board shall revoke a license and this is
13 what the Board has always done.

14 Now, if the Board interprets the
15 statute as not allowing the prior offenses --
16 similar prior offenses to count towards
17 multiplying the effect of the violation, then
18 it negates the reference to 830(c)(1)(b) and
19 (c)(1)(b) and that clearly isn't the intent of
20 the statute.

21 For these reasons, we ask the
22 Board to reconsider its decision and concur

1 with all prior precedent and treat violations
2 of an extremely serious nature as primary
3 violations which even though not in the DCMR
4 are indicated can be treated as primary
5 violations and ordered that this would have
6 been the fourth primary violation within a
7 four-year period.

8 Interestingly enough, and I just
9 make this as a parenthetical note, since that
10 time, there's been another case involving K
11 Street Lounge which the Board has heard. The
12 Board has not ruled on that case as far as I'm
13 aware yet. However, should they be convicted,
14 we end up in the same situation again and
15 that's one of the reasons why this doesn't
16 comply with the statutory scheme. Because
17 they could literally, have stabbings, fights,
18 activity in their establishment on every
19 weekend and never have prior violations if the
20 Board retains the position that it took in the
21 decision.

22 So, in conclusion, that is why the

1 District asks that the reconsideration be made
2 and if the Board has any questions, I'm
3 prepared to answer.

4 CHAIR MILLER: Okay. I think
5 we're going to hear from Mr. Kline and then
6 ask questions.

7 MR. STERN: Sure.

8 MR. KLINE: Great. Thank you.

9 For some reason, the Government
10 wants to deprive the Board of the discretion
11 that it has to make decisions concerning when
12 licenses should be revoked. The Board
13 obviously has that discretion, has that
14 authority.

15 The statute quite clearly says
16 when there is a violation, the Board can make
17 the determination as to whether to fine,
18 suspend or revoke. So, the Board always has
19 that authority.

20 The only thing we're talking about
21 here is mandatory revocation.

22 Now, Mr. Stern says that the Board

1 has always considered all of these things
2 primary tier violations. I, frankly, am not
3 aware of a case, perhaps there is one, I don't
4 know every case, in which there's been
5 mandatory revocation. So, whether the Board
6 considered violations primary tier or not that
7 were not scheduled, it's sort of irrelevant
8 unless we got to the point of a mandatory
9 revocation because that's really what we're
10 talking about here.

11 When are there four primary tier
12 violations which, under those circumstances,
13 deprives the Board of its discretion to merely
14 suspend, but requires that the license be
15 revoked? That's what we're talking about here
16 and I think that's all we're talking about.

17 The reference in the statute in
18 830(f) is to (c)(1) which talks about the
19 penalties for a primary tier violation and
20 talks about the graduated penalties for a
21 primary tier violation. So, I am not here to
22 argue before you today that in considering

1 what to fine a nonscheduled
2 yviolation, if the Board determines to fine it
3 like a primary tier, which you have the
4 authority to do, under the statute that the
5 graduated provisions don't apply. I'm not
6 here to argue that today. I don't think
7 that's an issue. (c)(1) is referenced.
8 (c)(2) is not referenced in terms of mandatory
9 revocation.

10 The point is this. We talk about
11 statutory scheme. It seems to me the
12 Government wants to turn the statutory scheme
13 on its head. We have a statute that says that
14 the Board will by rulemaking classify
15 violations into those that are more serious as
16 primary tier and those that are deemed to be
17 less serious as secondary tier. That's a
18 statutory scheme. There was no rulemaking
19 done.

20 Now, under the statute, either
21 you, the Board, can do a rulemaking or the
22 Council can do a rulemaking in terms of

1 scheduling violations. That was done and over
2 time, it was realized well, gee, because the
3 law changes sometimes there are things that
4 don't end up on the schedule and if you look
5 at the statutory history which we've appended
6 to our opposition, it's very clear and those
7 of us that were involved remember that what
8 was done there was some question if the
9 violation was not scheduled. If it wasn't on
10 the primary tier or the secondary tier,
11 there's some question as to whether the Board
12 under those circumstances had the authority to
13 fine because the authority to fine is
14 relatively new.

15 When I say relatively new, I've
16 been doing this stuff over 30 years. So,
17 anything in the last ten years to me is
18 relatively new, but it was given to the Board
19 in the 2002 or thereabouts rewrite of the
20 statute. But, it was unclear when the statute
21 changed or there were violations that were
22 overlooked whether the Board had authority to

1 fine.

2 If you look at the language in the
3 legislative history, it says the intent was to
4 clarify that the Board had the authority to
5 fine in those circumstances in which the
6 violation was not scheduled. It doesn't go
7 any further than that.

8 Now, Mr. Stern makes much of the
9 fact that well, gee, the Board considers these
10 serious violations. They should be treated as
11 primary tier violations for purposes of
12 mandatory revocation.

13 The solution to that is very
14 simple. Use the authority to do a rulemaking.
15 Do a rulemaking and make them primary -- make
16 those that you believe are primary tier
17 violations primary tier violations.

18 There are two purposes for doing
19 that. The first purpose, and they're equally
20 important, the first purpose is to put people
21 on notice. So, people are aware that they've
22 violated a particular section of the statute

1 and it's classified as a primary tier. Then
2 they know up front it's classified as a
3 primary tier. If they do it four times or
4 they violate other sections that have
5 previously been classified by a rulemaking as
6 primary tier, their license will be revoked
7 and this Board under those circumstances lacks
8 the discretion to say no, you know, you've
9 otherwise been a good guy. We think that's
10 too severe. The statute says they have to be
11 revoked.

12 So, the first purpose is notice.
13 Give the parties notice. Let them know in
14 advice what's a primary tier.

15 The second purpose is consistency
16 in decision making. The purpose of the
17 schedules, the purpose of the graduated fines
18 for multiple offenses is that there's some
19 consistency between cases and the Board itself
20 in the last couple of years has been very
21 careful to make sure that offers in compromise
22 and orders that it enters are consistent with

1 the graduated fine schedule that's set forth
2 in the regulations. People are notice.

3 So, they have notice number one
4 and number two, is the guideline. Everybody
5 knows what we're talking about. We know what
6 the fines are going to be.

7 So, (f) merely says all right if
8 we overlooked it, if it didn't get scheduled,
9 you still have the authority to fine and if
10 you want to, you can treat it as a primary for
11 purposes of fining.

12 There is nothing in the statute
13 that says that if it's treated for purposes of
14 fining as a primary, that it's primary for
15 purposes of mandatory revocation. Now, again,
16 you always have the authority to revoke. We
17 trust you to exercise your discretion.

18 For some reason, the Government
19 does not. The Government says no, we think
20 the Board needs to be more confined and even
21 those offenses which haven't been scheduled
22 and the Board, for whatever reason, either

1 hasn't gotten around to it or hasn't deemed it
2 appropriate to put on a primary tier schedule,
3 should mandate revocation.

4 I leave you with one example which
5 I think demonstrates the absurdity of the
6 argument from a practical standpoint. Mr.
7 Stern talks about violations which we admit
8 were serious and we admit that the Board is
9 concerned about that are not scheduled and
10 that, you know, the Board may want to treat as
11 primary for purposes of fining.

12 That's appropriate, but what about
13 violation of a voluntary agreement. That's
14 not scheduled. Now granted, some of the
15 provisions can go to the heart of the issuance
16 of a license, but really do we want to take
17 the position that if somebody ties their door
18 open in violation of a voluntary agreement one
19 time that's a primary tier violation?

20 It seems to me that in order for
21 something to be a primary tier violation, the
22 statute contemplates that the Board would have

1 thought about it or the Council would have
2 thought about it and said yes, we need to put
3 this on the primary tier schedule and those
4 things that are not on the primary tier
5 schedule, you have the authority to fine that
6 way and ultimately, regardless of what tier
7 they're on or how many there are, you always
8 retain discretion to revoke a license without
9 staring at a statute that says you have to
10 revoke a license.

11 Thank you.

12 MR. STERN: May I just respond --

13 CHAIR MILLER: Yes.

14 MR. STERN: -- to those arguments?

15 First of all, I just want to make
16 it clear. It's not the Government that is
17 seeking to take away any discretion from the
18 Board. It's the Government that is seeking to
19 have the law as passed by the Council which
20 took away the discretion of the Board
21 followed.

22 So, it's not the Government coming

1 in here and saying that we don't think the
2 Board should have discretion. The Council has
3 already ruled that in certain circumstances
4 because of the seriousness there is not
5 discretion any longer.

6 It does give in other
7 circumstances the Board discretion as to what
8 to do. Almost every other circumstance. But,
9 the Council said if you have four primary
10 violations in four years, that's just enough.

11 The other thing I would address or
12 one of the other things I would address is
13 that there was a case I can point you to
14 actually where a license was revoked and I
15 know it quite frankly only because I handled
16 it. It was the 800 Water Street H2O case. On
17 their violation, the Board decided to -- well,
18 the Board agreed it was a fourth violation and
19 revoked their license and I don't know if all
20 of them were unscheduled, but I know that some
21 of the violations within those four were for
22 keeping a disorderly establishment for

1 example.

2 So, the Board has followed that
3 rule in the past and the Board reiterated that
4 it would follow the rule in the Chicago case.

5 Excuse me. Morton's of Chicago case.

6 Mr. Kline also somewhat
7 disingenuously says well, I'm not here to
8 argue today that you can't fine the \$6,000
9 that you fined me. Well, that's an issue that
10 the Board has to consider because it places
11 itself not just in this case, but this whole
12 issue covers a much, much, much wider range of
13 cases and generally, again, the most serious
14 cases.

15 One of the things Mr. Kline said
16 is failure to follow the voluntary violation
17 one time shouldn't be treated as a primary.
18 Well, the law says you do treat it as a
19 primary. Under any interpretation, 830(f)
20 says it's treated as a primary violation.

21 The only question before the Board
22 today is when we treat it as a primary and

1 they do it again, does it get treated as
2 though both of them were primaries? And the
3 District's answer to that, of course, is yes.

4 Now, the last point I would make
5 on Counsel's argument is that while the
6 legislative history does talk about clarifying
7 the authority to fine, it never changed
8 Section (c)(2). That's not discussed in the
9 legislative history. It doesn't say we're
10 going to fine people and what we're going to
11 do is make it so you can never have repeat
12 primary violations. It doesn't take (c)(2) --
13 830(c)(2) out of the equation in the
14 legislative history.

15 We think you have to consider both
16 of them simultaneously and if you're treating
17 one as a primary violation and you do it four
18 times, then in treating it as a primary
19 violation, (c)(2) says that four of them
20 constitute a revocation.

21 Thank you. That's all I have.

22 MR. KLINE: I'd just like to add

1 one thing if I may very briefly.

2 CHAIR MILLER: Okay.

3 MR. KLINE: If the Board intended
4 that anything not scheduled should be treated
5 as a primary tier violation, it could have
6 easily said so. That's not what it says. It
7 could have easily said in 830(f), the last
8 sentence is what we're talking about, the
9 Board may -- it says the Board may fine for a
10 violation not listed on the schedule
11 consistent with the primary tier violation
12 penalty set forth in Subsection (c)(1).

13 The Board could have very easily
14 and very clearly said the Board may treat any
15 unscheduled violation as a primary tier
16 violation and then it would have been clear
17 that (c)(1) applies, (c)(2) applies, but what
18 they did instead was they limited it to (c)(1)
19 and they said the Board may fine, not may
20 treat it as a primary tier, but may fine as a
21 primary tier. The distinction is important
22 and the reference to (c)(1) makes it crystal

1 clear.

2 Mr. Stern argues that no one --
3 there's no expression in the legislative
4 intent to take (c)(2) out of it. Well,
5 there's no expression in the amendment to the
6 statute to put (c)(2) in it. So, you know, to
7 say there was nothing to take out of it in the
8 legislative history, there has to be some
9 reason for (c)(2) to be implicated and to be
10 put in it and it's not. So, obviously, it
11 would not be in the legislative history
12 because it simply is not addressed by the very
13 clear language of the statute and I say that
14 having been before you many times and dealt
15 with much language in these regulations and
16 statutes that are not clear, but this is
17 pretty clear.

18 CHAIR MILLER: Thank you. So,
19 now, the Board may have a few questions.

20 I have a couple of questions and
21 I'm just going to start with Mr. Kline just
22 because you were just responding here.

1 But, Mr. Stern, I think there's a
2 difference in interpretation with respect to
3 whether the Board needs to treat a violation
4 of a voluntary agreement as a primary and so,
5 I think I would like to ask each of you what
6 section of the code you're referring -- you're
7 relying on for your interpretation.

8 MR. STERN: Actually, I apologize.
9 You're right. Violations of voluntary
10 amendments are on the -- I responded too
11 quickly because of this part of -- part 6 of
12 830. But, separately, violations of voluntary
13 agreements are on the list of -- as I recall,
14 I don't have the list in front of me, but as
15 I recall, they are on the list of scheduled
16 penalties.

17 MR. KLINE: I'd certainly be
18 willing to make my copy of the regulations
19 available and I don't see where violations of
20 a voluntary agreement is scheduled.

21 So, we would rely on the civil
22 penalties schedule which does not contain

1 violation of a voluntary agreement. Just like
2 it doesn't contain the violations at issue --
3 which were at issue in this case. They're not
4 scheduled.

5 MR. STERN: Okay. Well, then he's
6 correct. They're not scheduled and we agree
7 then that they are -- would be treated as
8 primary violations because as a nonscheduled
9 offense, 830(f) says nonscheduled offenses
10 should be treated as primary violations.

11 MR. KLINE: Well, I think that --
12 and there's the issue. 830(f) has just been
13 misquoted. That is not what 830(f) says.

14 MR. STERN: Well --

15 CHAIR MILLER: Okay. So, I just
16 wanted to make sure. You're both saying look
17 at 830(f).

18 MR. KLINE: Well, I'm also saying
19 look at 800, the ABRA Civil Penalties Schedule
20 in which one does not fine violations of a
21 voluntary agreement and you asked me what the
22 authority for that was and I rely on 800 --

1 MR. STERN: Yes, and what I guess
2 our point is, and I'll quote now, what 830(f)
3 says is may fine for a violation not listed on
4 the -- consistent with the primary tier
5 violation penalties set forth in Subsection
6 (c)(1).

7 When something is consistent with
8 the penalties, that's what it is defined as.
9 The --

10 CHAIR MILLER: Okay.

11 MR. STERN: In my motion, I didn't
12 mention some of the arguments, but in my
13 motion, I do cite to another portion of the
14 regulations that also uses the term fine for
15 penalties and includes in that portion the
16 revocation provision and I use that only to
17 illustrate that because it says fines it
18 doesn't -- it isn't meant to be exclusive to
19 just those fines.

20 CHAIR MILLER: And could you tell
21 me, Mr. Stern, the case you were referring to
22 that was precedent for the Board treating it

1 as a primary?

2 MR. STERN: Well, yes, there is --
3 the case, you know, is cited in the order
4 itself Morton's of Chicago and then they were
5 -- 800 Water Street --

6 CHAIR MILLER: Eight Hundred Water
7 Street?

8 MR. STERN: -- was the
9 establishment.

10 CHAIR MILLER: Okay.

11 MR. STERN: It was H2O at the
12 time. Was the trade name and the license was
13 revoked after four primary violations.

14 CHAIR MILLER: And what --

15 MR. STERN: And of those four
16 primary violations, and I'm again using my
17 memory because it wasn't an issue except to
18 respond to what Mr. Kline said not having
19 heard of any of those primary violations, I
20 know -- I'm fairly certain one or more of them
21 were nonscheduled primary violations.

22 CHAIR MILLER: What year was that

1 about?

2 MR. STERN: I'm guessing around
3 two years ago.

4 CHAIR MILLER: Okay.

5 MR. STERN: Three years ago maybe.

6 MEMBER ALBERTI: I was here.

7 CHAIR MILLER: No? Oh, you
8 remember.

9 MEMBER ALBERTI: I was here. Yes.

10 CHAIR MILLER: Okay. So,
11 questions from Board Members.

12 MEMBER ALBERTI: I have a
13 question.

14 CHAIR MILLER: Mr. Alberti.

15 MEMBER ALBERTI: Okay. I'm trying
16 to figure out how to ask this question without
17 being confusing here.

18 Mr. Kline, I think what I'm
19 hearing you saying is that the actual dollar
20 amount, the fine level that we levied, all
21 right, you had no argument with that. You are
22 conceding that that was appropriate because

1 according to this -- because the Board treated
2 the three previous unscheduled violations as
3 primaries in -- appropriately treated the
4 three previous unscheduled violations as
5 primary in coming up with that dollar amount
6 according to the schedule in 830(c).

7 MR. KLINE: That may be too fine a
8 point on that and I'm not really prepared to
9 argue the specifics of that given the narrow
10 reach of Mr. Stern's motion.

11 Mr. Stern --

12 MEMBER ALBERTI: Well, but answer
13 my question. My question was -- okay. Well,
14 let me put it this way. You are not disputing
15 -- you are not saying that the Board arrived
16 at the wrong fine amount of \$6,000. Is that
17 correct?

18 MR. KLINE: I'd like to put it a
19 different way if I may.

20 MEMBER ALBERTI: All right.

21 MR. KLINE: What I'm saying is I
22 don't dispute that under 830(f) which

1 expressly references (c)(1) -- 830(c)(1), that
2 the Board may fine consistent with that
3 schedule. Meaning if there were previous
4 primary tier violations or previous violations
5 which the Board considered primary tier, then
6 you have a graduated schedule.

7 In terms of the specifics of this
8 case, I apologize. I'm not prepared to argue
9 that issue before you today because that's not
10 the issue that's before you on Mr. Stern's
11 motion.

12 MEMBER ALBERTI: But --

13 MR. KLINE: Mr. --

14 MEMBER ALBERTI: -- it's precisely
15 the issue that's before us.

16 MR. KLINE: No, it's not.

17 MEMBER ALBERTI: Because if it
18 allowed -- if the Board has the discretion to
19 fine \$6,000, we have to have a basis for that.

20 MR. KLINE: Correct.

21 MEMBER ALBERTI: And the basis
22 would be that the previous violations were

1 treated -- if you're going to apply 830, the
2 previous violations would have to be treated
3 as primaries in arriving at a \$6,000 fine
4 because we're fining as if it was a primary
5 and even there, I'm not sure it's consistent
6 because the fee schedule only goes up to three
7 previous primaries and not -- or two previous
8 primaries and not four previous.

9 MR. KLINE: Understood.

10 MEMBER ALBERTI: Two previous
11 primaries and not three previous primaries.

12 MR. KLINE: Um-hum.

13 MEMBER ALBERTI: Okay. And I'm
14 looking now at 830(c)(1) Subparagraph (c).
15 Okay.

16 MR. KLINE: Um-hum.

17 MEMBER ALBERTI: So, it would seem
18 to me that if you have to have -- if you
19 believe -- well, I'm trying to understand your
20 argument. All right. Because it seems to me
21 that the face of it's inconsistent to levy
22 that fine of \$6,000, all right, and not treat

1 the previous ones as primaries.

2 MR. KLINE: Not at all.

3 MEMBER ALBERTI: Why not?

4 MR. KLINE: Absolutely not at all.

5 MEMBER ALBERTI: Why not?

6 MR. KLINE: Because they may be
7 fined as primaries, that doesn't make them
8 primaries and the difference is if they were
9 primaries, then four primaries equal mandatory
10 revocation. So, although they may be fined as
11 primaries which is the clear language of
12 830(f), that doesn't make them primary.

13 MEMBER ALBERTI: Then what
14 justifies the Board's levy of \$6,000?

15 MR. KLINE: I leave that to the
16 Board. I'm not here to justify the Board's
17 levy of the fine.

18 MEMBER ALBERTI: That's the heart
19 of your argument. That's the heart of your
20 argument.

21 MR. KLINE: That is not the heart
22 of my argument.

1 MEMBER ALBERTI: The Board said
2 that it fined \$6,000 because we treated -- the
3 implication is that we treated the previous
4 ones as primaries.

5 MR. KLINE: Mr. Alberti, we
6 haven't asked you to reconsider that. That's
7 not what we're here to do today. We haven't
8 asked for reconsideration of that. That's not
9 what we're here for.

10 MEMBER ALBERTI: Okay. Well --

11 MR. KLINE: He's asked for
12 reconsideration. We didn't ask for
13 reconsideration. So, that's not the heart of
14 my argument. I'm not here to argue today that
15 your \$6,000 fine is inappropriate. We have
16 not moved for reconsideration -- for
17 reconsideration.

18 MR. STERN: Yes, and the very
19 basis of my reconsideration is that ambiguity
20 and that's why the Board has to address it
21 here.

22 MEMBER ALBERTI: Okay.

1 MR. STERN: The very ambiguity --
2 I'm talking about -- and Mr. Kline's using
3 very clever words here to try to skirt the
4 issue so he doesn't lose his appellate rights,
5 but what the basic issue is the Board did
6 treat these as three primary violations.
7 That's what authorized -- and we're not
8 talking about this violation. We're talking
9 about other violations that occurred in the
10 past. The Board treated those under the same
11 statute as primary violations. That's what
12 authorized the Board to fine \$6,000.

13 CHAIR MILLER: If I could
14 interject, I think that --

15 MEMBER ALBERTI: No. Just let me
16 finish with Mr. Kline please.

17 Mr. Kline, so, I think what you're
18 saying is that by implication of the Board's
19 order, we treated the previous fines --
20 previous infractions as primaries. So, if you
21 apply 830(c)(1), all right, then it would be
22 mandatory revocation. That's your argument.

1 Right?

2 MR. STERN: (c)(2) would require
3 mandatory revocation.

4 MEMBER ALBERTI: (c)(2). Okay.
5 Right. All right.

6 MR. STERN: But, yes, if you're
7 treating the others as primaries, this one
8 being of the same nature should also be
9 treated as a primary. That's leading it to --

10 MEMBER ALBERTI: And that's
11 because you believe otherwise it's
12 inconsistent --

13 MR. STERN: Yes.

14 MEMBER ALBERTI: -- with the
15 statute. Mr. Kline argued that -- and you did
16 argue this, Mr. Kline, that the mandatory
17 revocation portion of 830 does not necessarily
18 apply even if we treat them as primaries. I
19 think that that's what you argued earlier.

20 MR. KLINE: Let me -- that's not
21 what I argued. Okay.

22 MEMBER ALBERTI: Okay.

1 MR. KLINE: You do not have -- and
2 I'm going to say it very clearly. You do not
3 have authority in the statute to treat
4 nonscheduled offenses as primaries. There's
5 no language in the statute that allows you to
6 do that.

7 What you have the authority to do
8 is to take a nonscheduled offense and fine it
9 consistent with a primary.

10 Now, perhaps I'm hair splitting,
11 but that's what this is all about. We're here
12 to split the hairs. That's what the statute
13 says on its face. You have the authority to
14 look at a nonscheduled violation and fine it
15 consistent with a primary. That doesn't make
16 it a primary.

17 MEMBER ALBERTI: Okay. Fine.
18 Fine. That's your argument. Now, tell me
19 based on your argument what the fine -- apply
20 your argument to what the fine should have
21 been in this case based on the statute.

22 MR. KLINE: That's up to you. I'm

1 not going to argue.

2 MEMBER ALBERTI: No. No. No.

3 No. I'm asking you, Mr. Kline.

4 MR. KLINE: I'm not going to argue
5 that.

6 MEMBER ALBERTI: Mr. Kline, I'm
7 asking you a question.

8 MR. KLINE: And I'm not here to --

9 MEMBER ALBERTI: You can decline
10 to answer it, but I'm asking you a question.

11 MR. KLINE: I'm not here to answer
12 it because I'm not here to argue that.

13 MEMBER ALBERTI: Fine.

14 MR. KLINE: That's not what we're
15 here to argue about.

16 MEMBER ALBERTI: I'm not -- no,
17 I'm not saying it.

18 MR. KLINE: I did not ask you to
19 reconsider that.

20 MEMBER ALBERTI: Mr. Kline, I'm
21 not arguing -- for illustration purposes, I'm
22 asking you a question. I'm not asking you to

1 argue the point. I'm just asking a question.
2 There's a difference and you may say it's a
3 fine line and it is, but I'm asking you a
4 question. I'm not asking you to argue why.
5 I'm just asking you based on your argument and
6 your opinion, what would the fine be and how
7 does the -- and where is that -- how does that
8 come about by the statute as you interpret it.

9 CHAIR MILLER: Mr. Alberti, he has
10 already said he doesn't want to answer that
11 question.

12 MR. STERN: And if I could respond
13 to that.

14 MEMBER ALBERTI: Fine.

15 CHAIR MILLER: And I understand
16 that his argument is that (f) gives the Board
17 -- it talks about fining and he's not
18 challenging the Board's ability to fine. He's
19 challenging the other aspects of --

20 MR. STERN: If I may answer that
21 though --

22 MEMBER ALBERTI: Please do.

1 MR. STERN: -- following that
2 argument the maximum the Board could fine is
3 \$2,000 which would be for a first offense.

4 CHAIR MILLER: Okay.

5 MR. STERN: Following that
6 argument. Which makes a nullity out of
7 (c)(1)(b) and (c) and there is nothing in
8 statutory interpretation that is worse than
9 interpreting a statute and making a nullity of
10 provisions within that statute and that's
11 exactly why the Board has to interpret it
12 correlatively.

13 That you treat it as a primary and
14 it's treated for all purposes as a primary.

15 MEMBER ALBERTI: Madam Chair.
16 Madam Chair. Madam Chair, I will note that
17 Mr. Kline during Mr. Stern's explanation was
18 shaking his head no. All right. And now
19 seems to want to interject something, but he
20 won't. Well, wait. Please let me finish.

21 CHAIR MILLER: I --

22 MEMBER ALBERTI: Will you let me

1 finish please? He will not let his question
2 -- he will not answer my question directly.

3 It seems to me that if he's got an
4 opinion, if he has an opinion about what Mr.
5 Stern just said, then he can answer my
6 question.

7 MR. KLINE: Well, you may think
8 that, but I don't agree with you.

9 The point is this. It's not my
10 job to tell you what the fine is. It is up to
11 the Board to determine what the fine is and it
12 is done so in this case.

13 My argument quite simply is in
14 fining consistent with (c)(1), which you have
15 the authority to do for a nonscheduled
16 violation and I don't think there's even a
17 dispute about that part of it, one of the
18 things that the Board can consider is the
19 number of violations.

20 So, if that answers your question,
21 but it's not for me to tell you what the fine
22 should be in this case.

1 MEMBER ALBERTI: All right. Did
2 you --

3 MR. KLINE: That's for you to
4 decide.

5 MEMBER ALBERTI: Do you agree with
6 what Mr. Stern just said?

7 MR. KLINE: No, because Mr.
8 Stern --

9 MEMBER ALBERTI: Okay. Okay.
10 You've just said no.

11 MR. KLINE: May I respond?

12 MEMBER ALBERTI: Tell me why.

13 MR. KLINE: Because Mr. Stern says
14 it gets treated as a primary for all purposes
15 and that's not what the statute says.

16 MEMBER ALBERTI: No, it's not what
17 he just said.

18 CHAIR MILLER: Okay.

19 MR. KLINE: That's exactly what he
20 just said.

21 MEMBER ALBERTI: No, that's not
22 what he just said.

1 CHAIR MILLER: Going to argue --

2 MR. KLINE: That's what he said.

3 MEMBER ALBERTI: He was giving a
4 hypothetical. I was asking what you believe
5 -- whether you agreed or not with his
6 hypothetical.

7 MR. KLINE: I do not agree with
8 his hypothetical.

9 MEMBER ALBERTI: And why?

10 MR. KLINE: Because you have the
11 authority to fine consistent with (c)(1).
12 Which is the graduated schedule of fines for
13 repeated primary tier violations.

14 MEMBER ALBERTI: But, (c)(1)
15 relies on previous violations.

16 MR. KLINE: Correct. You have the
17 authority.

18 MEMBER ALBERTI: So, how do we
19 apply that here?

20 MR. KLINE: I leave that to you.
21 That's not my job.

22 CHAIR MILLER: He's not

1 challenging the --

2 MEMBER ALBERTI: Whoa. Whoa. I
3 think -- no, it does go to the heart of the
4 matter because (c)(1) cannot be read -- I mean
5 (c)(2) cannot be read alone. I mean it has to
6 be read in conjunction with (c)(1). You can't
7 just pick parts of the statute out and ignore
8 the whole of the legislation.

9 MR. KLINE: The Council did. Read
10 up. (f) says Subsection (c)(1). (f) does not
11 say Subsection (c)(2). It's plain English.
12 This is not hard.

13 MR. STERN: I've been misquoting
14 by the way. It's (c)(3) not (c)(2). I'm
15 sorry. Just for reference and for the record.

16 MR. KLINE: I mean I didn't pick a
17 certain portion of the statute out. The
18 Council of the District of Columbia did in
19 (f). (f) says, and I'll read it again,
20 because we seem to be confused, the Board my
21 fine for a violation not listed on the
22 schedule consistent with the primary tier

1 violation penalties set forth in Subsection
2 (c)(1) of this section.

3 Now, the only thing set forth in
4 Subsection (c)(1), let's read it. For primary
5 tier violations, the penalties shall be no
6 less than the following: (a), for the first
7 violation, no less than \$1,000; (b), for the
8 second violation within two years, no less
9 than \$2,000 and (c), for the third violation
10 within three years, no less than \$4,000. That
11 is the entirety of (c)(1).

12 Revocation is in (c)(2).

13 So, how do we get using 830(f)
14 from (c)(1) to (c)(2) when 830(f) explicitly
15 references (c)(1) and makes no mention of
16 whatsoever of (c)(2).

17 MEMBER ALBERTI: Well --

18 MR. KLINE: I don't even
19 understand how we get there.

20 CHAIR MILLER: Okay.

21 MEMBER ALBERTI: I'm not going to
22 -- all right.

1 CHAIR MILLER: Are there any other
2 questions?

3 MR. STERN: Yes, the other thing I
4 would say -- the only other thing I would say
5 in explaining this and how we get there is
6 that 830(f) was only intended to define what
7 the fines were. It wasn't intended to change
8 the application of 830(c)(3) which is actually
9 the violation. It was only intended to give
10 the Board the fining authority.

11 MR. KLINE: Well, I agree.

12 CHAIR MILLER: Right. I --

13 MR. KLINE: I absolutely agree
14 with that.

15 CHAIR MILLER: -- don't see that
16 there's disagreement then between the parties
17 if --

18 MR. KLINE: Absolutely agree.

19 MR. STERN: That's right. But, in
20 doing so, it told the Board you can consider
21 these for purposes of making a decision
22 primary violations. They are substantially

1 equal to primary violations.

2 MR. KLINE: For purposes of
3 fining.

4 CHAIR MILLER: Okay.

5 MR. KLINE: That's what it says.
6 For fining.

7 CHAIR MILLER: Any other
8 questions? I think we've heard the argument.
9 Okay.

10 Then that concludes this hearing
11 and the Board will consider the arguments and
12 issue an order within 90 days.

13 CHAIR MILLER: Thank you very
14 much.

15 MR. KLINE: Thank you.

16 MR. STERN: Thank you.

17 CHAIR MILLER: I don't believe
18 there's any further business on the Board's
19 calendar for this morning and so, we're
20 adjourned.

21 (Whereupon, at 11:49 a.m., the
22 hearing was adjourned.)

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