

DISTRICT OF COLUMBIA
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ALCOHOLIC BEVERAGE CONTROL BOARD
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MEETING

IN THE MATTER OF:

Soloman Enterprises, LLC t/a
Climax Restaurant & Hookah Bar Show Cause
900 Florida Avenue, NW Hearing
Retailer CT - ANC-1B
License No. 88290
Case #12-CMP-00228

(Failed to Comply with Board
Order No. 2013-370)

May 14, 2014

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

PRESENT:

RUTHANNE MILLER, Chairperson
NICK ALBERTI, Member
DONALD BROOKS, Member
HERMAN JONES, Member
MIKE SILVERSTEIN, Member
HECTOR RODRIGUEZ, Member
JAMES SHORT, Member

ALSO PRESENT:

CHRISSY GEPHARDT, OAG

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

(12:32 p.m.)

CHAIRPERSON MILLER: Okay. We're back and calling Case No. 12-CMP-00228, Climax Restaurant and Hookah Bar located at 900 Florida Avenue, N.W., License No. 88290, in ANC-1B.

Okay. Would the parties introduce themselves for the record?

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

MR. KLINE: Good afternoon. Andrew Kline on behalf of the licensee.

MR. YEGZAW: I'm Soloman Yegzaw, owner of Climax.

CHAIRPERSON MILLER: Okay.

MR. KLINE: Mr. Yegzaw apologizes for his tardiness. His car, his vehicle was towed in Prince George's County and it took him a little while to get here.

CHAIRPERSON MILLER: Okay. Well, that's fine. So it's a Show Cause Hearing and

1 are there any preliminary matters before we
2 start?

3 MS. GEPHARDT: Yes, there is a
4 preliminary matter in this case. The parties
5 have reached an offer in compromise that we
6 would like to present to the Board.

7 In this case, the fine has been
8 paid of \$2,000, but we are proposing an
9 additional fine of \$2,000 to be paid today.
10 In addition, the two days that are supposed to
11 be triggered from a new violation, we are
12 going to ask that they not trigger.

13 From a policy perspective, this is
14 a payment case. And in this case, the payment
15 has been made. So again, from a policy
16 perspective, we believe that in an effort to
17 settle this case, we will ask that these two
18 days not be triggered in this instance.

19 CHAIRPERSON MILLER: Okay. Mr.
20 Kline, is your client agreeable to this offer
21 in compromise of a \$2,000 penalty to be paid
22 today?

1 MR. KLINE: Yes. We concur with
2 the offer in compromise and recognize that
3 under 1604.7 if it's accepted, that we waive
4 our right to hearing and waive our right to
5 appeal. I would add if it goes to hearing,
6 there are substantive defenses and that this
7 represents a compromise and we request that
8 the Board accept it as a compromise and move
9 this matter forward.

10 CHAIRPERSON MILLER: Okay. Ms.
11 Gephardt, why should --

12 MEMBER ALBERTI: Madam Chair, may
13 I ask if you would repeat the offer in
14 compromise? Mr. Kline interjected in the
15 middle of I think you repeating it and I'm not
16 sure you -- I heard the whole thing. So would
17 you repeat it for me?

18 MS. GEPHARDT: Sure. In this
19 case, there is one charge and we are proposing
20 a \$2,000 fine. The underlying fine was
21 \$2,000, so in this case we are proposing a
22 \$2,000 fine for the late payment. And we are

1 also asking that, essentially from a policy
2 perspective, that since this is a payment type
3 case and the payment has been made, the two
4 days not trigger from the prior case.

5 MEMBER ALBERTI: Okay.

6 CHAIRPERSON MILLER: Okay. So I
7 actually -- when I asked you, Mr. Kline,
8 whether your client agreed to the offer in
9 compromise, I said \$2,000 payable today and I
10 didn't bring up the two days not being
11 triggered from the previous offense.

12 MR. KLINE: Right.

13 CHAIRPERSON MILLER: Okay. So
14 just --

15 MR. KLINE: I understand that.

16 CHAIRPERSON MILLER: And your
17 client agrees to that?

18 MS. GEPHARDT: And of course --

19 CHAIRPERSON MILLER: I'm sorry.

20 MS. GEPHARDT: -- those two days
21 still remain to be triggered if there was
22 another violation.

1 CHAIRPERSON MILLER: Right.
2 Because they arise out of the previous order.

3 MS. GEPHARDT: Correct.

4 CHAIRPERSON MILLER: So I just
5 want to ask you, Ms. Gephardt, why the Board
6 should treat a payment case differently from
7 any other kind of case with respect to days
8 being not triggered or triggered as a policy
9 matter?

10 MS. GEPHARDT: Well, I think in
11 this case, the payment was made. It was late,
12 but it was made. I think that if this were a
13 different case where the Show Cause Notice
14 went out and then the payment was made, I
15 believe that that would be a different
16 situation.

17 So this is sort of a policy thing.
18 We are just talking about payment cases where
19 the payment has already been made. And in
20 addition, this is also an effort for the
21 Government to settle this case with the
22 licensee.

1 MR. KLINE: Madam Chair, may I
2 address that?

3 CHAIRPERSON MILLER: Yes.

4 MR. KLINE: The Board, of course,
5 is charged with enforcing laws regulating the
6 sale and service of alcohol and has a very
7 important function related to public safety.
8 And certainly, the Board's orders are to be
9 complied with. We don't quarrel with that at
10 all.

11 It would seem, however, that a 100
12 percent penalty for failing to timely make a
13 payment, a payment that has now been made,
14 should be adequate. I mean, I don't know of
15 any other situation where -- well, I guess in
16 traffic tickets we have a 100 percent penalty.

17 But to do more than that and also
18 suspend the license just seems to be, in my
19 opinion, and the Board of course is entitled
20 to its own opinion, excessive for nonpayment.
21 Payment has been made. It has been cured that
22 the Board's Orders need to be complied with.

1 There has been compliance and it would seem
2 that the payment of an additional \$2,000
3 should be adequate from a policy perspective
4 to resolve this matter.

5 Put people on notice that hey, you
6 need to comply with the Board's Order. You
7 need to timely pay any fines that are levied
8 or it's real expensive and we think that's
9 enough.

10 MEMBER ALBERTI: Madam Chair?

11 CHAIRPERSON MILLER: Yes?

12 MEMBER ALBERTI: May I ask a
13 question --

14 CHAIRPERSON MILLER: Sure.

15 MEMBER ALBERTI: -- of Ms.
16 Gephardt, just to clear up the records,
17 because I think there may be some confusion
18 here?

19 Ms. Gephardt, you said that or you
20 implied that the fine was paid before the Show
21 Cause Notice was issued. Did I hear you
22 correctly on that?

1 MS. GEPHARDT: Correct.

2 MEMBER ALBERTI: When was the fine
3 paid?

4 MS. GEPHARDT: The fine was paid
5 on March 10, 2014.

6 MEMBER ALBERTI: I have a Show
7 Cause Notice issued on January 8, 2014, which
8 is prior -- two months prior to the payment of
9 the fine. Two months.

10 MS. GEPHARDT: Okay. I apologize.

11 MEMBER ALBERTI: I just wanted to
12 make sure that was clear for the record.

13 MS. GEPHARDT: You are correct.

14 MEMBER ALBERTI: Does that change
15 your argument, Ms. Gephardt, at all?

16 MS. GEPHARDT: No, it doesn't.

17 MEMBER ALBERTI: Okay. Thank you.

18 MS. GEPHARDT: I believe --

19 MEMBER ALBERTI: That's fine. I
20 think Mr. Jones has --

21 CHAIRPERSON MILLER: Oh, Mr.
22 Jones?

1 MEMBER JONES: Thank you, Madam
2 Chair.

3 CHAIRPERSON MILLER: Yes.

4 MEMBER JONES: Just to be clear,
5 what's the basis for your position again, now
6 to remove that element of timely payment
7 associated with receipt of a notice?

8 MS. GEPHARDT: I mean, again, I
9 think that this is an effort to settle this
10 case with the licensee. It's a non-payment
11 case. The payment has been made. We believe
12 that a doubling of the fine, a \$2,000 penalty,
13 essentially for not making the payment is
14 adequate in this case. And that's simply the
15 way that the Government sees it.

16 MEMBER JONES: Okay. Thank you.
17 Thank you, Madam Chair.

18 CHAIRPERSON MILLER: Okay. Any
19 other questions? Okay. Then we have an offer
20 in compromise before us.

21 I'm going to move that we approve
22 the offer in compromise. Do I have a second?

1 Okay. Not hearing a second, the motion dies
2 for lack of a second. Would someone like to
3 make a motion in the alternative? Mr.
4 Alberti?

5 MEMBER ALBERTI: Oh, I thought
6 maybe Mr. -- I will, okay, for lack of no one
7 else. I move that we deny the motion for the
8 offer in compromise as presented.

9 MEMBER SHORT: Second.

10 CHAIRPERSON MILLER: Okay. Mr.
11 Short has seconded the motion. There is a
12 motion to deny the offer in compromise.

13 All those in favor of the motion
14 to deny say aye.

15 MEMBER ALBERTI: Aye.

16 MEMBER BROOKS: Aye.

17 MEMBER SILVERSTEIN: Aye.

18 MEMBER RODRIGUEZ: Aye.

19 MEMBER SHORT: Aye.

20 CHAIRPERSON MILLER: All those
21 opposed? Opposed. All those abstaining? The
22 motion passes 6-1-0. Okay. So now we have

1 the hearing.

2 MR. KLINE: Correct.

3 CHAIRPERSON MILLER: Are there any
4 preliminary issues with respect to the
5 hearing?

6 MS. GEPHARDT: No, there are not.

7 CHAIRPERSON MILLER: Okay.

8 Whenever you are ready, go ahead.

9 MS. GEPHARDT: Oh, okay. Board
10 Members, in this case, there is a Board Order
11 that was issued on September 18, 2013 for Case
12 No. 12-CMP-00228 and it ordered the respondent
13 no later than 30 days from the date of the
14 order to submit to ABRA the amount of \$2,000
15 for the fine of, I believe it was, operating
16 a summer garden without a Board-approved
17 endorsement.

18 The licensee in this case did not
19 pay the fine until March 10, 2014, which is,
20 obviously, past the 30 days that were allotted
21 and, therefore, we will be making our case
22 through the testimony of Bill Hager, who is --

1 keeps the records for ABRA and can testify to
2 these facts.

3 CHAIRPERSON MILLER: Okay.

4 MS. GEPHARDT: So now, I would
5 like to call Bill Hager to the stand.

6 MR. KLINE: For the record, I'll
7 reserve opening to the licensee's case.

8 CHAIRPERSON MILLER: Okay. Okay.
9 Whereupon,

10 WILLIAM HAGER
11 was called as a witness by Counsel for the
12 Government, and having been first duly sworn,
13 assumed the witness stand and was examined and
14 testified as follows:

15 MR. HAGER: I do.

16 CHAIRPERSON MILLER: Okay. Thank
17 you.

18 DIRECT EXAMINATION

19 MS. GEPHARDT: All right. Good
20 afternoon, Mr. Hager.

21 MR. HAGER: Good afternoon.

22 MS. GEPHARDT: Can you, please,

1 state your name and spell it for the record?

2 MR. HAGER: William Hager, H-A-G-
3 E-R.

4 MS. GEPHARDT: And, Mr. Hager,
5 where do you work?

6 MR. HAGER: Alcoholic Beverage
7 Regulation Administration.

8 MS. GEPHARDT: And what is your
9 title?

10 MR. HAGER: I am the Public
11 Information Officer.

12 MS. GEPHARDT: And how long have
13 you worked for ABRA?

14 MR. HAGER: Five and a half years.

15 MS. GEPHARDT: Okay. And as the
16 Public Information Officer, what are your
17 responsibilities and duties?

18 MR. HAGER: One of the primary
19 functions is that I'm the custodian of the
20 ABRA's record.

21 MS. GEPHARDT: Okay. Are you
22 familiar with a licensee by the name of Climax

1 Restaurant and Hookah Bar?

2 MR. HAGER: I am.

3 MS. GEPHARDT: Okay. And I would
4 like to show the witness what I have marked as
5 Exhibit No. 1. I believe it is within the
6 Board's record, which is the order from Case
7 No. 12-CMP-00228, which was dated on September
8 18, 2013.

9 (Whereupon, the document was
10 marked as Government Exhibit 1 for
11 identification.)

12 MS. GEPHARDT: I have copies for
13 the Board.

14 CHAIRPERSON MILLER: Okay.

15 MS. GEPHARDT: Would you like them
16 or --

17 CHAIRPERSON MILLER: Yes.

18 MS. GEPHARDT: Okay.

19 CHAIRPERSON MILLER: And also, Mr.
20 Kline, do you have a copy?

21 MR. KLINE: I do have a copy.

22 CHAIRPERSON MILLER: Okay. Thank

1 you.

2 MS. GEPHARDT: All right. Mr.
3 Hager, can you, please, explain what the
4 document is that I just gave you?

5 MR. HAGER: This is the ABC
6 Board's findings of fact and conclusions of
7 law and order that was sought resolution to
8 ABRA Case No. 12-CMP-00228.

9 MS. GEPHARDT: And for what
10 licensee was this in reference to?

11 MR. HAGER: Soloman Enterprises,
12 LLC t/a Climax Restaurant and Hookah Bar.

13 MS. GEPHARDT: Okay. And what was
14 the Board Order in this case?

15 MR. HAGER: The Board's Order in
16 this matter required that the respondent in no
17 later than 30 days from September 18, 2013
18 submit to ABRA a fine in the amount of \$2,000
19 or payment for the fine of \$2,000. In
20 addition, there was also a two-day suspension,
21 both days were stayed for a period of one
22 year.

1 MS. GEPHARDT: Okay. And what was
2 the date on this order?

3 MR. HAGER: September 18, 2013.

4 MS. GEPHARDT: Okay. And do you--
5 the Government -- I apologize, one more
6 question.

7 Is this a record that you keep as
8 a custodian of records?

9 MR. HAGER: It is.

10 MS. GEPHARDT: Within the
11 licensee's file?

12 MR. HAGER: Yes.

13 MS. GEPHARDT: Okay. And are you
14 -- the Government asks that Government's
15 Exhibit No. 1 be admitted into evidence.

16 MR. KLINE: No objection.

17 CHAIRPERSON MILLER: Okay. It's
18 admitted.

19 (Whereupon, the document marked as
20 Government Exhibit 1 was received
21 in evidence.)

22 MS. GEPHARDT: And, Mr. Hager, are

1 you aware of whether this licensee complied
2 with the Board Order?

3 MR. HAGER: Within the time frame
4 that was required, no, they were not. No,
5 they did not.

6 MS. GEPHARDT: Okay. And how do
7 you know that?

8 MR. HAGER: Because there was a
9 Notice of Delinquency that was sent on October
10 25, 2013, I believe, requesting payment of the
11 fine, because the 30 day period had expired.

12 MS. GEPHARDT: Okay. And after
13 you sent that Notice of Delinquency, did you
14 receive any further payment from the licensee?

15 MR. HAGER: We did receive payment
16 from the licensee on March 10, 2014.

17 MS. GEPHARDT: Okay. I would like
18 to show the witness what I have marked as
19 Exhibit No. 2.

20 (Whereupon, the document was
21 marked as Government Exhibit 2 for
22 identification.)

1 MR. HAGER: Thank you.

2 MS. GEPHARDT: I have copies for
3 the Board.

4 CHAIRPERSON MILLER: Okay.

5 MS. GEPHARDT: All right. Mr.
6 Hager, can you explain what Government Exhibit
7 No. 2 is?

8 MR. HAGER: This is a copy of the
9 receipt that is maintained within ABRA's files
10 reflecting payment of the \$2,000 fine for Case
11 No. 12-CMP-228 that was made on March 10,
12 2014.

13 MS. GEPHARDT: And how do you know
14 that this receipt is for the payment from the
15 licensee in this case?

16 MR. HAGER: Payment from the
17 licensee?

18 MS. GEPHARDT: How do you know
19 this is the payment for -- that Climax/Hookah
20 Bar made?

21 MR. HAGER: Because it is
22 reflected as associated with 12-CMP-228 which

1 is an enforcement record that is associated
2 with Climax Restaurant and Hookah Bar.

3 MS. GEPHARDT: Okay. Got it. The
4 Government requests that Exhibit No. 2 be
5 entered into evidence.

6 MR. KLINE: No objection.

7 CHAIRPERSON MILLER: Okay.

8 Admitted.

9 (Whereupon, the document marked as
10 Government Exhibit 2 was received
11 in evidence.)

12 MS. GEPHARDT: And Government
13 Exhibit 2, is that something that is kept in
14 the licensee's file?

15 MR. HAGER: In one of the
16 peripheral files it is maintained in this
17 license matter, yes.

18 MS. GEPHARDT: And is that a file
19 that you maintain?

20 MR. HAGER: Yes, it is.

21 MS. GEPHARDT: Okay. Thank you.
22 That's the only questions I have for this

1 witness. Thank you.

2 CHAIRPERSON MILLER: Okay. Any
3 cross?

4 MR. KLINE: I have no questions of
5 the witness.

6 CHAIRPERSON MILLER: Any Board
7 questions? Thank you.

8 MR. HAGER: Thank you.

9 MS. GEPHARDT: The Government
10 concludes its witnesses, at this point, and we
11 rest our case.

12 CHAIRPERSON MILLER: Okay. Mr.
13 Kline?

14 MR. KLINE: Madam Chair, I would
15 move to dismiss the charges. There is an
16 essential element of the Government's case
17 that is missing and it's not good enough for
18 the Board to make a decision in their order
19 and expect compliance. What is also required
20 is that the order be served on the licensee,
21 that they get notice of the order and notice
22 of what is required of them.

1 There is no testimony from the
2 witness that the order was served. The
3 Board's rules provide how documents are to be
4 served under 23 DCMR § 1703, which says
5 "Service upon a party may be made in the
6 following manner:

7 (a) By personal delivery;"
8 personal delivery would mean bringing it to
9 them and handing it to them.

10 (b) "By use of a process server;

11 (c) By registered or certified
12 mail;

13 (d) By telegram; or

14 (e) As otherwise authorized by
15 law."

16 1703.5 says, "Service on a party
17 shall be completed upon any of the following
18 acts:

19 (a) Handing the paper to the
20 person to be served;" that would be the
21 personal delivery.

22 (b) "Leaving the paper at the

1 licensed premises with a Board-approved
2 manager;" we have no testimony that that was
3 done in this case.

4 (c) "Leaving the paper at the
5 party's usual place of residence with some
6 individual of suitable age and discretion
7 residing therein;" we have no testimony that
8 that happened.

9 (d) "Deposit of the paper in the
10 U.S. Mail," there was some testimony that that
11 may have happened, but not "by registered or
12 certified mail, properly stamped and
13 addressed;" which is what is required by the
14 rule.

15 (e) "Deposit of the paper with a
16 telegraph company;" I don't even know if we
17 still have telegraph companies, but that's
18 what is in the law.

19 (f) "Deposit of the paper in the
20 U.S. Mail by First Class Mail, properly
21 stamped and addressed by an attorney of
22 record;" well, that would be if one attorney

1 in a case were serving another attorney.

2 Now, perhaps the Board may be
3 inclined to --

4 Oh and (g), I'm sorry, I left out.

5 (g) "By an action in conformity
6 with an Order of the Board in any proceeding."

7 Now, perhaps the Board might
8 conclude that they do not, at this point,
9 apply to parties and they don't have a
10 responsibility of complying with these rules
11 with respect to service.

12 I would note that DC Code § 2-509,
13 which is the Administrative Procedures Act
14 requires that when any administrative agency
15 or any administrative body, I should say,
16 makes a decision, that the parties be given a
17 copy of the order.

18 Now, how were they given a copy of
19 the order? That is given meaning by the
20 Board's Rules. Otherwise, I suppose, one
21 could say well, we tacked it up on the
22 bulletin board. We gave you a copy of the

1 order. We mailed it to your sister. We gave
2 you a copy of the order.

3 The rules provide how it is to be
4 given and that's by service, which is a
5 technical term, meaning to get to provide
6 notice to somebody. There is no evidence in
7 this case that that was ever done. Therefore,
8 to hold a licensee in violation of a Board
9 Order, without any evidence whatsoever that
10 they were properly served with a copy of that
11 Board Order is -- would simply be improper.

12 And we would request that the
13 charges be dismissed or the charge be
14 dismissed.

15 CHAIRPERSON MILLER: Ms. Gephardt,
16 do you want to address that?

17 MS. GEPHARDT: In this case, there
18 is, I don't have in front of me, the service
19 form for the actual order. However, the
20 Government would argue that the licensee in
21 this case paid a \$2,000 fine on March 10,
22 2014. I can -- you can presume that he

1 wouldn't just come in and decide to give ABRA
2 \$2,000, which just so happens to correspond
3 with the fine he was -- that was alleged in
4 the order of September 18, 2013.

5 So the fact that the client paid
6 it or excuse me, the licensee paid it is
7 evidence that he received the Board Order.

8 I believe that we also would have
9 a service form indicating that it was served.
10 However, since my file was for the fact that
11 he didn't pay it, I don't actually have it in
12 my file here. I believe it would be in ABRA's
13 records.

14 MR. KLINE: Madam Chair, if I may
15 respond? Two points.

16 CHAIRPERSON MILLER: Okay.

17 MR. KLINE: One is --

18 CHAIRPERSON MILLER: Yes.

19 MR. KLINE: -- there isn't any
20 dispute that he ultimately learned that there
21 was a fine due and there is no dispute that he
22 paid it.

1 The dispute is whether he was
2 properly served with a copy of the order, such
3 that he could comply with it within the 30
4 days, that's what this case is about. Not
5 whether he paid it. He ultimately did pay it.
6 It's undisputed that he paid it. The issue is
7 one of timing.

8 And the Government's position is
9 it was not paid within the 30 days required by
10 the order and if there is no evidence that he
11 was timely served with that order, then it
12 would be impossible for him to timely comply
13 with the order, unless he were clairvoyant.
14 I mean, he has got to get notice of it in
15 order to comply. It's basic. It's due
16 process.

17 You give people notice. You say
18 here, here is an order. You've got to do it
19 within 30 days. Just to introduce evidence
20 that there is an order that says that he has
21 to do it within 30 days without proof that he
22 has been provided with notice of that order,

1 violates the fundamental tenets of due
2 process. You have to give people notice.

3 And so that is an essential
4 element of the Government's case. It is not--
5 there has been no evidence proffered that --
6 maybe there is some form somewhere, I don't
7 know, but it's not part of this record. And
8 the Board is constrained under the
9 Administrative Procedures Act and the cases
10 that have been decided under the
11 Administrative Procedures Act to rely on the
12 record that is before you.

13 And this record is barren of any
14 evidence whatsoever that this licensee was
15 timely served with a copy of this order, such
16 that he could comply and not be in violation
17 of the Board's Order.

18 CHAIRPERSON MILLER: Okay.
19 Anything else you want to say?

20 MS. GEPHARDT: No, thank you.

21 CHAIRPERSON MILLER: Mr. Kline,
22 are you saying that the Board is constrained

1 from checking public records to determine
2 whether there was a document showing service?

3 MR. KLINE: I'm not saying the
4 Board is constrained. What I'm saying is that
5 we are in an evidentiary Show Cause Hearing.
6 The Government has the burden. The Government
7 has rested its case. The record is complete.
8 And you, the Board is constrained to rely on
9 the evidence of record that has been presented
10 and as you have seen it.

11 CHAIRPERSON MILLER: Okay. Okay.
12 I understand that at least from one Board
13 Member that there is a request to go consider
14 this motion in Executive Session and then we
15 will come back. Is there any objection by any
16 others? Okay. In order to confer with our
17 attorney, as this is a legal issue. Okay.

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

1 for the purpose of seeking legal advice from
2 our counsel on Case No. 12-CMP-00228, Climax
3 Restaurant and Hookah Bar, per Section
4 405(b)(4) of the Open Meetings Amendment Act
5 of 2010, and considering the motion that is
6 pending.

7 Is there a second?

8 MEMBER RODRIGUEZ: Second.

9 CHAIRPERSON MILLER: Mr. Rodriguez
10 has seconded the motion.

11 All those in favor say aye.

12 ALL: Aye.

13 CHAIRPERSON MILLER: I'm sorry,
14 I'm going to take a roll call vote on this.

15 Mr. Brooks?

16 MEMBER BROOKS: I agree.

17 CHAIRPERSON MILLER: Mr. Alberti?

18 MEMBER ALBERTI: I agree.

19 CHAIRPERSON MILLER: Mr.

20 Rodriguez?

21 MEMBER RODRIGUEZ: I agree.

22 CHAIRPERSON MILLER: Ms. Miller

1 agrees.

2 Mr. Silverstein?

3 MEMBER SILVERSTEIN: I agree.

4 CHAIRPERSON MILLER: Mr. Short?

5 MEMBER SHORT: I agree.

6 CHAIRPERSON MILLER: Mr. Jones?

7 MEMBER JONES: I agree.

8 CHAIRPERSON MILLER: Okay. The
9 vote is 7-0-0 and the motion passes. And we
10 will now recess briefly to consider the motion
11 before us. Thank you.

12 (Whereupon, at 12:59 p.m. a recess
13 until 1:10 p.m.)

14 CHAIRPERSON MILLER: All right.
15 We're back on the record. And the Board had
16 an opportunity to consider the Motion to
17 Dismiss. However, the Board is not ready to
18 reach a decision on that, at this time. So we
19 are going to consider it in the context of our
20 deliberation on the case as a whole after we
21 hear the rest of the evidence.

22 We will consider that first, but

1 we didn't want to take any more time, at this
2 point, to try to resolve the legal issue.

3 So, Mr. Kline?

4 MR. KLINE: Madam Chair, I just
5 want to note my objection for the record to
6 preserve it for appeal.

7 CHAIRPERSON MILLER: Okay.

8 MR. KLINE: In that if the
9 Government has not met its prima facie case in
10 terms of making out the essential elements of
11 the violation, then I believe that the Board
12 has an obligation to rule on a properly made
13 Motion to Dismiss, because there really isn't
14 anything else to talk about if the Board were
15 to agree with the applicant's position that
16 the prima facie case has not been met.

17 So I raise that objection. I
18 implore the Board to follow normal procedure
19 in an administrative procedure or Court
20 procedure, as the case may be, and analyze the
21 Government's case and make a decision as to
22 whether they met their prima facie burden.

1 To require, as the Board almost
2 always does, that an applicant in the face of
3 a Motion to Dismiss, because the Government
4 didn't meet its prima facie case, is, in my
5 opinion, prejudicial and unfair. The
6 Government has got the burden. They have
7 either met the burden going forward to shift
8 the burden of going forward to the licensee or
9 they haven't. And it would seem to me the
10 Board is required to make that decision.

11 CHAIRPERSON MILLER: Okay. I
12 would just say in defense of the Board that I
13 think often in other cases in Court or
14 wherever, preliminary motions may be filed
15 first and the judiciary body has more time to
16 carefully evaluate them than in this type of
17 a hearing.

18 So but your objection is noted for
19 the record. And it's up to you how you want
20 to proceed, at this point.

21 MEMBER ALBERTI: Madam Chair, may
22 I just ask --

1 CHAIRPERSON MILLER: Yes?

2 MEMBER ALBERTI: -- Mr. Kline?

3 Just so I understand. Your argument, Mr.
4 Kline, is that the evidence hasn't been
5 presented in this case. You are not arguing--
6 you don't feel like you need to argue that the
7 evidence doesn't exist. You are just saying
8 that the evidence doesn't exist -- hasn't been
9 made part of this case, hasn't been presented,
10 so it is not before the Board. Is that what
11 your argument is?

12 MR. KLINE: Well, I need to say it
13 another way, because I'm not sure I can answer
14 that as a yes or no question. And you know,
15 in these proceedings, I don't necessarily get
16 to cross-examine.

17 MEMBER ALBERTI: I didn't expect a
18 yes or no, but go ahead.

19 MR. KLINE: But I mean, the way it
20 works, the way it is supposed to work is that
21 any administrative proceeding or legal
22 proceeding is the party with the burden is

1 required to go forward, put evidence in the
2 record that if the evidence is believed and at
3 the initial threshold it doesn't matter
4 whether the body believes the evidence or not,
5 but at least puts evidence in the record that
6 would make out the elements of, in this case,
7 the offense. Okay?

8 And from our -- from the way I
9 look at it, the elements of the offense, in
10 this case, are pretty simple:

11 The Board entered an order
12 requiring payment of \$2,000.

13 The order -- the licensee was
14 provided notice of that order, so that it
15 could timely comply.

16 And number three, the licensee did
17 not timely comply with the order.

18 Now, one and three I don't think
19 are -- you know, there is evidence of that.
20 But there is no evidence in the record and it
21 really doesn't matter whether it exists or not
22 for purposes of an administrative proceeding.

1 What matters and the Court of Appeals is --
2 you know, you raise an eyebrow and I would ask
3 you to turn around and ask Ms. Jenkins, the
4 Board's Counsel, but the Court of Appeals has
5 been very clear if the Board is going to make
6 a decision, then it must make a decision on
7 the evidence of record. And that's the
8 evidence that is brought before the tribunal.

9 And we are not sitting here saying
10 whether there is other evidence or not. I
11 mean, that's not really the point. The only
12 evidence that is relevant to this case, to
13 this charge is the evidence that is before
14 you, the evidence that has been presented.

15 And what we are merely saying is
16 based on the evidence that has been presented
17 and it's the Government's burden to go
18 forward, which means they have to show what is
19 called a prima facie case, they have to show
20 the elements of whatever it is, in this case
21 we think it is three. And if they haven't
22 produced any evidence, then the charge should

1 be dismissed. Does that make it clear?

2 MEMBER ALBERTI: It makes it very
3 clear. Thank you.

4 MS. GEPHARDT: May I say
5 something?

6 CHAIRPERSON MILLER: Yes.

7 MS. GEPHARDT: The Government
8 would argue that the record in this case,
9 which is in the possession of the Alcoholic
10 Beverage Administration for this licensee is
11 a public record. So the Board has the
12 authority to access that record to see if
13 there was service in this case of the order
14 and if it was on time.

15 So while it wasn't presented by
16 the Government, they are well within their --
17 since the issue has been raised by the
18 respondent, it is well within the Board's
19 discretion to access the file to locate that
20 information to use it in determining how they
21 are going to decide this case.

22 CHAIRPERSON MILLER: I appreciate

1 that. I guess I understand Mr. Kline is
2 saying that we should not go forward with an
3 evidentiary hearing until the Motion to
4 Dismiss has been decided. Is that your
5 position?

6 MR. KLINE: Yes. My position is--

7 MS. GEPHARDT: Oh, okay.

8 MR. KLINE: -- there has been no
9 meeting of the Government's burden of
10 presenting a prima facie case, which means
11 evidence that would support all elements of
12 the offense.

13 In the absence of that, it's our
14 position that the Board must dismiss.

15 CHAIRPERSON MILLER: Well --

16 MR. KLINE: I mean, it's no
17 different than any other proceeding where the
18 party moving forward needs to put on evidence
19 of the required elements and that has not
20 happened in this case.

21 CHAIRPERSON MILLER: I'm just
22 going to throw this out and that is that the

1 Board isn't ready to decide the Motion to
2 Dismiss at this time. So that is not on the
3 table. And we have not discussed the
4 possibility of whether or not we just stop the
5 proceedings here and decide the Motion to
6 Dismiss when we do as an option. And if we
7 deny the Motion to Dismiss, then there would
8 be the evidentiary -- the rest of the
9 evidentiary hearing.

10 And we have not discussed this and
11 I am just throwing this out, based on what I'm
12 hearing Mr. Kline saying we -- as objecting to
13 our going forward. So in other cases we have
14 held the Motions to Dismiss in abeyance and
15 gone forward right then and there and it
16 hasn't been an issue.

17 MR. KLINE: Because I didn't raise
18 it as an issue, but today I am raising it as
19 an issue.

20 CHAIRPERSON MILLER: Today you are
21 raising it as an issue.

22 MR. KLINE: That's why it hasn't

1 been an issue.

2 CHAIRPERSON MILLER: Okay.

3 MR. KLINE: Today I am.

4 CHAIRPERSON MILLER: Ms. Gephardt,
5 do you have a comment on that?

6 MS. GEPHARDT: Essentially, you
7 are saying the Board has not decided whether
8 there is -- how they are going to decide on
9 the motion, correct?

10 CHAIRPERSON MILLER: Correct.

11 MS. GEPHARDT: And so the Board
12 would like to proceed with the introduction of
13 evidence or the defense and, therefore, then
14 when that is concluded, then the Board will
15 make a decision?

16 CHAIRPERSON MILLER: No. What I'm
17 saying is that was what we were planning to do
18 and that's what we have done in all cases.
19 But Mr. Kline has raised an issue that we
20 should not go -- he should not be required to
21 go forward until the Motion to Dismiss is
22 decided. And so if that were the case, I was

1 asking just your view as to whether or not we
2 stop here and once the Board has made a
3 decision, you go home. You know, once we make
4 a decision, if the Motion to Dismiss is
5 denied, we would pick up the hearing again.

6 MEMBER ALBERTI: Madam Chair?

7 CHAIRPERSON MILLER: I'm throwing
8 that out. I'm going to ask my Board Members
9 the same thing, because it just seemed like a
10 question that was raised in response to Mr.
11 Kline's objection.

12 MEMBER ALBERTI: I would like to
13 ask Mr. Kline another question related to
14 this.

15 CHAIRPERSON MILLER: But we didn't
16 hear from Ms. Gephardt yet.

17 MEMBER ALBERTI: Okay. Okay.
18 Sure.

19 CHAIRPERSON MILLER: So did you
20 have?

21 MS. GEPHARDT: Yes, right. I
22 mean, the Government would -- basically, will

1 defer to the Board as to how the Board --

2 CHAIRPERSON MILLER: Okay.

3 MS. GEPHARDT: -- wants to proceed
4 in this matter and we don't object either way,
5 so --

6 CHAIRPERSON MILLER: Okay. Mr.
7 Alberti?

8 MEMBER ALBERTI: Mr. Kline, what
9 is the prejudice to your client? What do you
10 feel the prejudice to your client is if the
11 Board continues the hearing without making a
12 decision on the motion?

13 MR. KLINE: The Government, as I
14 indicated earlier, has not met its prima facie
15 case. And if we are required to proceed, then
16 the Government has another bite at the apple
17 to try to make its prima facie case, which it
18 previously has not made, which was its burden
19 through cross or through other evidence.

20 MEMBER ALBERTI: Okay. Thank you.

21 CHAIRPERSON MILLER: Okay. Any
22 other questions from Board Members? Comments?

1 Any comments, Board Members? Do you want to
2 proceed or do you want to --

3 MEMBER RODRIGUEZ: Proceed.

4 MEMBER JONES: We want to proceed.

5 MEMBER SHORT: Yes, yes.

6 CHAIRPERSON MILLER: Proceed?

7 MEMBER RODRIGUEZ: Oh, yes, ma'am.
8 We would like to proceed.

9 MEMBER JONES: We would like it
10 noted on the record, he has the opportunity to
11 move forward with an appeal.

12 CHAIRPERSON MILLER: Okay.

13 MEMBER JONES: So let's move
14 forward.

15 MEMBER RODRIGUEZ: Agreed.

16 MR. KLINE: I beg the Board's
17 indulgence?

18 CHAIRPERSON MILLER: Okay.

19 MR. KLINE: The licensee rests.

20 CHAIRPERSON MILLER: Okay.

21 MR. KLINE: The licensee is going
22 to rest on the record that you have.

1 CHAIRPERSON MILLER: Okay.

2 Closing?

3 MS. GEPHARDT: The Government has
4 met its burden in this case. The Government
5 has introduced evidence to show that the
6 payment in this case was made late. The order
7 stated that the fine should be paid within 30
8 days of September 18, 2013. And the evidence
9 was introduced that the payment was actually
10 made on March 10, 2014.

11 The respondent has raised the
12 issue that there is nothing to show a service
13 form when this Board Order was delivered or
14 served on the respondent. The Government
15 argues that this is information of public
16 record within the file of -- that ABRA has on
17 this licensee, which can be accessed, which is
18 within the discretion and the authority of the
19 Board to access information to make a
20 determination as to whether the licensee was
21 on notice that this order had been issued and
22 that he was obligated to pay within 30 days.

1 CHAIRPERSON MILLER: Thank you.

2 MS. GEPHARDT: Thank you.

3 CHAIRPERSON MILLER: Okay. Mr.
4 Kline?

5 MR. KLINE: Yes. Madam Chair,
6 Members of the Board, the Government would
7 have a licensee aware of and prepare for
8 anything that might be in the Board's files
9 and perhaps anything that might be in any
10 other administrative agency's public files in
11 these proceedings.

12 The Court of Appeals is very clear
13 that we try these cases, we make a record.
14 What you are to consider is the record
15 evidence. And if there is some other record
16 that the Board wants to rely on, then there
17 are procedures for doing that and the
18 Government is required to introduce that
19 during the course of their case in chief, so
20 that we have an opportunity to rebut it, to
21 put on witnesses to counter what that evidence
22 might be.

1 But just to suggest well, the
2 Board can go look and see what might be
3 elsewhere, this isn't a fishing expedition.
4 This is a charge, a serious charge that has
5 been brought against this licensee. The Board
6 says he got an order. He was supposed to pay
7 within 30 days. He didn't pay it and,
8 therefore, he was in violation, and that's
9 what the charge is.

10 But in order for him to comply and
11 pay within 30 days, there has to be some
12 evidence that he got notice of the order and
13 that evidence must be of record and we don't
14 have it.

15 I want to speak to if the Board
16 does, despite our arguments, which we think
17 should be persuasive, that there shouldn't be
18 a finding of liability on the part of this
19 licensee. I want to speak to penalty for a
20 minute.

21 It's on the record. It's no
22 secret that there was an offer in compromise

1 and they made the point that it was an offer
2 in compromise and it represented a compromise
3 for the licensee to pay an additional \$2,000,
4 which the Board rejected.

5 It is troubling to me in having
6 worked with many small businesses that somehow
7 a 100 percent penalty is not enough. I mean,
8 from where I sit and I hope no one will take
9 offense, it seems to lack a -- it seems to
10 reflect a lack of understanding of how
11 difficult it is to run a small business and
12 how many different things that are involved in
13 running a small business.

14 During the break, I was telling
15 the story about our -- I'm going to digress a
16 little bit, because I think this is really
17 important. Our small law firm looked to set
18 up a 401(k) and we told somebody there is
19 seven of us. And the requirements that the
20 Government has for setting a 401(k), you throw
21 up your hands.

22 Now, those of you who have not

1 been in a small business have no idea of what
2 I'm talking about. And you have no idea how
3 difficult it is for business people like this
4 immigrant and others like them to run these
5 businesses.

6 If, indeed, he did get notice,
7 which there is no evidence of, and he didn't
8 pay it on time, well, he made a mistake. You
9 know, if he got notice, he should have paid
10 it. But what is enough, a 100 percent penalty
11 really is not enough? And the Board rejects
12 that as if no we need more?

13 I mean, I sit back here and I --
14 representing these businesses and knowing
15 these business people and how hard they work
16 and the Board for whatever reason, in my
17 opinion, and please don't take offense, but
18 doesn't seem to get it. You don't seem to get
19 how hard it is to run these businesses, that
20 an additional \$2,000, \$4,000 off of his bottom
21 line is somehow not enough to deter future
22 conduct, which is what this is supposed to be

1 about?

2 I'm at a loss. I really am. So I
3 would ask that you take that to heart. Those
4 of you that have worked in small businesses
5 will know what I'm talking about. Those of
6 you that haven't, I hope you will consider
7 that how difficult it is, how challenging it
8 is to run these businesses, comply with all of
9 the obligations that have to be complied with
10 and at the same time make sure, because this
11 is very important, that you have enough money
12 at the end of the week to see that your
13 employees are paid. And that maybe you have
14 something to take home.

15 And I'm sorry if I sound
16 passionate about this, I am. My father was a
17 small business person. I have been before you
18 many, many times with people similar to this
19 gentleman and I hope that you will take that
20 into consideration in this case and in other
21 cases as people like Mr. Yegzaw come before
22 you having transgressed in some way, yes, they

1 need to pay. They need to be penalized in
2 some way, but, please, let's keep it in
3 perspective in terms of what the violation
4 might have been. Thank you.

5 CHAIRPERSON MILLER: Thank you. I
6 would like to ask a clarifying question.

7 MR. KLINE: Sure.

8 CHAIRPERSON MILLER: Just on your
9 legal argument, because we don't have your
10 Motion to Dismiss in writing. Are you saying
11 that the Government was required to show that
12 your client actually received notice or that
13 notice was actually served?

14 MR. KLINE: That there was --
15 okay. So let's back up. Let's simplify it.
16 The Administrative Procedures Act requires, as
17 I think the 4th Amendment if we want to, you
18 know, go to the big document, notice. Okay?
19 And the Administrative Procedures Act requires
20 that when a decision is made by an
21 administrative body, that the affected parties
22 -- what it actually says is that they are

1 given a copy, which is not very precise, but
2 I think that that's what the APA says.

3 CHAIRPERSON MILLER: Okay.

4 MR. KLINE: That they be given a
5 copy. Well, the question is well, how are
6 they given a copy? What does that mean to
7 give them a copy? Can you just post it on
8 your website? Is that giving them a copy?
9 Well, your rules, specifically I think it is
10 1703, 23 DCMR 1703, set forth what is
11 acceptable in terms of service.

12 Now, usually what happens is, you
13 know, an Investigator will come out and say
14 hey, I've got an order for you, sign here.
15 All right? Then there isn't any question of
16 notice, you know, and then that would be
17 introduced as part of the case. Yeah, they
18 got notice.

19 So our argument is that there has
20 to be evidence that the party who has
21 allegedly violated the order was timely given
22 notice of the order. And this record is

1 bereft of that evidence in terms of there
2 being any notice --

3 CHAIRPERSON MILLER: Okay.

4 MR. KLINE: -- to the licensee of
5 the order. And further, even if there was
6 some evidence that it was put in regular mail,
7 your regulations say that doesn't do it or if
8 they sent it by email, that didn't do it
9 either. Your regulations say how service --
10 and just like our licensees have to comply
11 with the letter of the law, they got to post
12 the license, it's got to be in a conspicuous
13 place, if not, you fine them. The Board is
14 charged with complying with the regulations.

15 CHAIRPERSON MILLER: Okay. I
16 didn't really want to open up the whole -- I
17 just wanted to --

18 MR. KLINE: You did.

19 CHAIRPERSON MILLER: I just really
20 wanted a clarification between given and
21 whatever. Okay. Got it. Thank you. All
22 right. If there is nothing else, then I'm

1 going to --

2 MEMBER SILVERSTEIN: Ms. Gephardt.

3 CHAIRPERSON MILLER: Oh, did you
4 want to respond to that?

5 MS. GEPHARDT: Yes.

6 CHAIRPERSON MILLER: Okay. Go
7 ahead.

8 MS. GEPHARDT: In terms of the
9 penalty, I would like to argue --

10 CHAIRPERSON MILLER: Oh, she has
11 rebuttal, right. Yes, she has rebuttal.

12 MS. GEPHARDT: Oh, and the
13 rebuttal.

14 CHAIRPERSON MILLER: She closed.

15 MS. GEPHARDT: Well, in this case,
16 I mean, I pretty much said in my closing
17 argument what my view of this is. I believe
18 in this case the -- Mr. is it Yegzaw?

19 MR. YEGZAW: Yes.

20 MS. GEPHARDT: Mr. Yegzaw did get
21 notice as evidenced by the fact that he paid
22 this fine of \$2,000. So he had to have been

1 put on notice somehow that he had to pay this
2 fine and, therefore, he was -- by having this
3 knowledge, he knew that he was late when he
4 paid the \$2,000 fine in March of 2014.

5 In terms of penalty, this is the
6 third primary for this licensee and,
7 therefore, we would ask for a fine of \$4,000.
8 We would also ask that the two days trigger in
9 this case. Thank you.

10 CHAIRPERSON MILLER: Okay. Thank
11 you. All right. I'm going to close the
12 record then, at this point, and ask the
13 parties if they want to file proposed findings
14 of fact and conclusions of law or waive your
15 right to do so?

16 MR. KLINE: We will waive.

17 CHAIRPERSON MILLER: Okay. Ms.
18 Gephardt?

19 MS. GEPHARDT: Waive, yeah.

20 CHAIRPERSON MILLER: Okay. So the
21 Board will issue an order within 90 days and
22 we will vote now to consider the case in

1 closed session.

2 As Chairperson of the Alcoholic
3 Beverage Control Board for the District of
4 Columbia and in accordance with Section 405 of
5 the Open Meetings Amendment Act of 2010, I
6 move that the ABC Board hold a closed meeting
7 for the purpose of seeking legal advice from
8 our counsel on Case No. 12-CMP-00228, Climax
9 Restaurant and Hookah Bar, per Section
10 405(b)(4) of the Open Meetings Amendment Act
11 of 2010, and deliberating upon this case for
12 the reasons cited in Section 405(b)(13) of the
13 Open Meetings Amendment Act of 2010.

14 Is there a second?

15 MEMBER SILVERSTEIN: Second.

16 CHAIRPERSON MILLER: Mr.

17 Silverstein has seconded the motion. I'll now
18 take a roll call vote. Mr. Brooks?

19 MEMBER BROOKS: I agree.

20 CHAIRPERSON MILLER: Mr. Alberti?

21 MEMBER ALBERTI: I agree.

22 CHAIRPERSON MILLER: Mr.

1 Rodriguez?

2 MEMBER RODRIGUEZ: I agree.

3 CHAIRPERSON MILLER: Ms. Miller
4 agrees.

5 Mr. Silverstein?

6 MEMBER SILVERSTEIN: I agree.

7 CHAIRPERSON MILLER: Mr. Short?

8 MEMBER SHORT: I agree.

9 CHAIRPERSON MILLER: Mr. Jones?

10 MEMBER JONES: I agree.

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

13 I hereby give notice that the ABC
14 Board will conduct a closed meeting in the ABC
15 Board conference room pursuant to the Open
16 Meetings Amendment Act of 2010 and issue a
17 written decision within 90 days. Okay. Thank
18 you very much.

19 MR. KLINE: Great. Thank you.

20 MS. GEPHARDT: Thank you.

21 CHAIRPERSON MILLER: So the Board
22 will now recess and we will be adjourned until

1 some time after 2:00.

2 (Whereupon, the Show Cause Hearing
3 in the above-entitled matter was concluded at
4 1:33 p.m.)

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