

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 * Show Cause
 1112 19th Street, NW * Hearing
 Retailer CR - ANC-2B * (Status)
 License No. 60001 *
 Case #14-CC-00121 *
 *
 (Sale to Minor Violation, *
 Failed to Take Steps Necessary *
 to Ascertain Legal Drinking Age) *

August 5, 2015

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
 MIKE SILVERSTEIN, Member
 HECTOR RODRIGUEZ, Member
 JAMES SHORT, Member

ALSO PRESENT:

CHRISSY GEPHARDT, OAG

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

2 9:38 a.m.

3 CHAIRPERSON MILLER: Okay. The next
4 case is Case No. 14-CC-00121, Smith & Wollensky
5 located at 1112 19th Street, N.W., License No.
6 60001, in ANC-2B.

7 MS. GEPHARDT: Madam Chair, can I ask
8 that I have a brief continuance on this case?

9 CHAIRPERSON MILLER: Okay.

10 MS. GEPHARDT: If we could just hold
11 off until I have --

12 CHAIRPERSON MILLER: You mean this
13 morning like --

14 MS. GEPHARDT: Oh, yes, yes, yes, yes.

15 CHAIRPERSON MILLER: Okay.

16 MS. GEPHARDT: Like maybe you can call
17 the next case.

18 CHAIRPERSON MILLER: All right.

19 MS. GEPHARDT: And hopefully we will
20 have something figured out by then.

21 CHAIRPERSON MILLER: All right.

22 MS. GEPHARDT: Okay.

1 MR. WHELAN: That's fine with us.

2 CHAIRPERSON MILLER: Okay.

3 MS. GEPHARDT: Okay. Thanks.

4 CHAIRPERSON MILLER: So we will call
5 you at the next appropriate time when you are
6 back. Okay.

7 MS. GEPHARDT: Thank you.

8 (Whereupon, the above-entitled matter
9 went off the record at 9:39 a.m. and resumed at
10 10:01 a.m.)

11 CHAIRPERSON MILLER: Are you ready to
12 proceed on the case that we passed earlier?

13 MS. GEPHARDT: Yes, I am ready to
14 proceed.

15 CHAIRPERSON MILLER: All right. That
16 is Smith & Wollensky, Case No. 14-CC-00121, so we
17 are recalling that case.

18 And if you would introduce yourselves
19 for the record?

20 MR. MIRKOVIC: Good morning. Ned
21 Mirkovic. I'm the general manager of Smith &
22 Wollensky Restaurant in Washington, D.C.

1 CHAIRPERSON MILLER: Okay.

2 MR. WHELAN: Good morning again.

3 Stephen Whelan on behalf of Smith & Wollensky.

4 MS. GEPHARDT: And good morning again.

5 Chrissy Gephardt on behalf of the Office of the

6 Attorney General.

7 CHAIRPERSON MILLER: Okay. So we had
8 already gone through the preliminary matters of
9 notice. And so we are at whether or not the
10 parties have a matter they want to present to us?

11 MS. GEPHARDT: Yes. We do have a
12 preliminary matter.

13 CHAIRPERSON MILLER: Okay.

14 MS. GEPHARDT: The parties have
15 reached an Offer in Compromise in this case,
16 which consists of a \$2,000 fine and five days
17 suspension, all days stayed for one year. This
18 is for Charge 2.

19 And Charge 1 will be dropped. And
20 additionally, five suspension days will need to
21 be served from Case No. 13-CC-00076. The five
22 days that will be served will be September 3rd,

1 4th, 5th, 6th and 7th, which is Labor Day
2 weekend.

3 And the fine must be paid within 30
4 days or the license will be suspended
5 immediately.

6 CHAIRPERSON MILLER: Okay. Let me ask
7 the licensee if you agree to the Offer in
8 Compromise as I believe I heard it, which would
9 be \$2,000 fine plus five days suspension, all
10 five days stayed. Charge 1 dropped. Five days
11 would be triggered from a previous violation to
12 be served Labor Day weekend, September 3, 4, 5, 6
13 and 7. And the \$2,000 fine must be paid within
14 30 days. If not paid within 30 days, the license
15 will be suspended.

16 MR. WHELAN: Yes, that's correct and
17 we are in agreement.

18 CHAIRPERSON MILLER: Okay. Now, are
19 there Board questions? Yes, Mr. Brooks?

20 MEMBER BROOKS: Yes. Ms. Gephardt,
21 Charge 1 was dropped.

22 MS. GEPHARDT: Correct.

1 MEMBER BROOKS: Any explanation as to
2 why?

3 MS. GEPHARDT: Sure. Well, the
4 thinking of the Government on the rationale
5 behind it is that as you are familiar with, I
6 assume, is Case No. 13-CC-00076, which was the
7 subject of a hearing and a lengthy decision by
8 the Board. The decision was written, I believe--
9 anyway, I'm seeing if I can find it here, I can't
10 find it.

11 But anyway, there was a decision
12 written by the Board for Case No. 14-CMP-00121
13 and 13-CC-00076 in which the licensee entered
14 into a staff settlement and paid a fine. It
15 turns out that it should have been a warning.
16 However, the Board correctly ruled that they had
17 entered into the settlement and, you know, you
18 can't just back out of it.

19 However, the Government feels that in
20 terms of equity that the suspension days in this
21 case should remain at five. If we had kept
22 Charge 1, it would have been nine. And so,

1 therefore, we see it as sort of more of just what
2 seems fair in this case, given what happened in
3 the last case.

4 And so, therefore, that is why we
5 dropped Charge 1. And in fact, the five days
6 that were stayed that they are serving on this
7 case would have never happened if they had just
8 gotten a warning. So again, it's just an equity
9 argument as to why we did that.

10 MEMBER BROOKS: Thank you, Madam
11 Chair.

12 MS. GEPHARDT: Um-hum.

13 MEMBER ALBERTI: May I, Madam Chair?

14 CHAIRPERSON MILLER: Sure. Mr.
15 Alberti?

16 MEMBER ALBERTI: Ms. Gephardt, I'm
17 trying to figure out how to say this without
18 putting you on the spot, but I think you may have
19 misread our order or misinterpreted our order.

20 In the case, I guess that is and I may
21 have the case wrong, but, 00076, we actually, in
22 that order if I'm in the right order, on that

1 order determined that that first violation was
2 egregious, so it didn't require a warning.

3 It wasn't that there was a mistake and
4 they agreed to it. And then we said you couldn't
5 back out. We actually went back, considered
6 their arguments and then deemed that to be an
7 egregious violation.

8 So it wasn't eligible for a warning.
9 So that's not the way you portrayed our order and
10 maybe you just misstated it or maybe you
11 misunderstood it, but at the very least, I think,
12 maybe it needs to be reviewed again.

13 MS. GEPHARDT: Okay. In terms of the
14 egregiousness factor, it's my understanding that
15 because the case never went to a hearing where
16 things could be adjudicated, where it could be
17 proven whether this was an egregious act or not,
18 other than just the Board stating up front that
19 they believe it was egregious, by settling the
20 case, that determination was really never made.

21 So the licensee was not given the
22 opportunity to defend the characterization that

1 it was an egregious offense. So therefore, it--

2 MEMBER ALBERTI: But --

3 MS. GEPHARDT: -- was just settled
4 with a fine.

5 MEMBER ALBERTI: I think part of our
6 argument was that they don't get a second bite at
7 the apple. They were given notice. They agreed
8 to the settlement. They can't come back on this
9 case and basically what you are arguing is they
10 are coming back on this case and arguing oh,
11 well, you know, that was a mistake and we never
12 really agreed to it and we never really
13 understood what we were agreeing to, so for
14 fairness, you need to consider that a warning in
15 the first case and consider that when you are
16 looking at the fine for this case.

17 That issue has been settled in this
18 order. Again, this order is pretty clear. The
19 Board considered it egregious. And the Board
20 considers that the licensee had full knowledge of
21 what they were agreeing to and can't back out and
22 that should not come in. The licensee's

1 continued objection to our decision should not be
2 a factor in determining the fine for this case or
3 the outcome for this case.

4 Madam Chair, I would like to go back
5 and have a discussion with the Board on this
6 matter.

7 CHAIRPERSON MILLER: Okay. Maybe we
8 can pull that case.

9 MEMBER SILVERSTEIN: Well, is there
10 any other questions?

11 CHAIRPERSON MILLER: Yes. Okay.
12 Okay. There has been a request for the Board to
13 recess for a brief discussion in Executive
14 Session, so I'm going to honor that request and
15 take a vote on convening for a closed meeting.

16 As Chairperson of the Alcoholic
17 Beverage Control Board for the District of
18 Columbia and in accordance with Section 405 of
19 the Open Meetings Amendment Act of 2010, I move
20 that the ABC Board hold a closed meeting for the
21 purpose of seeking legal advice from our counsel
22 on Case No. 14-CC-00121, per Section 405(b)(4) of

1 the Open Meetings Amendment Act of 2010 and
2 deliberating upon that case with respect to the
3 OIC to be discussed in public afterwards for the
4 reasons cited in Section 405(b) (13) of the Open
5 Meetings Amendment Act of 2010.

6 Is there a second?

7 MEMBER ALBERTI: Second.

8 CHAIRPERSON MILLER: Mr. Alberti
9 seconded the motion. I'm going to take a roll
10 call vote on the motion now that it has been
11 seconded.

12 Mr. Brooks?

13 MEMBER BROOKS: I agree.

14 CHAIRPERSON MILLER: Mr. Alberti?

15 MEMBER ALBERTI: I agree.

16 CHAIRPERSON MILLER: Mr. Rodriguez?

17 MEMBER RODRIGUEZ: I agree.

18 CHAIRPERSON MILLER: Ms. Miller
19 agrees.

20 Mr. Silverstein?

21 MEMBER SILVERSTEIN: I agree.

22 CHAIRPERSON MILLER: Mr. Short?

1 MEMBER SHORT: I agree.

2 CHAIRPERSON MILLER: Okay. So the
3 motion has passed by a 6-0-0 vote.

4 And I now hereby give notice that the
5 ABC Board will recess this proceeding to hold the
6 aforementioned closed meeting and we will return
7 shortly to address it in public.

8 Okay. Thank you.

9 (Whereupon, the above-entitled matter
10 went off the record at 10:11 a.m. and resumed at
11 10:37 a.m.)

12 CHAIRPERSON MILLER: Okay. The Board
13 is back on the record. We had an opportunity to
14 look at our order in this case while we were in
15 Executive Session and reflect on the arguments
16 that counsel had made.

17 So I believe that we are ready, at
18 this point, to proceed with voting on the motion,
19 unless there is anything new from the parties?

20 MR. WHELAN: I would just echo the
21 comments of Ms. Gephardt in that we believe that
22 the Offer in Compromise is fair given the facts

1 that she stated and the arguments that we made in
2 the Motion for Reconsideration.

3 CHAIRPERSON MILLER: Okay. Ms.
4 Gephardt, do you have anything else to add?

5 MS. GEPHARDT: No, I don't have
6 anything else.

7 CHAIRPERSON MILLER: Okay.

8 MS. GEPHARDT: Thank you.

9 CHAIRPERSON MILLER: Okay. I think a
10 lot has been said on this.

11 I'm going to move that we approve the
12 Offer in Compromise and I'm going to try to
13 reiterate what I believe it is again. And that
14 is to drop Charge 1 and proceed on Charge 2 with
15 the following Offer in Compromise of a \$2,000
16 fine to be paid within 30 days. If not paid
17 within 30 days, the license will be suspended
18 until paid.

19 And then a five day suspension of the
20 license. All five days stayed.

21 However, five days suspension will be
22 triggered from the previous case and those will

1 be served during the weekend of Labor Day and the
2 specific days will be September 3rd, 4th, 5th,
3 6th and 7th. I don't believe I left anything
4 out, did I? Okay.

5 MS. GEPHARDT: That's correct.

6 CHAIRPERSON MILLER: And that is the
7 motion. Do I have a second?

8 MEMBER SILVERSTEIN: I second, Madam
9 Chair.

10 CHAIRPERSON MILLER: Okay. Mr.
11 Silverstein has seconded the motion. Any
12 comments?

13 MEMBER ALBERTI: I would --

14 CHAIRPERSON MILLER: Mr. Alberti?

15 MEMBER ALBERTI: -- like to comment.
16 Neither the Government nor the licensee has
17 refuted the facts in the report on this case.

18 CHAIRPERSON MILLER: Okay.

19 MEMBER ALBERTI: I have to assume that
20 there is some validity to them in which case that
21 would make this a second sale to minor within a
22 year. I find that troubling, extremely

1 troubling. And for that reason, I cannot dismiss
2 that sale to minor case without a hearing on the
3 facts.

4 CHAIRPERSON MILLER: Other comments?

5 I just think it is an equitable Offer in
6 Compromise given the circumstances in this case.
7 And I have already addressed my views pretty
8 fully in my dissent to the previous order, so I'm
9 not going to add anything more about that. But I
10 do believe that the parties did come to an
11 equitable remedy here.

12 Okay. Mr. Silverstein?

13 MEMBER SILVERSTEIN: Thank you, Madam

14 Chair. I find myself in agreement with Mr.
15 Alberti regarding facts and I find myself in
16 agreement with the Chair regarding the remedy.

17 Offers in Compromise are imperfect
18 vehicles and they are sometimes difficult and
19 tortured ways of getting to a better result. I
20 feel very uncomfortable with the way that this is
21 structured, but I am okay with the five days
22 suspension, the five days stayed, the fine, that

1 we can move forward equitably considering how we
2 got here and our way forward.

3 Both sides worked hard on this and we
4 struggled with it. It is time to, if necessary,
5 hold our noses and move on. And I hope, as the
6 Courts would say and I pray, that the licensee
7 understands the gravity of this and that we don't
8 want to see this again.

9 MEMBER SHORT: Madam Chair?

10 CHAIRPERSON MILLER: Yes, Mr. Short?

11 MEMBER SHORT: I would also like to
12 comment on Mr. Alberti's statement and on Board
13 Member Silverstein's statement in that underage
14 drinking is a big problem in the city and nation.
15 And a very good businesses, and this is,
16 shouldn't be here before us or shouldn't have
17 been here in the first case.

18 So I also will hold my nose and move
19 forward with the Government's recommendation.
20 But I do want the licensee to know that this is a
21 very matter, and we would like to see him put a
22 better record on this. Thank you, Madam Chair.

1 CHAIRPERSON MILLER: Okay. Thank you,
2 Mr. Short. Anybody else? All right. Then there
3 is a motion that has been seconded.

4 All those in favor say aye.

5 MEMBER RODRIGUEZ: Aye.

6 CHAIRPERSON MILLER: Aye.

7 MEMBER SHORT: Aye.

8 MEMBER SILVERSTEIN: Aye.

9 CHAIRPERSON MILLER: All those
10 opposed?

11 MEMBER BROOKS: Opposed.

12 MEMBER ALBERTI: Opposed.

13 CHAIRPERSON MILLER: All those
14 abstaining? Okay. Then I believe the vote is 4-
15 2-0 with Board Members Alberti and Brooks
16 dissenting. Okay.

17 MEMBER SILVERSTEIN: Thank you all.

18 MS. GEPHARDT: Thank you.

19 MR. WHELAN: Thank you.

20 CHAIRPERSON MILLER: Okay. Thank you
21 very much.

22 MS. GEPHARDT: Thank you.

1 MR. WHELAN: Thank you.

2 CHAIRPERSON MILLER: Okay. That
3 completes our cases up to our 11:00 case and it
4 is 10:44, so the Board is going to recess and we
5 will return in a little while for our 11:00 case.
6 Thank you.

7 (Whereupon, the Show Cause (Status)
8 Hearing in the above-entitled matter was
9 concluded at 10:44 a.m.)

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