

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:)	
)	
Pangean Investment Group, LLC)	License No.: 78475
t/a 19 th (formerly Skye))	Case No.: 10-AUD-00016(a)
)	Order No.: 2011-394
Holder of a Retailer's Class CR License)	
at premises)	
1919 Pennsylvania Avenue, N.W.)	
Washington, D.C. 20006)	

BEFORE: Nick Alberti, Interim Chairperson
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member
Mike Silverstein, Member

ALSO PRESENT: Pangean Investment Group, LLC, t/a 19th (formerly Skye),
Respondent

Andrew Kline, on behalf of the Respondent

Walter Adams II, Assistant Attorney General,
on behalf of the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

On July 20, 2010, the Alcoholic Beverage Control Board (Board) found Pangean Investment Group, LLC, t/a 19th (formerly Skye) (Respondent) in violation of D.C. Official Code §§ 25-113(b)(3)(B)(i)(I) and 25-113(b)(3)(B)(i)(II) (Supp. 2011) and 23 DCMR § 2101 (2008). See generally, Pangean Investment Group, LLC, t/a 19th (formerly Skye), Board Order No. 2011-332 (D.C.A.B.C.B Jul. 20, 2011). The Respondent was ordered to pay a \$4,000.00 fine, because the establishment had two prior primary tier offenses before committing the violation at issue. Pangean Investment Group, LLC, Board Order No. 2011-332 at 4.

Subsequently, the Respondent filed a Motion for Reconsideration, dated August 1, 2011, which asks the Board to reconsider the penalty imposed upon the Respondent. The Respondent argues that it does not have two prior primary tier violations. The Respondent contends that in both prior cases the Respondent did not have proper notice that it was agreeing to a primary tier violation when it settled the charges related to violations that occurred in 2008 and 2010, which are listed as No. 2 and No. 10 respectively in the Respondent's Investigative History. ABRA Show Cause File No. 10-AUD-00016(a), *Investigative History*.

Specifically, the Respondent argues that the current offense should not be treated as the establishment's third primary tier violation, because it did not know that the staff settlement and the offer-in-compromise involved primary tier violations. The Respondent also argues that the offer-in-compromise should not be considered a primary tier violation because it is unclear whether the offer-in-compromise included the primary tier offense and because the case was settled for under \$1,000.00.

We disagree, because the Respondent had sufficient notice that the cases it settled were primary tier violations. Furthermore, even if the Respondent did not receive such notice, the Due Process Clause does not require such notice be given.

I. Knowingly, Intelligently, and Voluntary

We affirm our decision in Board Order No. 2011-332 that the Respondent knowingly, intelligently, and voluntarily agreed that it committed two primary tier violations when it settled the charges against it in 2008 and 2010. The arguments presented in the Motion for Reconsideration do not adequately address our prior findings and reasoning, which led to our conclusion that the Respondent has committed two prior primary tier violations in the past.

We agree with the Respondent that a guilty plea may only be accepted if it is made knowingly, intelligently, and voluntarily and that such rules apply to administrative agencies. Boykin v. Alabama, 395 U.S. 238, 242 (1969); Pierce v. U.S., 705 A.2d 1086, 1089 (D.C. 1997). However, the requirements to fulfill this requirement are not as technical or robotic as advocated by the Respondent. Instead, "[t]he critical inquiry is whether a defendant has been apprised adequately of the substance of an offense, rather than of its formal legal components." Upshur v. U.S., 742 A.2d 887, 893 (D.C. 1999) citing McClurkin v. U.S., 472 A.2d 1348, 1356 (D.C. 1984).

In our prior Order, we noted:

The Board's records indicate that the Respondent has two prior [primary tier] violations and three prior [secondary tier] violations in the past four years. On September 16, 2010, the Respondent agreed to a staff settlement, agreeing that the establishment violated D.C. Code § 25-762(2) on July 15, 2010, by "increasing the summer garden seating capacity and permitting the consumption of an alcoholic beverage in an unapproved area." ABRA Show Cause File No. 10-CMP-00502,

Consent to Waiver of Hearing and Payment of Fine. This violation is a [primary tier] violation because 23 DCMR § 800 indicates that a substantial change involving the expansion of an establishment's exterior private space, which includes the unauthorized use of a summer garden, is a primary-tier violation. 23 DCMR § 800 (2008). In addition, on September 24, 2008, the Respondent committed a [primary tier] violation by having an unauthorized sidewalk café. ABRA Show Cause File No. 10-AUD-00016(a), *Investigative History*. The notice charging the Respondent with the violation on September 24, 2008, indicates that the Respondent was charged with violating §§ 25-762(2) and 25-113(a). ABRA Show Cause File No. 10-AUD-00016(a), *Letter from Andrew J. Kline to the Board, Exhibit C, 2* (Jun. 7, 2011). There is no indication in the record that the prosecution dropped Charge I, which charged the Respondent with violating § 25-762(2). As such, the offer-in-comprise[,] accepted by the Board to resolve the violations that occurred on September 24, 2008, includes a [primary tier] violation.

Pangean Investment Group, LLC, t/a 19th (formerly Skye), Board Order No. 2011-332, para. 5 (D.C.A.B.C.B. Jul. 20, 2011). As such, it is clear that the Respondent knew the nature of the charges against him in both cases settled by the Respondent in 2008 and 2010, because the offenses were described respectively in the notice and staff settlement agreement.

Further, it is clear to the Board that the offer-in-compromise accepted in 2008 included the primary tier violation, because dropping the charge would have required an affirmative action on the part of the Board or the Office of the Attorney General, which is nowhere to be found in the record.

Lastly, we also noted that the size of the penalty is irrelevant to the determination of whether a charge is a secondary or primary tier violation. As we stated previously,

. . . the size of the penalty is irrelevant to the determination of whether an offense is a [primary tier] or [secondary tier] offense because, when settling a matter without a hearing, the prosecution is entitled to use its discretion and can offer penalties below the statutory minimum . . . As such, we find that the Respondent knowingly and voluntarily agreed that it committed a [primary tier] violation on July 15, 2010, and September 24, 2008.

Pangean Investment Group, LLC, t/a 19th (formerly Skye), Board Order No. 2011-332 at para. 9.

Consequently, we find that Respondent had sufficient notice that if it settled the charges against it, it would have two primary tier violations on its record.

II. Collateral Consequences

Furthermore, although we need not reach the issue based on the above, assuming, for the sake argument that the Respondent was not on notice that the violations it was

pleading to were considered primary tier violations under the law, this would not violate the Due Process Clause.

The Due Process Clause does not require defense attorneys or administrative agencies to inform respondents of the collateral consequences of a guilty plea. Goodall v. U.S., 759 A.2d 1077, 1081 (D.C. 2000); Ramos v. U.S., 840 A.2d 1292, 1293 (D.C. 2004). A collateral consequence is described as a consequence that is not “absolutely part and parcel to the sentence itself.” Ramos v. U.S., 840 A.2d at 1293. In that vein, the District of Columbia Court of Appeals has stated that neither the respondents’ attorneys nor the agencies are “required to inform [respondents] that [a guilty plea] could be used to enhance a later sentence *should* [the respondent] ever be convicted of another crime.” Thomas v. U.S., 766 A.2d 50, 53 (D.C. 2001); *see also* U.S. v. Salerno, 66 F.3d 544, 551 (2d Cir. 1995) (“That a defendant who is charged with a drug offense may later commit another drug offense, the penalty for which would be enhanced as a result of the original offense, is certainly a foreseeable possibility. But it is neither definite, immediate, nor largely automatic; hence, the defendant need not be told of this possible consequence in his original plea colloquy.”); Major v. State 814 So.2d 424 (F.L. 2002) (“we hold that neither the trial court nor counsel has a duty to advise a defendant that the defendant's plea in a pending case may have sentence enhancing consequences on a sentence imposed for a crime committed in the future.”).

Here, the Respondent’s argument rests on the presumption that it was entitled to be informed that if it agreed to settle the charges levied against it in 2008 and 2010, it would be subject to two primary tier violations. However, this assertion is incorrect. Under our statutes and regulations, the more primary tier violations a licensee commits within a certain timeframe, the more extensive the penalty. See D.C. Code § 25-830(c)(1)-(3). As indicated by the courts, the Respondent was not entitled by law to be informed that it agreed to have two primary tier violations on its record, because such information is only pertinent to whether the Respondent will suffer enhanced penalties in the future if it commits additional violations. Therefore, even if the Respondent was not informed that the offenses were considered primary tier violations when it agreed to settle the charges against it in 2008 and 2010; a violation of the Due Process Clause did not occur, because the alleged failure to inform the Respondent related only to a collateral consequence of pleading guilty in both cases.

III. Current Offense

Finally, the Respondent also argues that the current violation should be fined as a primary tier violation but not considered part of the total number of primary and secondary tier violations committed by the establishment. Our previous Order did not specifically address this issue, but we are in agreement with the Respondent on this issue. As such, the Order will be clarified to reflect that the offense shall be recorded as a secondary tier violation but considered a primary tier violation only for the purposes of calculating the penalty to be levied against the Respondent. See D.C. Code § 25-830(f) (2001).

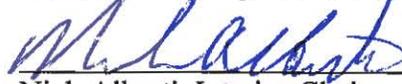
ORDER

Based on the foregoing findings of fact and conclusions of law, the Board, on this 14th day of September 2011, **DENIES** the Motion for Reconsideration filed by the Respondent. The Board **CLARIFIES** Board Order No. 2011-332 by noting that:

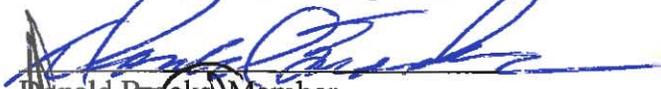
- (1) Charge I is an unlisted violation, and, as such, the violation found by the Board shall not count towards the establishment's tally of primary tier violations. This violation will be counted as a secondary tier violation but considered a primary tier violation for the purposes of calculating the penalty against the Respondent. D.C. Code § 25-830(f).

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

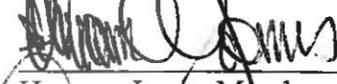
District of Columbia
Alcoholic Beverage Control Board



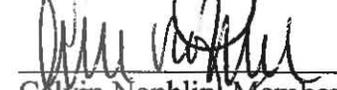
Nick Alberti, Interim Chairperson



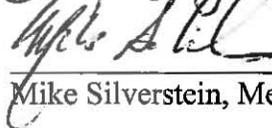
Donald Brooks, Member



Herman Jones, Member



Calvin Nophlin, Member



Mike Silverstein, Member

Pursuant to 23 DCMR § 1719.1 (2008), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of

this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (2008) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b) (2004).