

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

In the Matter of:)	
)	
Jaime T. Carrillo)	License Number: 21925
t/a Don Jaime)	Case Number: 10-PRO-00115
)	Order Number: 2011-165
Petition to)	
Terminate a Voluntary Agreement)	
for a Retailer's Class CR License)	
)	
at premises)	
3209 Mt. Pleasant Street, N.W.)	
Washington, D.C. 20010)	
)	

ALSO PRESENT: Jaime T. Carrillo, t/a Don Jaime, Applicant

Rick Massumi, on behalf of the Applicant

Sam Broeksmit, on behalf of the Mount Pleasant Neighborhood Alliance (MPNA), Protestant

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

ORDER DENYING THE MPNA'S MOTION FOR RECONSIDERATION

Jaime T. Carrillo, t/a Don Jaime (Petitioner), filed a Petition to Terminate a Voluntary Agreement (Petition) in order to terminate the Mount Pleasant Neighborhood Alliance (MPNA) Voluntary Agreement and to extend the establishment's hours of entertainment to correspond with its hours of sale and service of alcoholic beverages. Originally, the Petitioner had executed voluntary agreements with both the MPNA and Hear Mount Pleasant. The MPNA Voluntary Agreement was executed on August 2, 2000, while the Hear Mount Pleasant Voluntary Agreement was executed by Board Order No. 2008-190. The Petition initially came before the Alcoholic Beverage Control Board (Board) for a Roll Call Hearing on August 16, 2010, and a Status Hearing was held on September 22, 2010.

In Board Order No. 2011-143, the Board granted the Petition. *Jaime T. Carrillo, t/a Don Jaime, Board Order No. 2011-143, 16.* The Board notes that even though the

MPNA Voluntary Agreement has been terminated, the Hear Mount Pleasant Voluntary Agreement is still attached to the Petitioner's Retailer's Class CR License.

The MPNA filed a Motion for Reconsideration on March 5, 2011, and asks the Board to reverse its decision in Board Order No. 2011-143. In summary, the MPNA argues that the Board failed to follow precedent by not applying D.C. Code §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) (Supp. 2010). The MPNA also believes that the Board should have taken into account the fact that Hear Mount Pleasant is willing to terminate the Hear Mount Pleasant Voluntary Agreement and should not have relied on Advisory Neighborhood Commission (ANC) 1D's resolution. The Petitioner did not file a response.

The Board denies the MPNA's Motion for Reconsideration and will address each of the MPNA's arguments in turn. First, Board Order No. 2011-143 was not arbitrary and capricious. Second, the Board properly concluded that the Hear Mount Pleasant Voluntary Agreement would remain in effect once the MPNA Voluntary Agreement was terminated. Third, the Board's decision relied on substantial evidence and did not rely on improper facts, as alleged by the MPNA.

The Board correctly applied D.C. Code § 25-446 and was not arbitrary and capricious when it decided to not apply D.C. Code §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) to the Petition. First, the Board's decision properly explained the Board's departure from its previous interpretation of § 25-446(d)(4). Second, the Board's interpretation is derived from the plain meaning of the language of § 25-446(d)(4). Third, the Board's interpretation does not render portions of the statute inoperative, as argued by the MPNA.

D.C. Code § 25-446(d)(4) states that:

The Board may approve a request by fewer than all parties to amend or terminate a voluntary agreement for good cause shown if it makes each of the following findings based upon sworn evidence:

- (A) (i) The applicant seeking the amendment has made a diligent effort to locate all other parties to the voluntary agreement; or
- (ii) If non-applicant parties are located, the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the voluntary agreement;
- (B) The need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located; and
- (C) The amendment or termination will not have an adverse impact on the neighborhood where the establishment is located as determined under § 25-313 or § 25-314, if applicable. D.C. Code § 25-446(d)(4)(A)-(C) (Supp. 2010).

The Board did not act arbitrarily and capriciously because it provided a reasoned explanation for departing from its previous interpretation of § 25-446(d)(4) in 2008.

The Court of Appeals has specifically stated that "stare decisis has traditionally been thought to be a principle of palpably less rigorous applicability in the field of administrative law. . . ." Springer v. District of Columbia Dep't of Empl. Servs., 743 A.2d 1213, 1221 (D.C. 1999) *citing* FTC v. Crowther, 139 U.S. App. D.C. 137, 140, 430 F.2d 510, 513 (1970). Agencies have "the right to modify or even overrule an established precedent or approach, for an administrative agency concerned with the furtherance of the public interest is not bound to rigid adherence to its prior rulings." *Id. citing* Columbia Broadcasting System, Inc. v. FCC, 147 U.S. App. D.C. 175, 183, 454 F.2d 1018, 1026 (1971) (footnote omitted). However, the agency "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Id. citing* Watergate East, Inc. v. Public Service Comm'n, 665 A.2d 943, 947 (D.C. 1995) (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (1970), *cert. denied*, 402 U.S. 1007 (1971)). Consequently, an agency is entitled to alter its interpretation of its statutes and regulations so long as it provides "a reasoned analysis, so that the agency's path may reasonably be discerned." Watergate East, Inc. v. Public Service Comm'n, 665 A.2d at 947 *citing* Greater Boston Television Corp. v. FCC, 444 F.2d at 851; *see also* District of Columbia v. Am. Univ., 2 A.3d 175, 187 (D.C. 2010) *citing* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).

The Board is aware that it previously applied §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) to petitions to terminate voluntary agreements. *See, e.g., Board Order Nos. 2008-189, 2008-190*. However, the Board clearly explained, in writing, that it was relying on the plain language of § 25-446(d)(4) to conclude that petitioners, as a matter of law, did not have to satisfy §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) to terminate their voluntary agreements. *See Leeds the Way, LLC, t/a Hank's Oyster Bar, Board Order No. 2010-533*. Specifically, in *Hank's Oyster Bar*, the Board explained that § 25-446(d)(4) distinguished between petitioners who applied to amend their voluntary agreements versus those who applied to terminate their voluntary agreements. *Board Order No. 2010-533, para. 49*. The Board noted that neither §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) mentioned applicants who sought termination. *Board Order No. 2010-533, para. 49*. As a result, the Board provided a sound and reasoned basis for its decision in *Board Order No. 2010-533*.

Indeed, based on the Board's reasoning in *Hank's Oyster Bar*, such a change was required as a matter of law and public policy because the Board has a duty to apply the law as written by the Council of the District of Columbia.

Furthermore, the Board rejects the MPNA's contention that the Board misconstrued and misinterpreted § 25-446(d)(4). The MPNA wishes to demonstrate that the phrase, "if it makes each of the following findings," requires the Board to apply all three factors contained in § 25-446(d)(4) to both petitions to terminate voluntary agreements and petitions to amend voluntary agreements. However, this interpretation contradicts the plain language of §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) and asks the Board to contravene the Council. *See Wash. Gas Light Co. v. PSC of the Dist. of Columbia*, 982 A.2d 691, 702 (D.C. 2009).

The first factor, in section (A)(i), states: "The applicant seeking the amendment has made a diligent effort to locate all other parties to the voluntary agreement." § 25-446(d)(4)(A)(i). Section (A)(ii) then goes on to state that: "If non-applicant parties are

located, the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the voluntary agreement.”

Finding in favor of the MPNA’s interpretation would require the Board to amend section (A)(i) by either adding the phrase “*or termination*” or having the Board attribute no meaning to the phrase “seeking the amendment.” Furthermore, the Board can only presume that the phrase “non-applicant parties” refers to applicants seeking an amendment to their voluntary agreements, not termination, because the prior sub-section specifically refers to applicants “seeking [an] amendment.” This makes sense because it would be absurd to exempt petitioners who apply to terminate their voluntary agreements from having to make diligent efforts to locate the other signatories in section (A)(i), while requiring them to negotiate with any signatories they accidentally stumble upon if (A)(ii) is made to apply to petitions to terminate voluntary agreements. *See Young v. U-Haul Co.*, 11 A.3d 247, 247 (D.C. 2011).

In addition, the second factor, contained in section (B), states that: “The need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located.” § 25-446(d)(4)(B). Finding in favor of the MPNA’s interpretation would require the Board to amend section (B) by either adding the phrase “*or termination*” or having the Board attribute no meaning to the phrase “need for an amendment.”

The MPNA also does not explain why the Council included the term “terminate” and “termination” in §§ 25-446(d)(4) and 25-446(d)(4)(C) respectively but not in §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B). If the Council wanted to apply §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) to petitions to terminate voluntary agreements, then it could have easily inserted the word “terminate” or “termination,” as it did in §§ 25-446(d)(4) and 25-446(d)(4)(C). However, the Board finds it highly persuasive that the Council did not include the word “terminate” or “termination” in §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B). As such, the Board concludes that the Council did not intend to apply §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) to petitions to terminate voluntary agreements.

The Board is also not convinced by the MPNA’s argument that the Board acted arbitrarily and capriciously because the MPNA’s argument rests entirely on canons of statutory construction. It is well known that “canons of construction are not rules of substantive law.” *In re M.M.D.*, 662 A.2d 837, 852 (D.C. 1995). Indeed, it is often said that “for every canon, one can find an applicable countercanon.” *Id.* citing *In re Kossow*, 393 A.2d 97, 101 (D.C. 1978). As best stated by the District of Columbia Court of Appeals:

when a court relies on a particular interpretive maxim. . . the court is commonly electing between conflicting shorthand expressions to describe, after the fact, the court's particular rationale for deciding, for an assortment of reasons, what the statute means, having taken into account the statutory language and legislative history, the legislative scheme as a whole (including statutes that should be read together), and statutory purpose. Application of a canon of statutory construction, therefore, is actually a way of summarizing -- of explaining -- a decision otherwise made; it is not really a way of reaching a decision. *Id.*

As a result, the authority cited by the MPNA to support its interpretation of § 25-446(d)(4) is not persuasive.

Lastly, the Board finds that the MPNA's policy arguments, which argue that the Board nullified the amendment procedures, are irrelevant and incorrect. First and foremost, many petitioners may choose to amend rather than terminate their voluntary agreements in order to avoid future protests against their ABC licenses. In addition, petitioners who could not terminate their voluntary agreements, either due to accumulated ABC violations or who cannot prove appropriateness, will choose to amend their voluntary agreements in order to alter or delete those provisions that especially hurt their businesses, while retaining additional protections for their neighborhoods. Contrary to the MPNA's assertions, there is no basis in the text or the legislative history of § 25-446(d)(4) to conclude that the Board, as a matter of law, must favor petitions to amend voluntary agreements over petitions to terminate voluntary agreements.

Consequently, the MPNA has failed to cite any substantive law that contradicts the Board's decision. Simply put, the Board finds that the MPNA's interpretation would require the Board to disregard or amend the statute as written by the Council, which is far beyond the Board's limited powers.

The Board also properly presumed that the Hear Mount Pleasant Voluntary Agreement will remain in effect once the MPNA Voluntary Agreement was terminated. The termination of the Hear Mount Pleasant Voluntary Agreement was not at issue during the protest proceedings. Testimony that Hear Mount Pleasant is willing to terminate its voluntary agreement is irrelevant in this matter because such termination requires separate approval by the Board under D.C. Code 25-446(d)(1) (Supp. 2010). Consequently, the Board was entitled to presume in Board Order No. 2011-143 that the Hear Mount Pleasant Voluntary Agreement would remain in effect because further review by the Board would be required to terminate the Hear Mount Pleasant Voluntary Agreement.

Finally, the Board relied on substantial evidence and did not rely on the ANC 1D's desire to have voluntary agreements based on responsible hospitality principles in Mount Pleasant.

Under the ABC law, the Board may consider "all relevant evidence." D.C. Code § 25-313 (2001). Further, "Findings of Fact and Conclusions of Law shall be supported by and in accordance with reliable, probative, and substantial evidence." 23 DCMR § 1718.3 (2008).

The Board agreed with ANC 1D's recommendation to approve the Petition in Board Order No. 2011-143. Further, the Board's determination of appropriateness did not presume that the voluntary agreements proposed by ANC 1D were in effect. The MPNA ignores the fact that ANC 1D recommended that the Board consider demographic changes and income changes in Mount Pleasant and the fact that the MPNA Voluntary Agreement merely repeated the law, both of which are relevant considerations under the ABC laws. Indeed, paragraphs 47 through 54 extensively addressed peace, order, quiet, residential parking, and pedestrian safety in Mount Pleasant. As a result, the MPNA's arguments

have no merit because the Board specifically relied on “reliable, probative, and substantial evidence” in reaching its decision. § 1718.3.

For these reasons, the MPNA’s Motion for Reconsideration is denied.

ORDER

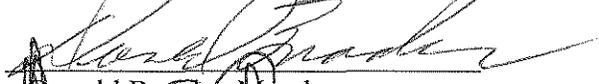
Therefore, it is hereby **ORDERED**, on this 23rd day of March 2011, that the Motion for Reconsideration filed by the MPNA is **DENIED**. Copies of this Order shall be sent to the MPNA and Jaime T. Carrillo, t/a Don Jaime.

District of Columbia
Alcoholic Beverage Control Board

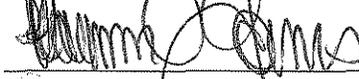
Charles Brodsky, Chairperson



Nick Alberti, Member



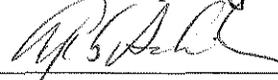
Donald Brooks, Member



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).