

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

In the Matter of:)	
)	
Prospect Dining, LLC)	License Number: 78058
t/a George)	Case Number: 10-PRO-00111
)	Order No.: 2010-508
Petition to)	
Terminate a Voluntary Agreement)	
at premises)	
3251 Prospect Street, N.W.)	
Washington, D.C. 20007)	

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

ALSO PRESENT: Prospect Dining, LLC, t/a George, Applicant

Ron Lewis, Chairperson, Advisory Neighborhood Commission
(ANC) 2E

Jennifer Altemus, President, Citizens Association of Georgetown
(CAG)

ORDER DENYING MOTION FOR RECONSIDERATION

Prospect Dining, LLC, t/a George (Applicant), which holds a Retailer's Class CR License, at premises 3251 Prospect Street, N.W., Washington, D.C., filed a Petition to Terminate a Voluntary Agreement (Petition), which has been contested by ANC 2E, represented by Chairperson Ron Lewis, and CAG, represented by CAG President Jennifer Altemus. The Alcoholic Beverage Control Board (Board) voted to re-placard the Applicant's request to terminate its voluntary agreement on August 27, 2010. The Applicant has filed a Motion for Reconsideration, which requests that the Board reconsider its decision. Both ANC 2E and CAG have submitted objections.

The Board finds that because the Alcoholic Beverage Regulation Administration (ABRA) failed to mail the official notice to the ANC's office, as required by D.C. Code § 25-421, it must re-placard the Applicant's establishment in order to provide proper notice under the law.

Facts

The Board takes administrative notice of the following facts, which have led to the present matter before the Board.

Both the Applicant and ANC 2E are signatories to the Voluntary Agreement. The Applicant subsequently filed a Petition. The Notice of Termination of a Voluntary Agreement for Prospect Dining, LLC, t/a George, was originally published in the D.C. Register with a Posting Date of April 30, 2010, a Petition Date of June 14, 2010, and a Hearing Date of June 28, 2010. The notice was published again in the D.C. Register, this time, with a Posting Date of May 14, 2010, a Petition Date of June 28, 2010, and a Hearing Date of July 12, 2010. Despite posting notice in the D.C. Register, ABRA investigators did not deliver the required placards to the establishment in a timely fashion. The Board notes that ANC 2E received proper notice regarding the first and second time the Applicant's establishment was placarded.

Nevertheless, because the placards were not delivered to the establishment and posted, ABRA rescinded and re-placarded the establishment. The new placard created a Posting Date of June 18, 2010, a Petition Date of August 2, 2010, and a Hearing Date of August 16, 2010. However, ABRA did not mail the proper notice to ANC 2E's offices as required by the law. Placards were delivered to the establishment and then posted on June 18, 2010. Because notice was not provided to the ANC, the Board voted to re-advertise and re-placard with a Posting Date of August 27, 2010, a Petition Date of October 12, 2010, and a Hearing Date of October 25, 2010.

Arguments

The Applicant argues that the Board should not re-placard the establishment. First, the Applicant argues that ANC 2E's August 10, 2010, e-mail request for notice is prohibited as an ex parte communication under 23 DCMR § 1720.2 (2008) and that ANC 2E did not serve the Applicant properly under 23 DCMR § 1703. *Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 2-3, Exhibit A.* Second, the Applicant further argues that ANC 2E received actual notice of the petition because ANC 2E was mailed notices of the petition on April 28, 2010, May 12, 2010, and June 16, 2010. *Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 3.* The Applicant also states that the Applicant met with members of ANC 2E to discuss amending or terminating the Voluntary Agreement. *Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 3.* Third, the Applicant argues that CAG's failure to understand that it had standing to protest a

termination of a Voluntary Agreement should not be used to justify the re-placarding decision. *Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 5*. Fourth, the Applicant argues that the Board cannot extend the protest process unless the placard has not remained visible to public for the full 45 day period under § 25-423(e). *Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 5*.

In turn, in pertinent part, ANC 2E argues that the Board should re-placard the establishment because the ANC did not receive the required official mailing regarding the June 18, 2010, re-placarding of the Applicant. *Memorandum of ANC 2E in Opposition to Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 1*. The ANC argues that if ABRA did not re-placard the Applicant this would violate the specific notice requirements of D.C. Code § 1-309.10(c)(2)(A) (2010). *Memorandum of ANC 2E in Opposition to Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 2*.

Finally, CAG argues that it has the right to participate in the protest process due to ABRA's error. On July 12, 2010, in an unrelated administrative review hearing, the Board's agent did not grant CAG standing because she erroneously believed that non-signatories to a Voluntary Agreement did not have standing to challenge the termination of a Voluntary Agreement. *Citizens Association of Georgetown Response to Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 1*. However, on July 26, 2010, CAG was later informed that it could in fact seek standing in situations where it was not a signatory to a Voluntary Agreement. *Citizens Association of Georgetown Response to Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 1*. Consequently, the only reason CAG did not properly file an objection to the Applicant's Petition was because of the prior incorrect interpretation of the law made by the Board's agent. *Citizens Association of Georgetown Response to Motion for Reconsideration of Decision Requiring Re-advertising and Re-placarding of Licensee's Petition for Termination of Voluntary Agreement, 2*.

Discussion

After reviewing both parties' arguments, the Board finds that it must re-placard the Applicant's establishment.

Under § 25-446, "Notice of an application to amend or terminate a voluntary agreement shall be given both to the parties of the agreement and to the public at the time of the applicant's renewal application according to the renewal procedures required under §§ 25-421 through 25-423. D.C. Code § 25-446 (2004). Under § 25-421, the Board is obligated to give notice to ANC by mailing a copy to the Commission office, the home of the ANC Chairperson, and the Commissioner of the Single Member District where the establishment is located. D.C. Code § 25-421(e)(1)-(3) (2004); D.C. Code § 1-

309.10(c)(2)(A) (2010). Under the law, such notice must “inform the recipient of the final day of the protest period and the date, time, and place of the administrative review. . . .” § 25-421(d). In turn, § 25-423 instructs the Board to give general notice by posting notice on the premises of the Licensee’s establishment. § 25-423. The statute further adds that “If the Board determines that the notices posted at an applicant's establishment have not remained visible to the public for a full 45 days, the Board shall require the reposting of the notices and shall reschedule the administrative review for a date at least 45 days after the originally scheduled review. . . .” § 25-423(e) (2004).

The facts indicate that ANC 2E did not receive notice that complied with the statutory requirements the third time the Board placarded the Applicant. The facts demonstrate that ABRA did not mail the required notice to ANC 2E’s offices. This clearly violates the notice requirements found in § 25-421(e)(1) and § 1-309.10(c)(2)(A), which require ABRA to mail notices to the Commissioner of the Single Member District where the establishment is located, the home of the Chairperson of the ANC, and the ANC’s offices.

The Applicant’s arguments that ANC 2E had actual notice of the Petition are lacking. Under § 25-421(d), the ANC is entitled to notice that informs it “of the final day of the protest period and the date, time, and place, of the administrative review.” § 25-421(d). Prior discussions with the Applicant at an ANC meeting or previous notices that were rescinded by ABRA do not fulfill the specific requirements outlined in § 25-421(e). Consequently, the Board finds that ANC 2E was not properly notified of the Applicant’s Petition.

In turn, the Board found that the proper remedy was to re-placard the establishment. The Board finds that the language of § 25-446, which orders the Board to follow the notification process in § 25-421 and § 25-423, should not be read in isolation but rather “holistically.” *See United Sav. Asso v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Under the law, ANCs are entitled to information regarding the final day to object to a Petition. As such, if an ANC is not properly informed of the final day to submit an objection, the final day must be reset. Otherwise, the ANC would not be able to consult with its constituents or plan its position accordingly.

Contrary to the Applicant’s arguments, the Board notes that § 25-423(e) does not bar this result. Section 25-423(e) is a specific remedy to situations where the posted notice is not visible to the public. It does not apply or otherwise limit the Board’s ability to remedy other violations of § 25-421 and § 25-423. As such, in no way, is the Board extending the protest period, as claimed by the Applicant.

Based on the above, the Board has re-placarded the Applicant’s establishment. The Posting Date was August 27, 2010, the Petition Date is October 12, 2010, and the Hearing Date is October 25, 2010.

However, before concluding, the Board will further add that it will not reject ANC 2E and CAG’s Motions because they failed to serve the Applicant or allegedly made an ex

parte communication. Under 23 DCMR § 1703.8, the “[f]ailure to serve all parties of record, or their designated representatives, may result in the Board delaying action on the matter at issue until such time as service is properly accomplished.” As a result, the Board is not required by regulation to delay ruling on a motion if there is a failure to serve the other party.

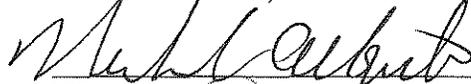
Therefore, upon consideration of the Respondent’s Motion and the entire record of this matter, the Board, on this 6th day of October, 2010, hereby **DENIES** Respondent’s Motion.

District of Columbia
Alcoholic Beverage Control Board

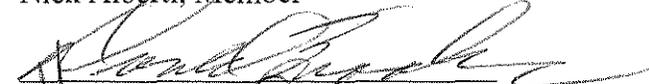
Charles Brodsky, Chairperson



Mital M. Gandhi, Member



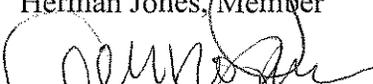
Nick Alberti, Member



Donald Brooks, Member



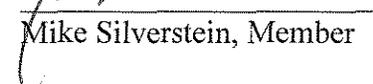
Herman Jones, Member



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Mike Silverstein, Member



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 the service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington D.C. 20001.

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 (April 2004) 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).