

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

<b>In the Matter of:</b>	)	
	)	
LMW, LLC	)	Case Number: 12-CMP-00603
t/a Little Miss Whisky's Golden Dollar	)	License Number: 79090
	)	Order Number: 2013-440
Holder of a	)	
Retailer's Class CT License	)	
	)	
at premises	)	
1104 H Street, N.E.	)	
Washington, D.C. 20002	)	

**BEFORE:** Ruthanne Miller, Chairperson  
Nick Alberti, Member  
Donald Brooks, Member  
Herman Jones, Member  
Mike Silverstein, Member

**ALSO PRESENT:** LMW, LLC, t/a Little Miss Whisky's Golden Dollar, Respondent  
  
Matthew LeFande, on behalf of the Respondent  
  
Christine L. Gephardt, Assistant Attorney General  
Office of the Attorney General for the District of Columbia  
  
Martha Jenkins, General Counsel  
Alcoholic Beverage Regulation Administration

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**ORDER DENYING RESPONDENT'S MOTION TO DISMISS**

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**INTRODUCTION**

The question before the Alcoholic Beverage Control Board (hereinafter "Board") is whether the Board is required to dismiss a show cause matter when LMW, LLC, t/a Little Miss Whisky's Golden Dollar (hereinafter "Respondent") received the relevant investigative report 36 days after the 90-day deadline under District of Columbia (hereinafter "D.C.") Official Code § 25-832. The Board concludes that the timeline set by § 25-832 is directory, and that the Respondent was not prejudiced by the untimely service of the report. Therefore, we deny the Motion to Dismiss filed by the Respondent.

### ***Procedural Background***

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on May 15, 2013. *ABRA Show Cause File No.*, 12-CMP-00603, Notice of Status Hearing and Show Cause Hearing, 2-3 (May 15, 2013). The ABRA served the Notice on the Respondent, located at premises 1104 H Street, N.E., Washington, D.C., on May 23, 2013. *ABRA Show Cause File No.*, 12-CMP-00603, Service Form. The Notice charges the Respondent with two violations, which if proven true, would justify the imposition of a fine, suspension, or revocation of the Respondent's ABC-license.

Specifically, the Notice, charges the Respondent with the following violations:

- Charge I: [On October 18, 2013,] [y]ou[] participated in a pub crawl without prior Board approval, in violation of 23 DCMR [§] 712 for which the Board may take the proposed action . . . .
- Charge II: [On October 18, 2013,] [y]our establishment violated its Voluntary Agreement ("VA") by participating in a pub crawl without Board approval, in violation of D.C. Official Code §25-446 . . . .

Notice of Status Hearing and Show Cause Hearing, 2-3.

Both the Government and Respondent appeared at the Show Cause Status Hearings for this matter on June 19, 2013. The Respondent submitted a Motion to Dismiss on July 22, 2013. The Government submitted a response on July 31, 2013. The Respondent replied to the Government's response

The parties proceeded to a Show Cause Hearing where they argued their respective cases on October 2, 2013, and the Board heard oral arguments on the Motion to Dismiss.

### **FINDINGS OF FACT**

1. The underlying incident in this matter occurred on October 18, 2012.
2. The Respondent received the incident report related to this matter on February 21, 2013. Mot. to Dismiss, 1. This means the Respondent received the incident report 126 days after the incident occurred on October 18, 2012. See 23 DCMR § 102.1 (West Supp. 2013) (Computation of Time).
3. The Respondent received the investigative report in this matter after the 90-day deadline created by § 25-832. Specifically, service of the investigative report occurred 36 days after the deadline set by § 25-832. Nevertheless, the Respondent has not provided any facts showing that it suffered any prejudice due to this error.

## DISCUSSION

The Respondent moves to dismiss the charges brought by the Government under D.C. Official Code § 25-832, even though the investigative report was only served 36 days after the deadline set by the statute.

In full, § 25-832 states,

- (a) ABRA shall provide a licensee with either an investigative report or a public police incident report that may result in a show cause hearing as set forth in § 25-447 within 90 days of the date upon which the incident occurred.
- (b) The requirement in subsection (a) of this section shall not apply where
  - (1) Criminal action is being considered against the licensee or its employees; or
  - (2) Enforcement action is requested by the Chief of Police under § 25-827.

D.C. Code § 25-832 (West Supp. 2013).

The question before this Board is whether § 25-832 is mandatory or directory. Gallothom, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 820 A.2d 530, 535 (D.C. 2003).

Whether a statute is mandatory or directory is one of statutory construction; whereby, the Board must examine the statutory language, the legislative history and the policies and purposes to be served by the statute. Teamsters, Local Union 1714 v. District of Columbia Public Employee Relations Board, 579 A.2d 706, 710-711 (D.C. 1990). “A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer.” JBG Properties, Inc. v. District of Columbia Office of Human Rights, 364 A.2d 1183, 1185 (D.C. 1976). The limitation will be deemed mandatory if it provides a sanction for the failure of the agency to act. Brown v. District of Columbia Public Employee Relations Bd., 19 A.3d 351, 357 (D.C. 2011). This general rule means that a statutory time limit for agency action which is not accompanied by attendant sanctions raises a rebuttable presumption that the time limitation is intended to be merely directory. Teamsters, Local Union 1714, 579 A.2d at 710.

In order to combat the potential for lengthy delays, the court further concluded, “Where an agency violates procedural regulations and the error has the natural effect of prejudicing substantial rights, the burden of showing the outcome was unaffected rests upon the party seeking to sustain it against the error.” JBG Properties, Inc. v. District of Columbia Office of Human Rights, 364 A.2d 1183, 1186 (D.C. 1976) (quotation marks omitted). As a result, the key inquiry is whether the untimely service creates “undue prejudice” that can only be cured by the termination of the prosecution. Id.

In JBG Properties, Inc., the court determined that a regulation requiring the D.C. Office of Human Rights to serve a copy of a complaint on a respondent “within 15 days”

of receiving said complaint was directory. Id. at 1184-1187.<sup>1</sup> While the court remanded the case for further adjudication, the court speculated that the petitioner did not suffer undue prejudice, in part, because the service of the complaint was only 12 days late. Id. at 1186-87.

Here, both § 25-832 and the regulation cited in JBG Properties, Inc. use the same “within ‘x’ days” language. We also note that the statute contains no sanction for failing to meet the 90-day deadline, a fact that weighs in favor of interpreting § 25-832 as directory. Brown v. District of Columbia Public Employee Relations Bd., 19 A.3d 351, 357 (D.C. 2011). Consequently, we are persuaded that the time limitation set forth in § 25-832 is directory.

This conclusion is supported by the legislative history of this provision, which contains no indication of any intent of the Council to restrict the government’s action for the mere failure to act within the prescribed time. We further determine that part (b) of § 25-832 merely carves out those circumstances where the public interest always outweighs any prejudice to the licensee. Specifically, there is a strong public policy interest in proceeding with a show cause action in cases falling under part (b), because (1) the service of an investigative report may interfere with a criminal investigation; (2) a pending criminal action may result in information not being available to the Board (e.g., through the use of the law enforcement privilege or the Fifth Amendment); or (3) Board action may be predicated on another body finding the licensee in violation of the law, see e.g., D.C. Code §§ 25-301(3)-(4), 25-823(1)-(2), (4) (West Supp. 2013). Accordingly, we conclude that § 25-832 must be directory in order to protect the safety and rights of the public.

Having determined that the statute is directory, we must now determine whether the licensee in this case has suffered prejudice, because of the government’s noncompliance with the time limitation. The 36-day delay in service experienced by the Respondent is similar to the 12-day delay experienced by the petitioner in JBG Properties, Inc.—it is certainly not the “months or years after the alleged incident” feared by those testifying before the Council. Mot. to Dismiss, 3; Council of the District of Columbia, Bill 17-983, the “Alcoholic Beverage Enforcement Act of 2008, Committee on Public Works, 18 (Nov. 21, 2008). Further, the record before us contains no facts alleging or demonstrating prejudice.<sup>2</sup> Given this short period and the lack of any facts demonstrating prejudice, we fail to see how the Respondent experienced undue prejudice.

We are also not persuaded by the cases cited by the Respondent that support its position that § 25-832 is mandatory. The cases cited by the Respondent all contain language that is not present in § 25-832. For example, the phrases “not later than” or “no event later than” do not appear in § 25-832. Mot. to Dismiss, 4.

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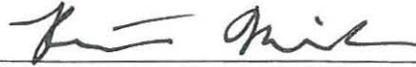
<sup>1</sup> The relevant statute reads: (a) After the filing of any complaint, the Office shall serve, within 15 days of said filing, a copy thereof upon the respondent, . . . and shall make prompt investigation in connection therewith. JBG Properties, Inc. v. District of Columbia Office of Human Rights, 364 A.2d 1183, 1184-85 (D.C. 1976).

<sup>2</sup> We also consider the oral notice of the violation given by the Investigator to the Respondent’s employee as ameliorative of any potential prejudice experienced by the Respondent, because the Respondent had actual notice that the establishment was under investigation. Dist. Resp. to Licensee’s Mot. to Dismiss, 2.

## **ORDER**

Therefore, for the foregoing reasons, the Board, on this 2nd day of October 2013, hereby **DENIES** the Motion to Dismiss. Copies of this Order shall be sent to the Government and the Respondent.

District of Columbia  
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



Nick Alberti, Member



Donald Brooks, Member



Herman Jones, Member



Mike Silverstein, Member

Under 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, under 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 under 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).