

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

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In the Matter of:	)	
	)	
S&W D.C., LLC	)	Case No.: 14-CMP-00121
t/a Smith & Wollensky	)	13-CC-0076
	)	License No: 060001
Holder of a	)	Order No: 2015-139
Retailer's Class CR License	)	
	)	
at premises	)	
1112 19th Street, N.W.	)	
Washington, D.C. 20006	)	

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

**ALSO PRESENT:** S&W D.C., LLC, t/a Smith & Wollensky, Respondent

Andrew Kline, Counsel, on behalf of the Respondent

Christine 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 WITHDRAW STAFF  
SETTLEMENT AGREEMENT**

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**INTRODUCTION**

On October 15, 2013, S&W D.C., LLC, t/a Smith & Wollensky, (Respondent) agreed to settle a sale to minor charge that occurred on July 11, 2013, for a fine and five stayed suspension days. The Respondent paid the fine, and then, as is the natural course of things, time began to

pass: the fall became the winter; the winter became the spring; the spring became the summer; the summer became the fall; and the fall once again became the winter.

Now, the Respondent comes before the Alcoholic Beverage Control Board (Board) facing a second sale to minor charge. Recognizing that it faces a major suspension of its license, the Respondent on January 23, 2015, submitted what appears to be a “Hail Mary” motion for reconsideration, which asks this body to convert the settlement—now gathering dust in ABRA’s file room—into a warning due to alleged legal deficiencies. *Mot. for Recon. Of Finding that Petitioner Committed an Egregious Violation of D.C. Code § 25-781, 1, 7* (Jan. 23, 2015) [*Resp. Mot.*].

While time cannot heal all wounds, it does have a knack for resolving legal controversies. In this case, the Respondent has had full knowledge and notice of the settlement since October 15, 2013. If the Respondent had an issue with the settlement, it should have immediately filed a motion for reconsideration with the Board—not bide its time for more than a year. At this point in time, the Respondent has not provided an adequate reason for its failure to file a timely motion for reconsideration related to the 2013 violation.

Therefore, for these reasons, and the reasons discussed below, the Board denies the Respondent’s motion for reconsideration and vacates the order to stay issued at the February 11, 2015 hearing.

### ***Procedural Background***

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on December 3, 2014. *ABRA Show Cause File No., 14-CMP-00121*, Notice of Status Hearing and Show Cause Hearing, 2 (Dec. 3, 2014). The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 1112 19th Street, N.W., Washington, D.C., on December 11, 2014, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 14-CMP-00121*, Service Form (Dec. 11, 2014). The Notice charges the Respondent with one violation, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent’s license.

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

Charge I: [On June 26, 2014,] [y]ou permitted the sale of an alcoholic beverage to a person under 21 years of age, in violation of D.C. Code § 25-781 . . . .

Notice of Status Hearing and Show Cause Hearing, 2. The Board held a motions hearing on February 11, 2015.

Both the Government and Respondent appeared at the Show Cause Status Hearing on January 14, 2015. In a motion for reconsideration dated January 23, 2015, the Respondent requested that the Board overturn a prior staff settlement agreement and convert the sale to minor

conviction into a warning.<sup>1</sup> *Mot. for Recon. Of Finding that Petitioner Committed an Egregious Violation of D.C. Code § 25-781, 1, 7* (Jan. 23, 2015). The Board held a motions hearing on February 11, 2015, where the Board stayed the future show cause hearing relating to this matter until the Respondent's motion was addressed by the Board. *Investigative History*, ABRA License No. 060001 (Feb. 11, 2015).

## FINDINGS OF FACT

The following information is relevant to the current controversy before the Board:

### I. Respondent's License Status

1. S&W D.C., LLC, t/a Smith & Wollensky, (Respondent) holds a Retailer's Class C Restaurant License at premises 1112 19th Street, N.W. *ABRA License No. 060001*, CAP Summary. Without including the sale to minor charge at issue in this matter, the Respondent's investigative history shows that it has been convicted of at least eight violations of the District's alcohol laws between July 14, 2006, and June 26, 2014. *Investigative History*, ABRA License No. 060001.

### II. The Sale to Minor Laws

2. Under § 25-781, it is illegal for a licensee to sell or deliver alcohol to a minor. D.C. Official Code § 25-781(a)(1). Nevertheless, § 25-830(f) requires a warning for a violation of § 25-781 if no prior citation, enforcement proceeding, or violation involving § 25-781 occurred in the past four years unless the violation is deemed "egregious." *Id.* Under current law, an "egregious" sale to minor violation involves the selling or delivering alcohol to a minor even after the minor fails to present identification after a request is made or the licensee or their agent engages in the intentional sale or delivery of alcohol to the minor. 23 DCMR § 807 (West Supp. 2015).

3. Under § 25-783(b), a licensee must "... take steps reasonably necessary to ascertain whether any person to whom the licensee sells, delivers, or serves an alcoholic beverage is of legal drinking age." D.C. Official Code § 25-783(b).

4. On October 30, 2014, the Legal Counsel Division of the Office of the Attorney General replied to a question posed by ABRA's Office of General Counsel. *Memo from Janet M. Robins, Deputy Attorney General, Legal Counsel Division, Office of the Attorney General, to Jonathan Berman, Assistant Attorney General, Alcoholic Beverage Regulation Administration, AL-13-664, 1* (Oct. 30, 2013), also available at <http://abra.dc.gov/node/769202>. The Office of General Counsel requested advice on whether a licensee's failure to request identification constituted an egregious violation under D.C. Official Code § 25-830(e)(1). According to the guidance memo, "[t]o intentionally sell alcohol to a minor, a licensee must know that the customer is a minor and make the sale anyway in violation of the statute. When a licensee fails to request identification,

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<sup>1</sup> The appropriateness of this remedy is questionable, because it does not address the potential charge that could have been brought under D.C. Official Code § 25-783—a charge not subject to a mandatory warning requirement—that was not included in the settlement, and could be revived if the settlement was overturned. *Infra*, at ¶¶ 3, 8.

the licensee will typically have no knowledge of the customer's minority, thus negating the element of intent." *Id.*

### **III. The Sale to Minor Violation Occurring on July 11, 2013**

5. Case Report 13-CC-00076 indicates that on Thursday, July 11, 2013, Alcoholic Beverage Regulation Administration (ABRA) Investigator Erin Mathieson conducted an underage drinking compliance check at the Respondent's establishment. *Case Report No. 13-CC-00076*, 1.<sup>2</sup> As part of the operation, the investigator accompanied two underage minors, both seventeen years of age. *Id.* Both minors had in their possession identifications that identified the undercover youths as younger than twenty-one years of age. *Id.* at 1, Exhibit Nos. 5, 6. The investigators also took photographs of the minors participating in the investigation. *Id.* at Exhibit Nos. 1-4.

6. Around 7:00 p.m., Investigator Mathieson entered the establishment by herself and stood by the Respondent's bar. *Id.* The two minors entered the establishment a few minutes later. *Id.* The minors sat at the bar near Investigator Mathieson, but did not interact with her. *Id.* A male bartender, Milos Petrovic, approached the minors and took their orders. *Id.* The minors ordered two Samuel Adams beers. *Id.*

7. The bartender did not request the identification of the minors. *Id.* He then returned with the two beers in glasses and placed the beers on the bar in front of the minors. *Id.* at 1, Exhibit No. 7. The minors touched the glasses, requested the check, and paid for the drinks. *Id.* at 1-2. The minors then left but left the beverages inside the establishment. *Id.* at 2.

8. After the minors left, ABRA Investigator Kofi Apraku entered the Respondent's establishment. *Id.* at 2. He joined Investigator Mathieson near the bar and took a photograph of the beers left by the two minors. *Id.* Investigator Apraku then identified himself to the bartender and requested to speak to the licensed manager. *Id.* Upon meeting the manager, Investigator Apraku explained the violation and the manager signed the "Sale to Minor—Preliminary Conference Notice," which notified the Respondent that ABRA investigators had observed the violations of §§ 25-781 and 25-783 at the establishment. *Id.* at 2, Exhibit No. 8.

9. Case Report 13-CC-00076 also contained a copy of the Respondent's investigative history, which showed, that as of July 11, 2013, that the Respondent had only previously committed one sale to minor offense in 2006. *Id.* at 2.

10. The Board takes administrative notice that ABRA Investigator Mathieson no longer works for ABRA at this time.

### **IV. The Staff Settlement Agreement Executed by the Respondent**

11. In a letter, dated September 30, 2013, the Alcoholic Beverage Regulation Administration (ABRA) notified the Respondent that ABRA's Enforcement Division had observed a violation at the Respondent's establishment. *Staff Settlement Case File No. 13-CC-00076, Letter from*

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<sup>2</sup> The Respondent claimed during oral argument that it did not contest the underlying facts contained in the report. *Tr.*, February 11, 2015 at 52-53.

*Yazmin Delgado, Paralegal, to Smith & Wollensky*, (Sept. 30, 2013). In the letter, ABRA invited the Respondent to a settlement conference on October 31, 2013, at 11:30 a.m. in order to attempt to settle the matter in lieu of prosecution by the Office of the Attorney General (OAG). *Id.*

12. The Board notes that when a licensee does not accept a settlement, ABRA refers the matter to the OAG. If the OAG decides to prosecute the case, the OAG will draft a notice describing the charges, which is then served on the licensee by ABRA's Enforcement Division.

13. On October 15, 2013, Catherine Tsoukalas, who identified herself as the Respondent's Chief Financial Officer, executed and signed the settlement agreement offered by ABRA. *Waiver Consent Order* (Oct. 15, 2013).

14. The written agreement signed by Ms. Tsoukalas had the following title: "WAIVER CONSENT ORDER (Sale to Minors 1st Egregious Offense)." *Id.* As part of the settlement, the Respondent agreed that ". . . there is sufficient evidence to establish a prima facie case against the . . . Respondent for violating Section 25-781 of Title 25 of the D.C. Official Code, which prohibits the sale of alcoholic beverages to anyone under the age of twenty-one (21)." *Id.* The agreement indicated that the offense occurred on July 11, 2013. *Id.* The agreement then stated, "the Respondent admits that a sale to minor occurred . . . and hereby consents to the entry of this Order to settle this matter and to avoid the time and expense of litigation should the matter proceed to a Show Cause Hearing." *Id.*

15. As part of the agreement, the Respondent was offered two potential penalties. *Id.* The Respondent selected a fine of \$3,000 and five stayed suspension days. *Id.* ABRA's records show that the Respondent paid the fine on October 17, 2013 at 12:15 p.m. *Office of Finance and Treasury, Receipt* (Oct. 17, 2013).

#### **V. The Alleged Sale to Minor Violation Occurring on June 26, 2014**

16. Case Report 14-CC-00121 alleges that the Respondent committed a violation of §§ 25-781 and 25-783 on June 26, 2014. *Case Report 14-CC-00121*, 1. On September 17, 2014, the Board reviewed Case Report 14-CC-00121 and referred the matter to the Office of the Attorney General for prosecution. *ABRA Show Cause File No. 14-CC-00121*, Show Cause Tracking Sheet. As noted above, the notice in this matter was served on the Respondent on December 11, 2014. *Supra*, at 2.

17. On January 23, 2015, the Respondent submitted the motion that is the subject of this Order. The Board notes that this motion was submitted approximately one year and three months after the Respondent entered into the staff settlement agreement with ABRA.

#### **ARGUMENTS OF THE PARTIES**

18. The Respondent's request for relief is premised on the following: (1) the Respondent has a right to file a motion for reconsideration of the settlement order under 23 DCMR § 1719, because it was allegedly not notified of the egregious designation until January 2015 in an email sent by the prosecutor, *Resp. Mot.*, at 1, Exhibit A; (2) the Board violated the D.C.

Administrative Procedure Act by not issuing findings of fact and conclusions of law determining “egregiousness” under the law when it authorized ABRA to offer a settlement, *Resp. Mot.*, at 4-5; (3) the Board failed to provide notice of its egregiousness determination on September 25, 2013; and (4) there was no information in the record that could possibly support a legal determination of egregiousness. *Resp. Mot.*, at 6-7.

19. The Government filed an opposition in response. *District’s Resp. to Pet. Mot. for Recon. of Finding that Pet. Committed an Egregious Violation of D.C. Code § 25-781*, 1 (Jan. 28, 2015). The Government notes that motion should be denied because (1) the consent order indicated that the offense had been classified as egregious and (2) the Respondent waived its right to a hearing related to this offense, and that the Respondent misconstrues the D.C. Administrative Procedure Act. *Id.* at 1-2.

### STANDARD OF REVIEW

20. “In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof.” D.C. Official Code § 2-509. In this case, the Respondent has the burden of proof because it is the proponent of an order to permit the Respondent to withdraw from the October 15, 2013 settlement agreement.

### CONCLUSIONS OF LAW

21. The Board agrees with the Government, and denies the motion for reconsideration for the following reasons:

#### **I. THE MOTION FOR RECONSIDERATION, FILED OVER A YEAR LATE, IS UNTIMELY.**

22. The Board denies the motion for reconsideration, because the Respondent did not file it in a timely manner. Section 25-433(d) permits the filing of a motion for reconsideration “. . . within 10 days after the date of receipt of the Board’s final order.” D.C. Official Code § 25-433(d). In this case, the Respondent signed the consent order on October 15, 2013; as a result, the Respondent had until October 25, 2013, to file a motion for reconsideration. All of the alleged errors—including those related to notice, the sufficiency of the plea, the issuance of findings of fact and conclusions of law, or the legal insufficiency of the egregiousness determination—existed or could have reasonably been discovered during the reconsideration period. Thus, there is no excuse for the Respondent’s failure to seek timely reconsideration over a year after the matter was concluded.<sup>3</sup>

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<sup>3</sup> The Board notes that if this motion had been made before the Superior Court of the District of Columbia, it is unlikely that the court would have granted it. First, the Respondent is not professing innocence, only that it is entitled to a warning as a matter of law. *Bennett v. United States*, 726 A.2d 156, 167 (D.C. 1999) (“if the mere assertion of a legally cognizable defense were a sufficient condition for withdrawal, ‘the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant’s whim’ rather than ‘a grave and solemn act ... accepted only with care and discernment.’”). Second, the Respondent’s motion comes more than a year after the settlement was signed and executed. *Id.* at 169-170 (indicating that a request to withdraw a plea that comes a few days after the event favors withdrawal, but “a three week delay, even in the absence of prejudice to the government, did not weigh in favor of granting . . .” withdrawal.) Third, even though the Respondent may not have

23. The Respondent's argument that it did not receive notice of the "egregiousness" determination is not well taken. *Resp. Mot.*, at 3 n. 1. Even if it were required, the title of the October 15, 2013 settlement sufficiently informed the Respondent that ABRA was treating this matter as a first-time egregious sale to minor offense; as a result, the Respondent's claim that it never received notification of the egregiousness designation is wholly without merit and not supported by the factual record. *Supra*, at ¶ 14.

24. Consequently, the Board is satisfied that the failure to comply with the motion for reconsideration law is a sufficient basis for denying the motion. Nevertheless, should this determination be deemed insufficient, the Board makes the following additional rulings:

## **II. THE RESPONDENT WAIVED ITS RIGHT TO CHALLENGE THE SETTLEMENT.**

25. First, the Respondent has waived the right to challenge the October 15, 2013 settlement. Under the § 2-509(a), "any contested case may be disposed of by stipulation, agreed settlement, consent order, or default." D.C. Official Code § 2-509(a). Under the regulations, "[a]n offer submitted by the parties and accepted by the Board shall constitute a waiver of appeal and judicial review." 23 DCMR § 1604.6 (West Supp. 2015). In this case, because the Respondent waived the right to a show cause hearing by entering into a consent order, it has forfeited its rights to challenge the charge over a year after the consent order became final. *Supra*, at ¶ 14.<sup>4</sup>

## **III. THE BOARD IS NOT OBLIGATED TO PRODUCE FINDINGS OF FACT AND CONCLUSIONS OF LAW UNTIL THE RECORD IS CLOSED AND THERE EXIST CONTESTED ISSUES OF FACT.**

26. Second, the Respondent incorrectly argues that the Board was required to produce findings of fact and conclusions of law related to the alleged "egregiousness" determination on September 25, 2013, when the Board reviewed the case report on its investigative agenda. *Resp. Mot.*, at 2.

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had counsel on October 15, 2013, the Respondent had ample opportunity to obtain counsel before it entered into the agreement, as well as during the ten-day reconsideration or thirty-day appeal period that occurred after the agreement was executed. *Id.* at 170; *Resp. Mot.*, at 2; D.C. App. Rule 15. As a result, if the Respondent has suddenly come down with a bad case of "buyer's remorse," then it only has itself to blame.

<sup>4</sup> The Respondent's citation to *Overmyer* is puzzling and unpersuasive. *Tr.*, February 11, 2015 at 46. *Overmyer* dealt with the constitutionality of a "cognovits note," which may permit judgment against a debtor without notice, hearing, or an appearance. *D. H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 175-76 (1972). While it recites the "knowing, voluntary, and intelligent" waiver standard in one sentence, it provides no subsequent interpretation or explanation of this standard that helps the Respondent or otherwise elucidates the issues under review. *Id.* at 185. Indeed, the Respondent provided no evidence that Catherine Tsoukalas was not of sound mind and body when she entered into the agreement, lacked English language skills, lacked the authority to enter into a settlement, or was not properly apprised of the charges or the settlement. *Supra*, at ¶¶ 8-9, 13-14; *Dupont Circle Citizens Ass'n v. D.C. Alcoholic Beverage Control Bd.*, 766 A.2d 59, 63 n. 5 (D.C. 2001) (noting that the Board does not have to credit "sketchy" evidence). Furthermore, even if we were inclined to accept a lack of counsel theory, the Respondent failed to present sufficient evidence regarding its organization to demonstrate that it truly lacked counsel. *Id.*

27. The production of findings of fact and conclusions of law is governed by the D.C. Administrative Procedure Act and D.C. Official Code § 25-433. Section 2-509(e) states, “[e]very decision and order adverse to a party to the case, rendered by the Mayor or an agency in a contested case, shall be in writing and shall be accompanied by findings of fact and conclusions of law.” D.C. Official Code § 2-509(e). The Board interprets § 2-509(e) as only applying to final agency actions, which are the only time the Board would issue a “decision” or “order.” § 2-509(e). In Title 25, § 25-433(c) only obligates the Board to produce findings of facts and conclusions of law 90 days after the close of the record. D.C. Official Code § 25-433(c). Under § 25-433(b), the record officially closes after the conclusion of a hearing. § 25-433(b).

28. When the Board reviews a case report on its investigative agenda, it typically orders ABRA to take no further action; authorizes ABRA to offer a settlement, which is commonly referred to as “staff settlement”; or refers the matter to the Office of the Attorney General for prosecution. These intermediate steps in the enforcement process do not, in any way, constitute a final decision in a contested case or an adverse action.<sup>5</sup> Specifically, in this case, when the matter was referred to staff settlement, the Respondent could have contested the matter in a hearing, and no condition, fine, suspension, revocation, or other penalty would have been attached to the Respondent’s license until the Board issued findings of fact and conclusions of law.<sup>6</sup> D.C. Official Code § 25-509. As a result, the Board’s decision to refer this matter to ABRA for staff settlement did not constitute a final decision, order, or an adverse action in accordance with §§ 2-509(e) or 25-433(c) that required the issuance of findings of fact and conclusions of law.<sup>7</sup>

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<sup>5</sup> While the Board found no District case directly addressing the present controversy, the Board is confident that findings of fact and conclusions of law are only required upon issuance of a final decision. *See Newsweek Magazine v. D.C. Comm’n on Human Rights*, 376 A.2d 777, 783 (D.C. 1977) (saying “[t]he ultimate conclusion of an administrative agency must be supported by the findings of fact . . .”). The Board emphasizes that it was not persuaded by Respondent’s citations on this point, which do not appear applicable to the factual record in this matter. Specifically, the Respondent’s citation to *Powell* is not relevant to this matter, because the petitioner there did not enter into a settlement conceding to violations and waiving her right to hearing, and, unlike here, that case involved a final agency decisions issued after a hearing, *Powell v. D.C. Hous. Auth.*, 818 A.2d 188, 191-92 (D.C. 2003); the Respondent’s citation to *Citizens Association of Georgetown* is not persuasive, because that case does not address the factual scenario at issue here, *see generally Citizens Ass’n of Georgetown, Inc. v. Washington*, 291 A.2d 699 (D.C. 1972); and finally, the Respondent’s citation to *Daro* and *Lee* are unpersuasive because those cases involved contested matters that were not settled before the hearing. *See generally Daro Realty, Inc. v. D.C. Zoning Comm’n*, 581 A.2d 295, 298 (D.C. 1990) (saying that case was appealed after the agency held public hearings); *Lee v. D.C. Zoning Comm’n*, 411 A.2d 635, 637 (D.C. 1980) (saying that the agency held a hearing).

<sup>6</sup> The Respondent stated in its motion that the referral decision triggered a \$3,000 fine and five day suspension. *Resp. Mot.*, at 4-5. This is patently wrong. The only thing that triggered a fine and suspension in Case Number 13-CC-0076 was the Respondent’s decision to enter into a staff settlement. *Supra*, at ¶¶ 13-14.

<sup>7</sup> The Board also disagrees with the contention that the failure to issue a warning on an investigative agenda item constitutes a final agency action. *Tr.*, February 11, 2015 at 58-59. Hypothetically, had the Respondent rejected the settlement, the matter would have been referred to the OAG for prosecution. If OAG had charged the Respondent with a violation of § 25-781, among other possible defenses, the Respondent would be entitled to argue that it is owed a warning for the violation, even if the underlying violation was true, or that the facts do not rise to the level of egregiousness for whatever reason (e.g., insufficient evidence). If the Respondent prevailed on either theory, the Board would have issued a final written order or decision that issued a warning for the violation; as a result, the

29. On a final note, the Board is also not obligated to produce findings of fact and conclusions of law unless there are contested issues of fact. As noted in the Board's regulations, "Findings of Fact and Conclusions of Law shall consist of a concise statement of the Board's conclusions on each contested issue of fact . . . ." 23 DCMR § 1718.2 (West Supp. 2015); *Craig v. D.C. Alcoholic Beverage Control Bd.*, 721 A.2d 584, 590 (D.C. 1998) ("The Board's regulations require findings only on contested issues of fact.") In this case, because the Respondent admitted to the violation and agreed to a settlement, there were no contested issues of fact or law. *Supra*, at ¶¶ 13-14. Therefore, the Board had no obligation to issue findings of fact and conclusions of law once the Respondent executed the October 15, 2013 settlement to resolve the case.

**IV. A SHOWING THAT A MINOR HAD A YOUTHFUL APPEARANCE MAY BE USED TO DEMONSTRATE CIRCUMSTANTIALLY THAT A LICENSEE INTENTIONALLY SOLD ALCOHOL TO A MINOR.**

30. Third, based on the Board's review of the Case Report and the attached Exhibits during the reconsideration hearing, it is also apparent that the Respondent incorrectly argues that the Case Report contains no information that can indicate that an intentional sale to minor occurred July 11, 2013. *Resp. Mot.*, 6-7.

31. The Board notes that the Legal Counsel Division did not indicate that its opinion applied to all situations; indeed, it did not discuss whether intent could be inferred from the fact that a minor looked under the age of twenty-one at the time of sale. Yet, in some jurisdictions, it is recognized that it is possible to determine intent based on the youthful appearance of a minor. *Case v. Newman*, 154 So. 3d 1151, 1154 (Fla. Dist. Ct. App. 1st Dist., Dec. 17, 2014), *reh'g denied* (Jan. 29, 2015) ("Circumstantial evidence of knowledge of the age of a person 'may consist of facts relating to the apparent age of a person. The appearance of a person alone can impart knowledge of his or her age within certain ranges and to certain degrees of certainty . . . .'"); *Gorman v. Albertson's, Inc.*, 519 So. 2d 1119, 1120 (Fla. Dist. Ct. App. 2nd Dist., Feb. 10, 1988) ("Although at this point there is no direct evidence of the state of mind of the clerk who allegedly sold the alcoholic beverages to Kimbrell, knowledge that a purchaser of alcoholic beverages is not of lawful drinking age may be established by circumstantial evidence relating to the apparent age of the person . . . . Furthermore, whether in a particular instance the person's appearance alone imparted such knowledge, and to what extent, is normally a question of fact for the jury to determine."); *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 453 N.E.2d 430, 434-35 (Sup. Jud. Ct. Mass., Apr. 18, 1983) (finding that the alcohol seller knew or should have known the purchaser was a minor because the purchaser ". . . had a youthful appearance . . . ."); *State v. Benioh*, No. 27,920, 2009 WL 6567167, at \*4 (N.M. 2009) ("While lack of facial hair alone is insufficient to support a reasonable suspicion that a person is under age twenty-one, we are not

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Respondent cannot sustain the argument that the Board's failure to issue a warning constitutes a final agency action when the Respondent had—and gave up—the right to a hearing that could have led to the Board ultimately issuing a warning in this matter.

persuaded that ‘youthful appearance’ is a meaningless term merely because Slaughter was unable to describe it with specificity.”).

32. Based on this precedent, it is apparent that in any sale to minor case where the licensee or its agent fails to request identification from a minor, it is, at the very least, plausible to make a finding of intent under § 25-781, or find a violation of § 25-783, based on the youthful appearance of the minor—a question of fact that is appropriate for an adjudication proceeding. *Supra*, at ¶ 5.

### ORDER

Therefore, the Board, on this 24th day of June 2015, hereby **DENIES** the motion for reconsideration filed by the Respondent.

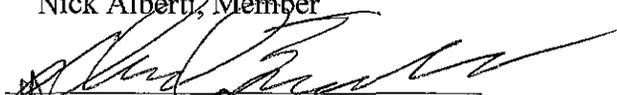
**IT IS FURTHER ORDERED** that the stay issued at the February 12, 2015 hearing is **VACATED**.

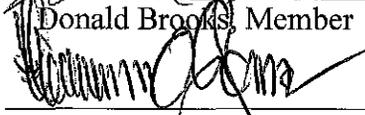
**IT IS FURTHER ORDERED** that the Board’s findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

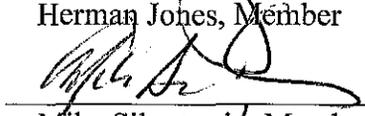
The ABRA shall deliver copies of this Order to the Government and the Respondent.

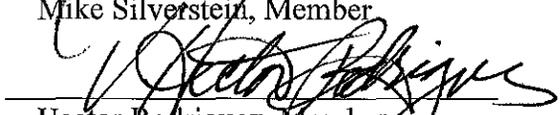
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Alcoholic Beverage Control Board

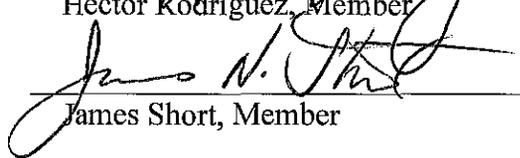
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Hector Rodriguez, Member

  
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James Short, Member

I respectfully disagree with my colleagues. In my view the Alcoholic Beverage Control Board (Board) erred as a matter of law in sending the case to staff settlement. For that reason, I believe that the settlement order is not binding and that it would be unjust for the Licensee to suffer the penalty. As set forth more fully below, I, therefore, dissent from the majority opinion.

This case involves a mandatory warning prescribed by the Council of the District of Columbia (Council) in D.C. Code § 25-830(3)(1). Pursuant to that statute, the Board was required to issue the mandated warning under the circumstances of this case, and was not authorized to refer the case to the staff for staff settlement. Accordingly, the settlement order should be vacated as void ab initio. A warning should be issued in its place in accordance with the statute.

D.C. Code § 25-830(e)(1) mandates a warning for a first time sale to minor offense except for egregious violations as defined in the Board's regulations at 23 DCMR 807. 1, unless the licensee has been given a written warning, or received a citation, for the violation, or had an enforcement proceeding before the Board, during the 4 years preceding the violation. D.C. Official Code § 25-830(e)(1). Egregious is defined in the Board's regulations at 23 DCMR § 807.1 as "a sale to minor violation where the licensee: (1) sold or served an alcoholic beverage to a minor who was unable to produce a valid identification after a request from the licensee to do so, or (2) intentionally sold an alcoholic beverage to a minor." 23 DCMR § 807 (West Supp. 2015).

In the case at issue, the establishment's employee failed to ask two minors for an ID and then served each of them a beer. This circumstance is not included in the above definition of an egregious offense under the regulation. To the contrary, the Council chose not to adopt it as

egregious and as an exception to the mandatory warning during the most recent legislative history regarding this very issue.

On November 30, 2012, the Board submitted to the Council for consideration and approval a proposed Resolution entitled “Egregious First Time Sale to Minor Violation Clarification Approval Resolution of 2012.” The proposed resolution would have approved a proposed rule adopted by the Board by a 4 to 1 vote on October 31, 2012, to amend 23 DCMR 807.1 to add a definition as to what constitutes egregious to include service to a minor when the minor was not asked for ID. The Council of the District of Columbia did not adopt the proposed rule and it was deemed disapproved. Instead, after a hearing on the Board’s proposed rule regarding a failure to ask for an ID, the Chair of the Agency’s oversight committee specifically requested that the Board draft an alternative exception to egregious for circumstances where there is a pattern of behavior. That provision which was in effect at the time of the violation and referral to staff settlement stated, “(3) can be established to have had a pattern of prior alcoholic beverage sales or service to minors.” The “pattern” rule was a temporary provision that has subsequently expired.

Despite the direction of the Council described above, shortly thereafter the majority sent this case to staff settlement instead of issuing the mandatory warning. The majority appears to conclude that a plausible finding of intent is sufficient to defeat the statutorily mandated warning. This broad circumvention of the mandatory warning on grounds that “it is at the very least, plausible to make a finding of intent under § 25 -781...based on the appearance of a minor” (Opinion at 10) is not supported by the statute’s legislative history, or the law governing the inference of intent, as advised by the Legal Counsel Division of the Office of the Attorney General in a reply to a question posed on this issue by ABRA’s Office of General Counsel. Memo from Janet M. Robins, Deputy Attorney General, Legal Counsel Division, Office of the Attorney General, to Jonathan Berman, Assistant Attorney General, Alcoholic Beverage Regulation Administration, AL-13-664, 1 (Oct. 30, 2013). This legal memorandum is published on ABRA’s website at <http://abra.dc.gov/node/769202> for the public to look to for guidance as well. The memo advises, “[t]o intentionally sell alcohol to a minor, a licensee must know that the customer is a minor and make the sale anyway in violation of the statute. When a licensee fails to request identification, the licensee will typically have no knowledge of the customer’s minority, thus negating the element of intent.”<sup>8</sup>

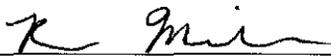
Title 25’s statutory scheme is one in which the legislature keeps a tight reign on the agency entrusted to regulate alcohol in the District of Columbia. All regulations proposed by the Board must be approved by the Council. Throughout the statute, the Council indicates clearly what the

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<sup>8</sup>The majority likewise suggests that the warning required by § 25-781 may be circumvented by another statute, § 25-783 that does not require a mandatory warning for a similarly described offense. *Opinion* at 3, fn.1. § 25-783 provides in pertinent part, “(b) A licensee or his agent or his employee shall take steps reasonably necessary to ascertain whether any person to whom the licensee sells, delivers, or serves an alcoholic beverage is of legal drinking age.” However, it is a basic tenet of statutory construction that provisions should be interpreted in harmony with one another, not in contradiction of each other. Accordingly, § 25-783 should not be interpreted to require a penalty for circumstances that would mandate a warning under § 25-781, but rather encompass other circumstances falling within the provision.

Board shall do and what it may do. The Board's penalty schedule, approved by the Council, delineates mandatory and discretionary warnings. Because the warning in this case is mandatory, as opposed to discretionary, the Board was not authorized to send the case to staff settlement and accordingly, the settlement order was void ab initio.

Based on the above, the settlement order should be vacated and a warning issued instead, as mandated by law.

  
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Ruthanne Miller, Chairperson

Pursuant to 23 DCMR § 1719.1, 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, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 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).