

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

In the Matter of:)	
)	
BCI Food Services, LLC)	Case No. 10-PRO-00016
t/a Standard)	License No. 083769
)	Order No. 2010-553
Application for a New)	
Retailer's Class CR License)	
at premises)	
)	
1801 14th Street, N.W.)	
Washington, D.C. 20009)	

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

ALSO PRESENT: BCI Food Services, LLC, t/a Standard, Applicant

Ramon Estrada, Commissioner, Advisory Neighborhood
Commission (ANC) 2B

Peter Raia, Commissioner, ANC 1B

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**ORDER VACATING APPROVAL OF VOLUNTARY AGREEMENT AND
REINSTATING PROTEST OF ANC 2B**

The Application for a New Retailer's Class CR License, filed by BCI Food Services, LLC, t/a Standard (Applicant), at premises 1801 14th Street, N.W., Washington, D.C., having been protested by ANC 1B, represented by Commissioner Peter J. Raia, and ANC 2B, represented by Commissioner Ramon Estrada, initially came before the Alcoholic Beverage Control Board (Board) for a Roll Call Hearing on April 5, 2010, and a Status Hearing on May 5, 2010, in accordance with D.C. Official Code § 25-601 (2001). ANC 1B was dismissed as a Protestant because it failed to appear at the Roll Call Hearing. ANC 1B later requested reinstatement but was denied by the Board. The protest did not proceed to a Protest Hearing because ANC 2B entered into a Voluntary Agreement, dated June 14, 2010, with the Applicant.

The Voluntary Agreement was approved by Board Order No. 2010-373. Board Order No. 2010-373 originally stated that Commissioner Raia was the Chairperson of ANC 1B and referred to ANC 1B throughout the Order. The Applicant agrees that the original Order should not have referred to Commissioner Raia as the Chairperson of ANC 1B because Commissioner Raia does not hold that position with ANC 1B. *ABRA Fact Finding File, License No. 083769, 2*. Upon the request of Commissioner Raia, the Order was changed to reflect that Commissioner Raia was acting on behalf of Single-Member District (SMD) 1B02 and not ANC 1B. These changes are now reflected in Board Order No. 2010-373

The Board held a Fact Finding Hearing on October 14, 2010, to determine whether Commissioner Raia was authorized to act on behalf of ANC 1B and whether ANC 1B was a party to the Voluntary Agreement.

The Applicant informed the Board that when it originally signed the Voluntary Agreement it believed that it was entering into a Voluntary Agreement with ANC 1B and not Single-Member District ANC 1B02. *ABRA Fact Finding File, License No. 083769, 2*. The Applicant claims that this has had a deleterious impact on the business because Commissioner Raia now claims that he did not enter into a Voluntary Agreement on behalf of ANC 1B with the Applicant, which is delaying their ability to obtain a sidewalk café permit from the District of Columbia Department of Transportation (DDOT). *Transcript (Tr.), October 14, 2010, at 27*. Commissioner Raia told the Board that he only signed the Voluntary Agreement in his capacity as a Commissioner of a Single-Member District and not on behalf of ANC 1B. *Tr., 10/14/10 at 31*. The Applicant requested that the Board recognize ANC 1B as a party to the Voluntary Agreement.

FINDINGS OF FACT

1. Mr. Thaddeaus Curtz, the owner of the establishment, testified during the Fact Finding Hearing. *Tr., 10/14/10 at 8*. He stated that he learned that the original Voluntary Agreement was modified when ANC 1B protested his application for public space usage and included a modified version of the Voluntary Agreement. *Tr., 10/14/10 at 10*. He stated that ANC 1B claimed that it never entered into a Voluntary Agreement with the Applicant. *Tr., 10/14/10 at 11*.
2. Mr. Curtz stated that he received a new copy of the Order, which listed Commissioner Raia as acting on behalf of ANC 1B02. *Tr., 10/14/10 at 12*.
3. Mr. Curtz stated that he believed he had negotiated a Voluntary Agreement with ANC 1B and ANC 2B. *Tr., 10/14/10 at 13*. He stated that Commissioner Raia attended a mediation session held by ABRA and stated that he was representing ANC 1B. *Tr., 10/14/10 at 13*. Mr. Curtz noted that Commissioner Estrada told him that it would be in his best interest to include ANC 1B in the Voluntary Agreement and communicated ideas generated by Commissioner Raia. *Tr., 10/14/10 at 14*. The Applicant stated that he agreed to include ANC 1B in the negotiations because he needed to appear before DDOT in order to obtain another permit. *Tr., 10/14/10 at 19*.

4. Commissioner Raia also testified during the Fact Finding Hearing. *Tr.*, 10/14/10 at 30. Commissioner Raia stated that the Voluntary Agreement is between SMD 1B02 and the Applicant. *Tr.*, 10/14/10 at 30. He stated that he originally was authorized to represent ANC 1B and then stated that when ANC 1B was dismissed, he no longer represented ANC 1B. *Tr.*, 10/14/10 at 30-31. He stated that when he signed the Voluntary Agreement he told the Applicant that he could only sign on behalf of SMD 1B02. *Tr.*, 10/14/10 at 31, 45-46. He stated that he could not sign on behalf of ANC 1B because the ANC did not approve the Voluntary Agreement before he signed it. *Tr.*, 10/14/10 at 33.

5. Commissioner Estrada, on behalf of ANC 2B, testified during the Fact Finding Hearing. *Tr.*, 10/14/10 at 35. Commissioner Estrada stated that he believed Commissioner Raia represented SMD 1B02 and ANC 1B at various times during the negotiations. *Tr.*, 10/14/10 at 36. Commissioner Estrada stated that he intended to include Commissioner Raia as a representative of ANC 1B. *Tr.*, 10/14/10 at 38.

6. A letter, dated March 19, 2010, designated Commissioner Raia as ANC 1B's representative during hearings. *ABRA Fact Finding File, License No. 083769., Letter from E. Gail Anderson Holness, Chairperson, to Chairman Brodsky.*

7. The Applicant provided electronic communications exchanged between the parties. *Tr.*, 10/14/10 at 14-26. He noted that Commissioner Raia disclosed in an email that he only represented SMD 1B02. *Tr.*, 10/14/10 at 23. Mr. Curtz wrote in a June 12, 2010 email to Commissioner Raia that Commissioner Raia had "indicated a desire to represent [his] ANC to negotiate an agreement." *ABRA Fact Finding File, License No. 083769, Exhibit A.* In the same email, Mr. Curtz noted that "Although you are not a seated protestant, you have contacted me personally to request that your ANC be able to sign a VA, and I drafted the agreement to include ANC 1B." *ABRA Fact Finding File, License No. 083769, Exhibit A.* In response, Commissioner Raia wrote in a June 12, 2010, email that "You must also realize I negotiate the wishes of the community and the commission it's never just me as you might feel it to be." *ABRA Fact Finding File, License No. 083769, Exhibit A.* He also wrote in the same email that "Though I can not bind the commission to your paragraph one. . . ." *ABRA Fact Finding File, License No. 083769, Exhibit A.*

8. An email from Mr. Curtz on May 26, 2010, to Commissioner Raia stated, "I will allow ANC 1B to sign the voluntary agreement." *ABRA Fact Finding File, License No. 083769, Exhibit A.*

9. An email, dated June 13, 2010, from Mr. Curtz to Commissioner Ramon Estrada stated that "I understand that you are coordinating ANC 1B's signature to the voluntary agreement. Please provide a voluntary agreement with the required signatures from ANC 1B and ANC 2B at your earliest convenience." *ABRA Fact Finding File, License No. 083769, Exhibit A.*

10. The Board also takes administrative notice of the following provision in the Voluntary Agreement:

H. NOTICE AND OPPORTUNITY TO CURE. In the event that any of the signatories is in breach of this Voluntary Agreement, they shall be entitled to reasonable notice and opportunity to cure. . . If to ANC1B: ANC1B, P.O. Box 73710, Washington, DC, 20056.” *Board Order No. 2010-373, para. H.*

11. The Board notes that the Chairperson of ANC1B did not sign the Voluntary Agreement. *See Board Order No. 2010-373.* The Board notes that Commissioner Raia, on behalf of SMD 1B02, is a signatory to the Agreement. *See Board Order No. 2010-373.* The Board also takes administrative notice that the Voluntary Agreement is the “form” Agreement used by ANC 1B.

CONCLUSIONS OF LAW

12. “The applicant and any protestant may, at any time, negotiate a settlement and enter into a written voluntary agreement setting forth the terms of the settlement.” D.C. Code § 25-446(a) (2001). Under § 25-446(c), so long as the Board finds that the Voluntary Agreement “complies with all applicable laws [the] Board shall approve the license application, conditioned upon the licensee’s compliance with the terms of the voluntary agreement.” § 25-446(c).

13. Under § 25-446(a), akin to a contract, all of the parties listed as signatories must agree to the terms of the settlement. § 25-446(a). The Board may not impose a Voluntary Agreement before the conclusion of a Protest Hearing unless the parties are in agreement. *See generally* § 25-446. As such, “[o]ne of the essential elements for formation of a contract is a manifestation of agreement or mutual assent by the parties to the terms thereof; in other words, to establish a contract the minds of the parties must be in agreement as to its terms.” *Owen v. Owen*, 427 A.2d 933, 937 (D.C. 1981) (citations removed). The failure to agree on or even discuss an essential term of a contract may indicate that the mutual assent required to make. . . a contract is lacking.” *Id.* at 937 (citation removed). The Board also notes that parole evidence is admissible to “clear up ambiguity” in a contract. *Vakas v. Manuel*, 316 F.2d 369, 370 (D.C. Cir. 1963). Finally, “there is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” 17A Am Jur 2d Contracts § 370 (2010) (footnotes removed); *Hais v. Smith*, 547 A.2d 986 (D.C. 1988)

14. Because the signature line of the Voluntary Agreement does not have a signatory for ANC 1B but Paragraph H treats ANC 1B as a party, the Board finds that the Voluntary Agreement is ambiguous. As such, the Board finds that the parties are entitled to submit parole evidence to explain the terms of the Voluntary Agreement.

15. The Board finds that the Voluntary Agreement lacked the mutual assent of the parties. Here, although no one signed the Voluntary Agreement as a representative of ANC 1B, paragraph H indicates that ANC 1B is a signatory, which the Board finds creates a conflict between the terms of the Voluntary Agreement and the signature line. The Applicant had no reason to include Commissioner Raia in the negotiations and permit ANC 1B to sign the Voluntary Agreement unless it helped the Applicant with its application for a permit before DDOT. Indeed, the Applicant’s emails to the

Commissioners make it clear that the Applicant believed that ANC 1B was a party. Given the multitude of communications that led the Applicant to believe it was signing an Agreement with ANC 1B, the Applicant reasonably believed that it was entering into a Voluntary Agreement with ANC 1B. In addition, Commissioner Raia's statements before the signing that he was only representing SMD 1B02 runs counter to tenor of the parties' pre-signing negotiations and the text of the Voluntary Agreement, which refers to ANC 1B as a signatory. The evidence demonstrates that Mr. Curtz expected to enter into a Voluntary Agreement with ANC 2B and ANC 1B, not SMD 1B02. Based on these facts, the Board finds that the Voluntary Agreement lacked mutual assent and should be vacated because the Agreement did not comply with § 25-446(a) and, therefore, could not be approved under § 25-446(c).

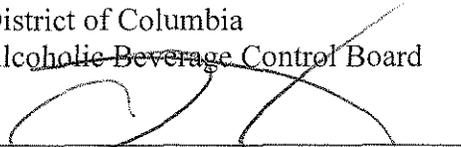
16. The Board cannot grant the relief requested by the Applicant because ANC's are a separate governmental entity over which the Board lacks any authority over. Therefore, the Board cannot adopt Commissioner Raia's actions as binding on ANC 1B.

17. Lastly, the Board finds it necessary to register its disappointment that this situation has unnecessarily delayed and frustrated the Applicant's efforts to become operational. The Board expects ANC Commissioners to negotiate the terms of Voluntary Agreements in good faith. It was unfair and misleading for Commissioner Raia to negotiate the Voluntary Agreement as though he were representing ANC 1B and then only sign the document on behalf of SMD 1B02. Further, Commissioner Raia's request to change the intent of the Voluntary Agreement after it was signed denied the Applicant the fruits of their negotiation and breached the covenant of good faith and fair dealing. Consequently, the Board vacates its previous decision to approve the Voluntary Agreement.

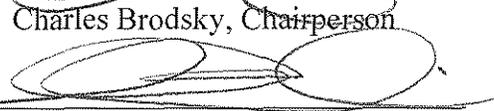
ORDER

The Board does hereby, this 10th day of November, 2010, **VACATE** Board Order No. 2010-373, dated June 23, 2010, which approved the Voluntary Agreement. Therefore, the protest of ANC 2B is reinstated. The Status Hearing will be held on November 17, 2010 at 9:30 a.m. and the Protest Hearing will be held on December 1, 2010, at 1:00 p.m. Copies of this Order shall be sent to the Applicant, ANC 2B, ANC 1B, and Commissioner Peter Raia.

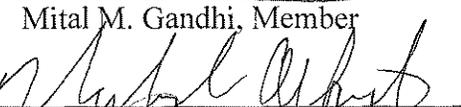
District of Columbia
Alcoholic Beverage Control Board



Charles Brodsky, Chairperson



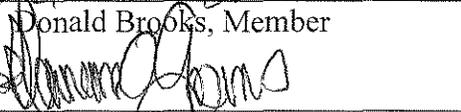
Mital M. Gandhi, Member



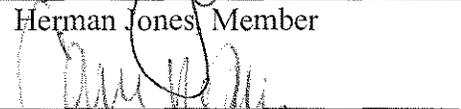
Nick Alberti, Member



Donald Brooks, Member



Herman Jones, Member



Calvin Nophlin, 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.