

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

In the Matter of:)	
)	
Red & Black, LLC)	Case No.: 14-PRO-00022
t/a Vendetta)	License No.: 093974
)	Order No.: 2014-348
Petition to Terminate a Settlement)	
Agreement for Retailer's Class CT License)	
)	
at premises)	
1210 H Street, NE)	
Washington, D.C. 20002)	

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

ALSO PRESENT: Red & Black t/a Vendetta, Applicant

Jay Williams, Commissioner, on behalf of Advisory Neighborhood
Commission (ANC) Single Member District (SMD) 6A05

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**ORDER DENYING APPLICANT'S MOTION FOR RECONSIDERATION OF ORDER
ON DISMISSAL AND REQUEST FOR REINSTATEMENT**

This matter comes before the Alcoholic Beverage Control Board (Board) on the Petition to Terminate a Settlement Agreement for Retailer's Class CT License (Petition) filed by Red & Black, LLC, t/a Vendetta (Petitioner). The Petition was timely protested by ANC 6A on December 14, 2013. The Roll Call Hearing initially was scheduled to take place on May 12, 2014.

By request of the Parties, the Board rescheduled the Roll Call Hearing for June 9, 2014. On June 9, 2014, the Petitioner failed to appear. Accordingly, the Board issued Board Order No. 2014-250 which dismissed the Petition due to the Petitioner's failure to appear at the Roll Call

Hearing. See *Red & Black, LLC t/a Vendetta*, Case No. 14-PRO-00022, Board Order No. 2014-250 (D.C.A.B.C.B. June 18, 2014). In this same Order, the Board denied Petitioner's request for reinstatement of the Petition. *Id.*

Petitioner's Arguments

The Petitioner has filed a Motion for Reconsideration (Motion) of the Board's Order denying reinstatement of the Petition. In its Motion, the Petitioner raises three issues.

First, the Petitioner argues that Vendetta was not given proper notice and as a result, did not have actual notice of the Roll Call Hearing date. *ABRA Protest File 14-PRO-00022, Motion for Reconsideration of Order on Dismissal of Petition to Terminate a Settlement Agreement and on Petitioner's Request for Reinstatement* dated June 27, 2014. In the Motion, the Petitioner states that the parties mutually agreed to continue the May 12, 2014 scheduled Roll Call Hearing. *Id.* at 2. ABRA sent the Parties the newly scheduled date of June 9, 2014 electronically to the Parties' emails. *Id.* Yet, the Petitioner claims that the Petitioner did not receive the notice because it went to its SPAM folder. *Id.* The Petitioner contends that notice in this matter was not proper because it was given electronically. *Id.* at 3-4. The Petitioner states that under 23 DCMR § 1703.4, this is not an acceptable mode of service. *Id.* at 4.

Next, the Petitioner argues that this Motion should be granted because similarly unopposed motions for reinstatement have consistently been granted by the Board. *Id.* at 4-5. The Petitioner posits that in twenty-seven previous motions for reinstatement filed since 2013, four motions were granted, at least in part because the motions were unopposed. *Id.* Further, the Petitioner argues that denying its Motion was "contrary to the decisions made by the Board previously" and given that the Board did not highlight any extenuating circumstances which would warrant a denial, Vendetta's motion should have been granted. *Id.* at 5.

Lastly, the Petitioner argues that the Motion should be granted because the Board has applied its standard in an arbitrary and capricious fashion. *Id.* at 5-6. The Petitioner additionally argues that there is no clear explanation or purpose which drives the Board's decisions. *Id.* at 6. For these reasons, the Petitioner argues that the Motion for Reconsideration should be granted. *Id.*

Protestant's Response to Petitioner's Arguments

On June 29, 2014, the Protestant filed an Opposition to Motion for Reconsideration of Order on Dismissal of Petition to Terminate a Settlement Agreement and On Petitioner's Request for Reinstatement. *ABRA Protest File 14-PRO-00022, Opposition to Motion for Reconsideration of Order on Dismissal of Petition to Terminate a Settlement Agreement and on Petitioner's Request for Reinstatement* [Opposition] dated June 29, 2014, 2. The Protestant argues that despite both parties having received emailed notice of this hearing date, no representative for Vendetta appeared at the Roll Call Hearing. *Id.* The Protestant includes documentation of the email correspondence between the parties that shows the Petitioner's acknowledgement of the joint request for a continuance of the initial Roll Call Hearing. Opposition, Exhibit A-B. More specifically, the Protestant contends that Mr. Englert previously

responded to an email from ABRA. Opposition, 3. Further, the Protestant argues that it seems highly unlikely that emails to and from an email addresses to which Mr. Englert had directly responded in the past would suddenly end up in his SPAM folder. *Id.* The Protestant also argues that the notice from Ms. Anderson was sent in the same email thread to which Mr. Englert had responded. *Id.* Thus, the Protestant reasons, it seems unlikely that one part of the thread would get past a SPAM filter, but a later part of the thread would suddenly be “flagged as SPAM.” *Id.* The Protestant further argues that because the Board’s Order properly applied the Board’s “discretion,” per 23 DCMR § 1602.3, the Petitioner’s Petition was properly dismissed and the Motion for Reconsideration should be denied. *Id.* at 3.

Discussion

The Board addresses each issue raised in the Petitioner’s Motion in turn. First, the Board does not credit the Petitioner’s argument that the notice given to the Petitioner was improper. As set forth in 23 DCMR § 1703.3(e), the Board has the authority to serve a party as otherwise authorized by law. 23 DCMR § 1703.3(e). The applicable law in this instance is governed by the Administrative Procedure Act. Under Section 2-509(a) of the Administrative Procedure Act, all parties shall be given reasonable notice of the afforded hearing by the agency. Administrative Procedure Act § 2-509(a) (2001). Here, the Petitioner acknowledges that the notice was received electronically, albeit to a folder other than the inbox. The Board sent the notice electronically, which is permitted by § 1703.3(e).

With regards to the Petitioner’s next argument that the Board’s decision not to grant the request for reinstatement was “contrary” to previous Board decisions, the Board does not find this argument to be credible. As outlined in 23 DCMR § 1602.3, the failure to appear in person or through a designated representative at the roll call hearing may result in denial of the license application or dismissal of a protest, unless, in the discretion of the Board, good cause is shown. 23 DCMR § 1602.3. The Board routinely addresses instances where parties fail to attend hearings. In these instances, it has been the Board’s customary practice to dismiss a party for the failure to appear. *See eg., CRV Corporation t/a The Bottom Line*, Case No. 14-PRO-00045, Board Order No. 2014-293 (D.C.A.B. July 23, 2014); *M Street Management Group, LLC*, Case No. 14-PRO-00032, Board Order No. 2014-137 (D.C.A.B.C.B. April 28, 2014).

Under 23 DCMR § 1601.7, the Board shall consider whether, in its discretion, the party has shown good cause for his or her failure to appear at Board hearings. 23 DCMR § 1601.7. Examples of good cause for failure to appear include, but are not limited to: sudden, severe illness or accident; death or sudden illness in the immediate family such as spouse, partner children, parents, siblings; incarceration; or severe inclement weather. 23 DCMR § 1601.6. Here the Board did not err, as a matter of law, by using its discretion to determine that the circumstances described by the Petitioner did not constitute good cause as required in 23 DCMR § 1601.6.

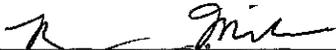
Lastly, the Board does not find the Petitioner’s final argument that the Board applied its decision in an arbitrary and capricious manner to be credible. An agency decision may not be disturbed unless it is arbitrary, capricious, or otherwise not in accordance with the law. *Sims v. District of Columbia*, 933 A.2d 305, 309 (D.C. 2007). Here, there is no factual dispute. The

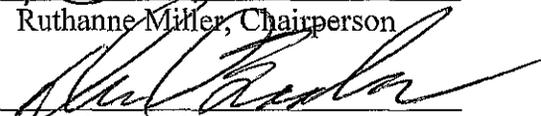
Parties were electronically notified of the rescheduled Roll Call Hearing. The Board agrees with the ANC that it is clear that Mr. Englert had previously responded to an email from ABRA. Opposition, 3. Additionally, the notice of the rescheduled Roll Call Hearing was in response to Mr. Englert's email. *Id.* Thus, the Board finds it highly unlikely that the electronic notification of the rescheduled Roll Call Hearing went to a SPAM folder. Therefore, the Board concludes that Petitioner was notified, and the Board did not err, as a matter of law, in denying its Motion for Reconsideration.

ORDER

Therefore, based on the foregoing, the Board, on this 15th day of October 2014, **DENIES** the Motion for Reconsideration filed by Red & Black, LLC t/a Vendetta. ABRA shall deliver copies of this Order to the Applicant and the ANC.

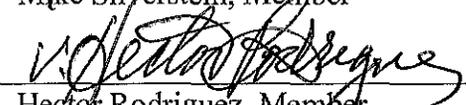
District of Columbia
Alcoholic Beverage Control Board

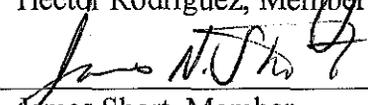

Ruthanne Miller, Chairperson


Donald Brooks, Member

Herman Jones, Member


Mike Silverstein, Member


Hector Rodriguez, Member


James Short, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), 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, N.W., 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, District of Columbia 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).