

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

In the Matter of:

Asefu Alemayehu
t/a Yegna

License No.: 74241
Case No.: 11-CMP-00321
Order No.: 2016-139

Holder of a Retailer's Class CT License
at premises
1920 9th Street, N.W.
Washington, D.C. 20001

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
Ruthanne Miller, Member
James Short, Member

ALSO PRESENT: Asefu Alemayehu, t/a Yegna, Respondent¹

Fernando Rivero, Esq., Assistant Attorney General,
on behalf of the District of Columbia

Martha Jenkins, Esq., General Counsel
Alcoholic Beverage Regulation Administration

ORDER ON REMAND HEARING

INTRODUCTION

The Alcoholic Beverage Control Board reverses its decision to revoke the Retailer's Class CT License held by Asefu Alemayehu, t/a Yegna (hereinafter "Respondent" or "Yegna") for the offenses described in its prior Order. In lieu of revocation, the Board uses its discretion to impose a fine of \$30,000.

¹ Attorney Richard Bianco indicated that he no longer serves as counsel to the Respondent. The Board's records do not indicate that Yegna has obtained an alternative counsel as of the date of this Order.

Procedural Background

The Board scheduled the Remand Hearing ordered by the District of Columbia Court of Appeals in *Alemayehu v. District of Columbia Alcoholic Beverage Control Board*, 109 A.3d 1095 (D.C. 2014) for March 30, 2016 at 11:00 a.m. Notice of the hearing and proposed findings of fact and conclusions of law, were provided by letter, dated, March 24, 2016.

The Board addresses the issues raised by the court in its decision at the Remand Hearing. Specifically, the issues before the Board are (1) whether the Board should deem Asefu Alemayehu a “communication-impaired person” under D.C. Official Code § 2-1902(c) and should have appointed an interpreter during the Show Cause Hearing on January 9, 2013; and (2) if Ms. Alemayehu did not qualify as a “communication-impaired person,” whether the Board should impose a fine of no less than \$30,000 and a suspension of no less than 30 days, or maintain the revocation of the Respondent’s license in accordance with D.C. Official Code § 25-830(c)(1)(D).

As part of the Remand Hearing, the Board took official notice of records in ABRA’s possession that relate to Ms. Alemayehu’s ability to speak and understand English. Specifically, the records identified in the proposed findings of fact and conclusions of law were made part of the record and taken into evidence in accordance with 23 DCMR § 1717 (West Supp. 2016).

FINDINGS OF FACT

The Board credits the following findings of fact based on the testimony, evidence, and other records in the Board’s official file related to this matter:

1. On October 6, 2006, Ms. Alemayehu attended a protest hearing regarding her establishment. *Transcript (Tr.)*, October 6, 2006 at 1, 140. She was called as a witness and testified without an interpreter. *Id.* at 140-186. During her examination, she responded to questions asked by her counsel, the Board, and the other side. *Id.* In particular, she answered and responded to questions involving her personal information, business plans, deliveries, work experience, parking, safety measures, and government licenses. For example, in response to a question about her security plans, she responded:

Yes. Since we organized the 9th Street Business Association, we hired a police from District, on the street, plus when we have, on Friday and Saturday, Sunday, I have my own security guard at the door. After that, we have a police official outside, on the street. We already hired them. We pay every month 305 dollar, plus the security, 120 . . . every night, for two people, two security guard.

Id. at 152-53.

2. On May 6, 2009, Ms. Alemayehu attended a show cause hearing involving a violation at her establishment without an interpreter. *Tr.*, May 6, 2009 at 1-2. On this date, she indicated to the chair that she received and understood the notice of charges, which went as follows:

CHAIRMAN FEATHER: Ms. Aleymayehu, did you receive a Notice of Status and Show Cause in this matter?

MS. ALEYMAYEHU: Yes, sir.

CHAIRMAN FEATHER: Were you able to read and understand the charges?

MS. ALEYMAYEHU: Yes.

CHAIRMAN FEATHER: I can either read this notice into the record or you could waive reading.

MS. ALEYMAYEHU: Waive reading.

Id. at 3. She then verbally indicated that she understood and accepted a proposed offer in compromise. *Id.* at 5-6.

3. On December 12, 2012, Ms. Alemayehu's former counsel requested an interpreter, which the Board granted without considering the hearings that occurred in 2006 and 2009. *Tr.*, December 12, 2012 at 16. While counsel believed she could not speak English, he also admitted that she repeatedly stated that she understood their conversation. *Id.* at 5-6.

4. During a second hearing on January 9, 2013, Ms. Alemayehu's second former counsel indicated the following:

MR. KLINE: The only way that I can address that is I have spent a great deal of time with Ms. Alemayehu. I'm satisfied that she understands the terms of the deal. I'm happy to have her answer any questions that the Board may have, so that the Board might be satisfied. Obviously, in my role, I've got to make a decision as to whether the client understands what is going on or not. And in this case, given the time that I have spent with her in our review of the offer and other considerations, I don't have a question in my mind at this point.

Tr., January 9, 2013 at 13.

CONCLUSIONS OF LAW

I. The Board, itself, is obligated to inquire into whether Ms. Alemayehu qualifies as a communication-impaired person.

5. Under § 2-1902(c),

Whenever a communication-impaired person is a party . . . in an administrative proceeding before a . . . licensing authority . . . , the appointing authority conducting the proceeding may appoint a qualified interpreter to interpret the proceedings to the communication-impaired person and to interpret the communication-impaired person's testimony.

D.C. Official Code § 2-1902(c).

6. As noted by the court, under § 2-1902(c), “The Board [is] required to exercise its discretion as to whether to appoint an interpreter” *Alemayehu v. District of Columbia Alcoholic Beverage Control Board*, 109 A.3d 1095, 1101 (D.C. 2014). In addition, the court found that the Board, itself, should have inquired further into Ms. Alemayehu’s language abilities and comprehension. *Id.* In this case, the Board satisfies this requirement by relying on transcripts of Ms. Alemayehu talking and testifying at various proceedings before the Board. *Supra*, at ¶¶ 1-4.

II. The Board finds that Ms. Alemayehu adequately speaks and understands English; therefore, she is not a communication-impaired person in accordance with § 2-1902(c).

7. The court remanded this matter to the Board for the purpose of determining “whether [Ms. Alemayehu] was communication-impaired at the time of the Show Cause Hearing” *Alemayehu*, 109 A.3d at 1101.

8. Under the Interpreter Act, a “Communication-impaired person means a hearing-impaired person or a non-English or limited-English speaking person.” D.C. Official Code § 2-1901(2) (quotation marks removed). Further, under the Act, a “Non-English or limited-English speaking person means a person who is unable to readily understand oral and written communications in the English language or who cannot communicate effectively in the spoken or written English language.” D.C. Official Code § 2-1901(4) (quotation marks removed). According to scholarly authorities,

Factors that a trial judge must evaluate when deciding whether due process requires word-for-word interpretation of trial proceedings to assist a defendant who has some ability to understand and to speak English, but not the level of language skill that a native speaker of English would possess, include: (1) the extent to which the defendant can comprehend spoken English; (2) the extent to which the defendant can express himself or herself in English; and (3) the degree to which the trial testimony will present complex or subtle issues of fact that will require the defendant's input.

65 Am. Jur. Trials 1 (1997).

9. Previously, Ms. Alemayehu testified competently and extensively at a prior protest hearing involving her license application. *Supra*, at ¶ 1. ABRA’s records further show that she participated in two hearings without an interpreter—one involving the 2006 protest proceeding and another involving the acceptance of settlement, similar to the hearing on January 9, 2013. *Supra*, at ¶¶ 1-2. Under these circumstances, Ms. Alemayehu has demonstrated an adequate grasp of the English language and had the capability to understand the proceedings at the January 9, 2013 Show Cause hearing; therefore, the Board does not deem her a “Non-English or limited-English” person, and finds that she does not qualify as a “communication-impaired person.”

III. Based on the Board's determination in Section I, the Board reinstates its finding of a violation.

10. According to the court, "If the Board finds that [Ms. Alemayehu] was not communication-impaired at the time of the January 9, 2013, Show Cause Hearing, it may reinstate its finding that Petitioner committed the charged infraction." *Alemayehu*, 109 A.3d at 1101 n. 9. Because the Board makes such a finding in Section II, the Board reinstates its finding of a violation in this case.

IV. The violation committed by Yegna merits the imposition of a fine in accordance with D.C. Official Code § 25-830(c)(1)(D).

11. In remanding this case to the Board, the court ordered the Board to consider whether revocation is mandatory under the old penalty scheme or, rather than choosing revocation, whether a discretionary penalty of no less than \$30,000 dollars and a suspension of no less than 30 days is permitted and merited under the penalty scheme passed by the counsel. *Id.* at 1103.

12. The Board finds that the new penalty scheme enacted by the Council applies retroactively to this case. The Board finds that the new law provides for leniency in the case of four primary tier violations; therefore, the interests of justice are served by affording the Board the option of leveling a lesser penalty, if the situation calls for such a resolution. *Id.* at 1102.

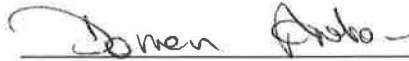
13. The Board relies on its discretion to impose a \$30,000 fine and 30 day suspension. In this case, the Board is persuaded that the lesser penalty is merited because the Respondent was dealing with family issues at the time the violations occurred, and the size of the penalty acts as a deterrent against future violations.

ORDER

Therefore, the Board, on this 20th day of April 2016, hereby, **MODIFIES** its prior determination as follows:

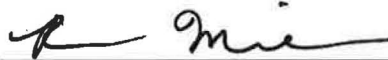
1. The Board reinstates Yegna's license; however, the license shall remain in safekeeping until the fine imposed by this Order is paid;
2. Yegna shall pay a fine of \$30,000; and
3. Based on the amount of time Yegna's license was revoked, Yegna shall be deemed to have satisfied the suspension required by § 25-830(c)(1)(D).

District of Columbia
Alcoholic Beverage Control Board

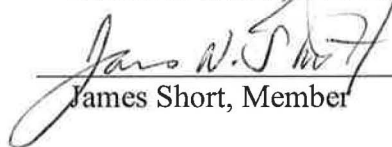


Donovan Anderson, Chairperson

Mike Silverstein, Member



Ruthanne Miller, Member



James Short, Member

I concur with the Board's determination that the Respondent had an adequate grasp of the English language at the original show cause hearing. Nevertheless, I believe revocation remains an appropriate penalty in this matter; therefore, I dissent as to the Board's decision to modify the penalty.

The decision of the District Court of Appeals was not unanimous regarding the matter of penalty. While the majority of the three-judge panel ordered the Board to consider whether the 2013 amended D.C. Code § 25-830 applied in Ms. Alemayehu's case, they did not advise that the amended D.C. Code § 25-830 was applicable. The court presented arguments for and against the applicability of the amended D.C. Code § 25-830, but did not reach a conclusion based on their analysis of those arguments. They simply left the assignment of penalty to the Board's discretion.

My decision in this matter is guided by the dissenting opinion of Associate Judge McLeese. In his dissent, Judge McLeese concludes that the need for the Board to consider whether the 2013 amended D.C. Code § 25-830 was applicable is unwarranted and that the Board should be permitted to reinstate the revocation of the Ms. Alemayehu's license.

Judge McLeese makes two persuasive points in his argument for why the revocation of Ms. Alemayehu's license remains the appropriate penalty. The first is that Ms. Alemayehu's contention that the Board should have considered the 2013 amended D.C. Code § 25-830 was not presented in a timely manner to the Board or to the court. Ms. Alemayehu did not bring the amended code to the attention of the court or the Board in her initial appeal. The brief filed by the Board in response to Ms. Alemayehu's appeal mentioned the 2013 amendment. Ms. Alemayehu had an opportunity address to the amended code by responding to the Board's brief, but she chose to not file a reply brief. It was not until oral argument before the court that Ms. Alemayehu first contended that the Board erred by failing to consider the 2013 amended D.C. Code § 25-830. Judge McLeese's dissent includes the following remarks about the timing of Ms. Alemayehu's belated contention that the Board erred by not considering the 2013 amended code: "Under well settled principles, this court normally would not consider a claim raised so

belatedly... I see no extraordinary circumstances justifying a departure from those well settled principles.”

Judge McLeese also observed that the Board had explained in its order revoking Ms. Alemayehu’s license that the licensee had ‘shown she cannot comply with the law, and that she had no regard for public safety, or the quality of life of residents’. In light the Board findings in its previous order, he made the following comment with regards to the Board’s decision to revoke Ms. Alemayehu’s license: “I understand that, at the time the Board reached that conclusion, the Board may not have been considering the possibility of a fine as large as would be permissible under the 2013 amendment. But I see no reason to suppose that the Board would have been inclined in this case to forgo revocation in favor of suspension and a larger fine.”

Judge McLeese summed up his discussion of whether it is appropriate for the Board to reinstate the revocation of Ms. Alemayehu’s license by stating, “Under the circumstances, remanding to require the Board to consider the potential applicability of the 2013 amendments would be unwarranted even if Ms. Alemayehu had properly presented this issue to the Board and this court.” He concluded his dissent by saying that “if Ms. Alemayehu is not a communication-impaired person, then in my view the Board should be permitted to reinstate the prior order in its entirety.”


Nick Alberti, Member

Pursuant to D.C. Official Code § 25-433(d)(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, 2000 14th Street, N.W., Suite 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 (West Supp. 2016) 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).