

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

In the Matter of:

Millie's Spring Valley, LLC
t/a Millie's

Holder of a
Retailer's Class CR License

4866 Massachusetts Avenue, N.W.
Washington, D.C. 20016

Case No.: N/A
License No.: 100214
Order No.: 2018-709

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
James Short, Member
Bobby Cato, Member
Rema Wahabzadah, Member

PARTIES: Stephen K. Gardner, Chairperson, Advisory Neighborhood Commission
(ANC) 3D, Petitioner

Millie's Spring Valley, LLC, t/a Millie's, Respondent

David M. Leahy, on behalf of A Group of Five or More Individuals,
Respondent

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING MOTION FOR RECONSIDERATION

On October 3, 2018, the Alcoholic Beverage Control Board *sua sponte* denied Advisory Neighborhood Commission (ANC) 3D's petition to terminate the settlement agreement (Petition) entered into by the ANC, Millie's Spring Valley, LLC, t/a Millie's (MSV), and a Group of Five or More Individuals, represented by David Leahy (Leahy Group), in 2016. *In re Millie's Spring Valley, LLC, t/a Millie's*, Board Order No. 2018-572, 1 (D.C.A.B.C.B. Oct. 3, 2018). Specifically, the Board found that ANC 3D's argument that the settlement agreement was void due to the participation of an allegedly disqualified commissioner in the vote approving the agreement to be without merit and unsupported by legal authority. *Id.* at 2. The Board further

found that the ANC's argument that an alleged breach of the agreement by the Leahy Group merited termination of the agreement was unpersuasive and not permitted under § 25-446(d)(1). *Id.* In light of this reasoning, the Board denied the petition *sua sponte* because, even if the Board agreed with and accepted all of the facts presented by the ANC, the request could not be granted as a matter of law under D.C. Official Code § 25-446(d)(1). In its Order, the Board further advised the parties that they could voluntarily agree to terminate the agreement, although the agreement would still remain in effect between MSV and any party that did not voluntarily agree to terminate the agreement. *Id.* at 3.

Subsequently, the ANC filed a motion for reconsideration asking the Board to vacate its Order and hold a hearing. *Mot. for Recon.*, at 6. The motion claims this remedy is warranted based on the following allegations: (1) the ANC only filed a "request for agency action," not a petition to terminate the settlement agreement; (2) the Board's response did not comply with the time periods provided by D.C. Official Code § 1-1309.10(h)(1); (3) the Board's Order denied the ANC substantive due process; and (4) the Board's action violated the Open Meetings Act. *Mot. for Recon.* at 1-7. The Board is not persuaded by this reasoning

For the following reasons, the motion is denied:

I. The ANC Filed a Petition to Terminate the Settlement Agreement.

1. The ANC claims that it did not submit a petition to terminate, but rather a request for agency action under the ANC laws, and that no such process to petition for termination exists in the alcohol laws of the District of Columbia.¹ This is incorrect.

2. In adjudicating matters that come before it, the Board must rely on the overt statements made by parties, not their secret intentions and thoughts. In this case, in its February 7, 2018, letter the ANC wrote, "We conclude by asking the ABC Board to consider terminating the existing settlement agreement for cause prior to its four-year renewal so that any bilateral agreement between ANC3D and Millie's can immediately form the basis for Millie's operations going-forward." *Letter from ANC 3D to the Alcoholic Beverage Control Board*, 1 (Feb. 7, 2018). The letter then stated, "In the alternative to termination, ANC 3D requests that ABRA finds that the settlement agreement is ambiguous with regard to this matter and, therefore Millie's should not be found in violation." *Id.* at 8. On September 26, 2018, the ANC "reiterated" its request. *Letter from ANC 3D to the Alcoholic Beverage Control Board*, 2 (Sept. 26, 2018). As a result, there is no doubt that the ANC explicitly asked the Board to terminate the agreement.

3. Under § 25-446(d)(2),

¹ The ANC complains that there is no "petition" to terminate mentioned in the law. Despite the law describing them as applications, they have always been described as petitions by the Board and the court. See e.g., *Mallof v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 43 A.3d 916, 917 (D.C. 2012) ("At the protest hearing on Hank's petition to terminate . . ."). The Board notes that whether these types of actions are called petitions or applications, this has no impact on the legal analysis or result.

The Board may accept an application to amend or terminate a settlement agreement by fewer than all parties in the following circumstances: (A) During the license's renewal period; and (B) After 4 years from the date of the Board's decision initially approving the settlement agreement.

D.C. Code § 25-446(d)(2). The regulations further indicate that “Any request filed with the Board that involves an existing voluntary agreement shall be considered a contested case by the Board and not subject to the issuance of a declaratory order.” 23 DCMR § 1903.1 (West Supp. 2018). In light of this authority, it was appropriate for the Board to consider the matter a contested case and issue a formal order resolving the matter under § 25-446. Moreover, it was further appropriate for the Board to summarily and *sua sponte* dismiss the ANC’s petition when it blatantly violated the requirements of § 25-446 and had no merit on its face.

II. Any Violation of § 1-1309(h)(1) Does Not Change the Outcome in this Matter.

4. Even if the Board agreed with the ANC that its Petition was merely a “request for agency action,” and that the time periods described in § 1-309.10(h)(1) were not followed, this would not change the outcome in this matter. Section § 1-1309(h)(1) provides that

(h)(1) Each Commission may initiate its own proposal for District government action. The District government entity to which the proposal is made shall acknowledge the proposal in writing to the initiating Commission within 10 days of receipt of the proposal and shall issue a status report to the initiating Commission within 60 days of receipt.

D.C. Code § 1-309.10(h)(1).

5. It is clear that the time periods provided § 1-1309.10 are directory, and not mandatory. It is well known that “when a statute says that an agency ‘shall’ make a decision or engage in an action within a set period of time, that limit is generally considered ‘directory rather than mandatory.’” *Brown v. D.C. Pub. Employee Relations Bd.*, 19 A.3d 351, 355 (D.C. 2011) *citing Spicer v. District of Columbia Real Estate Comm’n*, 636 A.2d 415, 418 (D.C. 1993). Indeed, it is quite clear that § 1-1309.10(h)(1) is directory where the statute contains no sanction for any failure to comply. *Id.* at 356.

6. In finding that § 1-309.10(h)(1) is directory, the next question is whether the failure to comply was prejudicial. As noted in *JBG Properties, Inc.* when confronted with the violation of a directory procedural regulation by the government, the question is whether there is prejudice to “substantial rights,” where the burden of showing the outcome was unaffected rests upon the party seeking to sustain it against the error.” *JBG Properties, Inc. v. D.C. Office of Human Rights*, 364 A.2d 1183, 1186 (D.C. 1976). In this case, even if the Board accepts that a violation of § 1-1309(h)(1) occurred, there is no prejudice because the ultimate remedy sought by the ANC is prohibited by law and no additional process would change the outcome. Therefore, § 1-309.10 has no impact on the outcome of this case.

a. The Board's Orders in this matter satisfy § 1-1309(h)(1).

7. Moreover, to whatever extent the ANC's petition qualifies as a "proposal" pursuant to § 1-1309.10(h)(1), the matter is moot, as the prior Order and the Board's response in this Order satisfy any requirement of § 1-309(h)(1) to acknowledge receipt of the proposal and issue a status report. Furthermore, the Orders issued by the Board also close the matter under § 1-1309.10 because they explain in writing to the ANC that its proposal was considered and rejected.

III. The ANC's Due Process Claim is Without Merit.

8. The Board further rejects the ANC's request for a hearing or claim that it has been otherwise denied due process. *Mot. for Recon.*, at 3-4. Nothing in the District's alcohol laws, § 1-1309(h)(1), or the ANC laws provide the ANC with the right to a hearing in this matter. In light of this lack of authority, the decision to hold a hearing lies solely within the discretion of the Board. The Board is also free to decide any matter on papers alone. In this case, no hearing is warranted where the ANC's request to terminate the settlement agreement can be addressed on legal principles alone, is futile, and cannot be granted as a matter of law.

9. The ANC's substantive due process claims are also without merit. Nothing prevented the ANC from providing the Board with all of its evidence and argument in its initial petition (which appears to be extensive and a complete), or subsequently in its motion for reconsideration (which the ANC chose not to do). Additionally, nothing prevented the ANC from hiring or seeking the advice of counsel before it initiated its petition, or after it received the Board's prior Order. As a result, having proffered no evidence or law that supports its position, there is no reason to consider this matter further.

10. Moreover, the issuance of the Board's prior Order *sua sponte* is entirely appropriate where the legal issues are easily disposed of, the matter is frivolous, and no other party has filed an objection or response to the Board's prior Order even though they are on notice of these proceedings.

IV. The Board Denies the ANC's Request for an Advisory Opinion.

11. The ANC further claims that the Board should have converted the matter into a request for an advisory opinion. *Mot. for Recon.*, at 4. This claim has no effect on the outcome of this matter, as there is no right to the issuance of an advisory opinion. 23 DCMR § 1902.4 (West Supp. 2018). Furthermore, the issuance of an advisory opinion is not appropriate in this case where the ANC is asking for agency action, not just guidance; the matter affects multiple parties; and the prior Orders of the Board in this matter provide clear guidance that the Board will not order the termination of the settlement agreement. Therefore, to the extent the petition or motion for reconsideration constitutes a request for an advisory opinion not addressed by the Board's prior Order, the request is denied.

V. No Violation of the Open Meetings Act Occurred.

12. The ANC claims that the Board violated the Open Meetings Act by holding closed deliberations related to the issuance of the prior Order. As the matter was being treated (and still being treated) as a contested case, the closure of the meeting was entirely appropriate under D.C. Official Code § 2-575(b)(13) for the purpose of deliberations. *Mot. for Recon.*, at 5. Furthermore, there is no evidence that the matter was improperly publicized. Therefore, the Board is not persuaded that it violated the Open Meetings Act.²

ORDER

Therefore, on this 28th day of November 2018, the Board hereby **DENIES** the motion for reconsideration and **AFFIRMS** Board Order No. 2018-572.

IT IS FURTHER ORDERED that the request for an advisory opinion is **DENIED**.

IT IS FURTHER ORDERED that the ANC's proposal submitted on February 7, 2018, and September 26, 2018, pursuant to § 1-1309(h)(1) has been considered, rejected, and **DENIED** for the reasons contained in this Order and Board Order No. Board Order No. 2018-572.

A copy of this Order shall be sent to the parties.

² It should also be noted that a mere violation of the Open Meetings Act alone is not sufficient to render an agency's actions void; especially, in this case, where, as part of a contested case, the ANC received formal written orders addressing its issues and concerns, and had an individual right to request reconsideration. D.C. Official Code § 2-579. Therefore, even the Board accepted that a violation occurred, it would amount to nothing more than harmless error.


District of Columbia
Alcoholic Beverage Control Board



Donovan Anderson, Chairperson



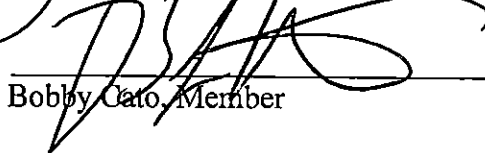
Nick Alberti, Member



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James Short, Member



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Rema Wahabzadah, 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, 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).