

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

In the Matter of:)		
)		
Dane Flannery Restaurant, LLC)	Case No.:	22-CMP-00006
t/a The Big Board)	License No:	ABRA-087398
)	Order No:	2022-057
Holder of a)		
Retailer’s Class CT License)		
)		
at premises)		
421 H Street, N.E.)		
Washington, D.C. 20002)		
)		

BEFORE: Donovan Anderson, Chairperson
James Short, Member
Bobby Cato, Member
Rafi Aliya Crockett, Member
Jeni Hansen, Member
Edward S. Grandis, Member

ALSO PRESENT: Dane Flannery Restaurant, LLC, t/a The Big Board, Respondent

Katie Lane Chaverri, Counsel, on behalf of the Respondent

Walter Adams II and Anthony Celo, Assistant Attorneys General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER AFFIRMING SUMMARY SUSPENSION

INTRODUCTION

A police officer gets hit by a car while directing traffic near Nationals Stadium. A 55-year-old pastor has a heart attack while helping a senior citizen with his chores in Congress Heights. A Vietnam Veteran living in Palisades has a stroke while taking a walk. A mother in Kingman Park having a high-risk pregnancy goes into active labor. A five-year-old visiting the Washington Monument with her family has the first severe asthma attack of her life. What do these people have in common? *All of them require medical attention—immediately.* Yet, without significant efforts to curb the coronavirus disease 2019 (COVID-19), such as mask

requirements and proof of vaccination requirements in areas where the risk of an outbreak is high, these people may find themselves dying in the hospital waiting room due to a lack of medical staff and hospital capacity.

As noted in the Mayor’s recent public emergency orders, issued in December 2021, the District must

take immediate measures to mitigate the spread of COVID-19 and its worst effects to avoid further straining our health care facilities and hospitals or delaying [elective] procedures Each such delay would come at a personal cost to persons needing [medical] services. Further we must avoid overcrowding or any other deterrents to people seeking hospital and medical services, so that persons needing care do not delay care to the detriment of their own health.

Mayor’s Order No. 2021-147, at ¶ 6 (Dec. 20, 2021). The Mayor further explained that intermediate measures such as requiring mask wearing and checking proof of vaccination at public venues is necessary “[i]n order to avoid resorting to the more drastic remedy of closing non-essential businesses or re-imposing capacity limits” because these measures will “preserve life, health, and hospital capacity” *Mayor’s Order No. 2021-148*, at ¶ 9 (Dec. 22, 2021).

In light of the ongoing crisis presented by COVID-19, the actions of Dane Flannery Restaurant, LLC, t/a The Big Board, (hereinafter “Respondent” or “The Big Board”); whereby, the owner, Eric Flannery, intentionally refuses to comply with emergency mask wearing and proof of vaccine checking requirements on an ongoing basis, constitutes a threat to the health safety and welfare of the public and the ability of the District to offer adequate, timely, and immediate medical care. Indeed, even worse, the owner’s knowing and repeated refusal to require his employees to wear masks jeopardizes his own staff’s health and well-being. Simply put, Mr. Flannery’s actions constitute a disturbing abuse of the employee-employer relationship that demonstrates a mentality akin to a mine owner that puts his miners in danger by ignoring mine safety regulations. Consequently, because The Big Board’s ownership cannot be trusted to diligently comply with COVID-19 mitigation rules, the license shall be suspended until all mask wearing and proof of vaccine checking requirements at on-premise retailers regulated by the Alcoholic Beverage Regulation Administration (ABRA) are no longer in effect and have been repealed, amended, or superseded.

The Board’s reasoning and Order are further explained in detail below.

Procedural Background

On January 28, 2022, the Board executed a notice issued by the Office of the Attorney General suspending the Retailer’s Class CT License held by Dane Flannery Restaurant, LLC, t/a The Big Board, under the authority granted by D.C. Official Code § 25-826, 23 DCMR § 810, Mayor’s Order 2021-147, Mayor’s Order 2021-148, and Mayor’s Order No. 2022-007. *Notice of Summary Action*, 1 (January 28, 2022) [*Notice*]. Specifically, the notice alleges that between January 14, 2022, and January 22, 2022, the ownership intentionally failed to comply with emergency mask and proof of vaccination check requirements implemented to curb the spread of

COVID-19 in the District of Columbia in violation of 23 DCMR §§ 810.3(n), (o), (p), (q), (r), and (s). *Id* at 2-3. The notice further alleges that these violations constituted “an imminent danger to the health and safety of the public.” *Id*.

The Respondent subsequently requested a hearing, which after the granting of a continuance, was held on February 10, 2022. The question now before the Board is whether “. . . the operations of a licensee present an imminent danger to the health and safety of the public” D.C. Code § 25-826(a).

FINDINGS OF FACT

The Board having considered the evidence contained in the record, the testimony of witnesses, the arguments of the parties, and the documents comprising the Board’s official file, makes the following findings:¹

I. Background Information Related to the Emergency Rules.

1. On January 12, 2022, emergency rules implementing various mayoral emergency orders designed to curb the spread of COVID-19 went into effect. *Notice of Seventeenth Emergency Rulemaking*, at 1-2. Instead of engaging in a “lockdown” or ending alcohol sales entirely, which is permitted by law during emergencies, these emergency regulations permitted the continued sale of alcohol at on-premise establishments so long as, among other things, wait staff wear masks; patrons wear masks as a condition of entry; eligible patrons show proof of vaccination and identification; and licensees post required signage informing patrons of these requirements. D.C. Code § 25-211(c) (mayoral authority to prohibit alcohol sales during a public emergency); *Notice of Seventeenth Emergency Rulemaking*, 23 DCMR §§ 810.3(n), (o), (p), (q), (r), (s) (effective January 12, 2022 until May 12, 2022).

2. Dane Flannery Restaurant, LLC, t/a The Big Board, holds a Retailer’s Class CT License located at 421 H Street, N.E., Washington, D.C. *ABRA License No. 087398*. Therefore, as of January 12, 2022, the Respondent was obligated to comply with the Board’s emergency rules. *Notice of Seventeenth Emergency Rulemaking*, 23 DCMR § 810.1(a).

II. Evidence Related to the Danger Posed by COVID-19.

3. During the hearing, the Government presented evidence regarding the threat to public health posed by COVID-19. As noted by Acting Supervisory Epidemiologist for the District of Columbia Anil Mangla, COVID-19 is a highly infectious airborne virus that spreads easily among those not wearing masks or those who are not fully vaccinated. The spread of COVID-19 within the District of Columbia is concerning because it is causing a high number of deaths in the United States. Furthermore, the spread of COVID-19 among hospital and healthcare staff

¹ The full transcript in this matter was not available at the time this Order was written; however, the Board is sufficiently versed in the evidence and testimony after holding the summary suspension hearing to make the findings of fact and conclusions of law contained in this Order. This action was necessary on the part of the Board because § 25-826(c) requires the Board to issue an Order within three business days of the Summary Suspension Hearing. D.C. Code § 25-826(c); 23 DCMR § 810.11.

has caused shortages of healthcare workers. This threatens the ability of healthcare facilities to provide adequate and timely lifesaving and necessary healthcare to residents and visitors of the District of Columbia. *See also Mayor's Order 2021-148*, ¶¶ 8-9 (Dec. 22, 2021).

4. The Government next presented evidence that the spread of COVID-19 remains a significant threat, and that bars and restaurants remain a significant source of spread of the disease. Specifically, compared to past surges of COVID-19, the current Omicron variant of COVID-19 is spreading faster and causing a greater number of hospitalizations. *Government Exhibit Nos. 2*, Pages 3-4 (See charts). In particular, just a few months ago, in November 2021, COVID-19 was infecting approximately 682 unvaccinated individuals per 100,000 people every week, as compared to up to 75 unvaccinated people at other infection peaks during 2021. *Id.* at 3. Moreover, in November 2021, among the unvaccinated, approximately 30 individuals per 100,000 people per week were being hospitalized, as compared to up to seven people at other infection peaks during 2021. *Id.* at 4. The evidence further shows that even though COVID-19 cases in the District are declining rapidly, as of January 31, 2022, the current daily case rate matches various infection peaks in 2021. *Respondent's Exhibit E*. Finally, the evidence further shows that bars and restaurants are the third largest location of COVID-19 outbreaks amongst various tracked sources. *Government Exhibit No. 2*, Page 5. Indeed, this figure is not surprising as bars and restaurants are places where people generally linger to eat, drink, and talk in a confined space, which are activities conducive to spreading an airborne virus. Thus, the District remains in a state of "Substantial Community Spread" of COVID-19, bars and restaurants remain a significant source of spread of the disease, and many of our city's residents remain at risk of infection, bodily harm, or death from the disease or its impact on the District's healthcare system. *Id.*

5. The Government further presented evidence that mask and vaccine checking requirements are necessary measures to protect the public. As noted by the District's Acting Supervisory Epidemiologist, consistent mask usage and vaccines are crucial, proven, and effective means of preventing and mitigating the spread of COVID-19. *Government Exhibit Nos. 2*, 6. Indeed, when compared to unvaccinated persons, fully vaccinated individuals are 20 times less likely to die from COVID-19 and 10 times less likely to get infected. *Government Exhibit No. 2*.

III. Evidence Related to the Respondent's Intentional Violation of Various COVID-19 Mitigation Measures.

6. After the enactment of the Board's emergency regulations, ABRA investigators were tasked with ensuring compliance with the Board's new COVID-19 mitigation measures. During this time, ABRA investigators visited The Big Board multiple times between January 14, 2022, and January 22, 2022.

a. Evidence Related to January 14, 2022.

7. On January 14, 2022, ABRA Investigator Rhoda Glasgow entered the establishment. Inside, she observed employees and wait staff without masks. She spoke to the owner Eric Flannery and advised him of the requirements. She also informed him that she was aware of

public statements he had made stating that he would not comply with the rules. Mr. Flannery told the investigator that he was aware of the rules and had no intention to comply.

b. Evidence Related to January 15, 2022.

8. On January 15, 2022, ABRA Investigators Vanessa Pleitez and Kevin Puente received complaints regarding non-compliance with the District's COVID-19 rules at The Big Board. *Case Report No. 22-CIT-00008*, at 1 (Jan. 15, 2022). Investigator Pleitez entered in an undercover capacity at around 9:00 p.m. and observed a bartender not wearing a mask. *Id.* at 2. She also ordered and received a water; yet, no one in the establishment requested proof of vaccination. *Id.* Investigator Puente later entered at 9:05 p.m. and observed a female patron enter the establishment without a mask. *Id.* Investigator Puente also did not see any of the required signs. *Id.* at 2. After observing the establishment's operations, the investigators identified themselves to Mr. Flannery. *Id.*

9. When asked about whether he was aware of requirements regarding face masks and vaccines, Mr. Flannery feigned ignorance. *Id.* Investigator Puente reminded him of his conversation with Investigator Glasgow the day before and then proceeded to advise him again regarding the requirements. *Id.*

10. Investigator Puente then ended the conversation by handing Mr. Flannery a copy of Mayor's Order 2021-147, Mayor's Order 2021-148, and a copy of the required signage. *Id.* He further requested that employees and Mr. Flannery put on face masks. *Id.* Nevertheless, Mr. Flannery stated that he did not have any masks. *Id.* He further told the investigator that "Until the Mayor changed her mind on the orders, I am not going to change mine." *Id.* After concluding the investigation, the investigative team issued a written warning and left. *Id.*

c. Evidence Related to January 18, 2022.

11. On January 18, 2022, in the evening, ABRA Investigator Mark Ruiz entered The Big Board. *Case Report No. 22-CIT-00010*, 1 (Jan. 18, 2022). Inside, Investigator Ruiz observed staff not wearing masks. *Id.* When he spoke to Mr. Flannery about the violations, the investigator asked if he was complying with the vaccine check requirement; nevertheless, the owner stated that he could not answer that question. *Id.* Investigator Ruiz also did not see the required signage. *Case Report No. 22-CIT-00011*, at 2 (Jan. 18, 2022).

d. Evidence Related to January 20, 2022.

12. On January 20, 2022, at around 9:35 p.m., ABRA Investigator Christopher Condon visited The Big Board in an undercover capacity. *Case Report No. 22-CIT-00013*, at 2 (Jan. 20, 2022). Inside, the investigator entered without being asked for proof of vaccination. *Id.* He further observed that no staff were masked inside the premises. *Id.* After the investigator left, Investigator Ruiz entered the establishment, met Mr. Flannery, and issued him a citation based on Investigator Condon's observations.

e. Evidence Related to January 22, 2022

13. On January 22, 2022, at approximately 9:00 p.m., Investigator Puente returned to The Big Board. *Case Report No. 22-CMP-0006*, at 1 (Jan. 22, 2022). Inside, he observed the business in operation, did not observe patrons or staff wearing face masks, did not observe the establishment request proof of vaccination from patrons, and did not observe the required signage. *Id.* at 2-3. Investigator Puente then advised Mr. Flannery of the violations. *Id.* at 3.

CONCLUSIONS OF LAW

14. “If the Board determines, after investigation, that the operations of a licensee present an imminent danger to the health and safety of the public, the Board may summarily revoke, suspend, fine, or restrict, without a hearing, the license to sell alcoholic beverages in the District.” D.C. Code § 25-826(a). “In rendering a decision on a summary suspension hearing, the Board may suspend or restrict the license of the licensee.” 23 DCMR § 1613.1 (West Supp. 2022).

I. The Respondent Repeatedly and Intentionally Failed to Comply with 23 DCMR § 810.

15. The Board is persuaded that the Respondent intentionally failed to abide by various regulations enacted to curb the spread of COVID-19, including regulations requiring patrons and employees to mask, requirements that the establishment check for proof of vaccination, and the requirement to post related signage.

16. The Board’s emergency rules state as follows:

810.1 The sale and service of alcoholic beverages for on-premises consumption indoors and outdoors shall be permitted in the District of Columbia for the remainder of the Mayor’s Public Emergency by authorized licensees, provided, that they comply with the requirements set forth in this section. The sale and service of alcoholic beverages for on-premises consumption indoors and outdoors shall be conditionally permitted by the following license classes:

(a) The holders of a retailer’s license class C or D

810.3 A licensee who holds an on-premises retailer license, class C/R, D/R, C/T, D/T, C/N, D/N, C/H, D/H, C/X, or D/X, . . . or any other license or permit set forth in Title 25 of the D.C. Official Code, may sell, serve and allow the consumption of beer, wine, or spirits indoors or on a Board-approved outdoor sidewalk café or summer garden, including an existing rooftop patio, pursuant to the terms of its license. When operating, the licensee:

(n) Shall require its wait staff to wear masks or face coverings;

(o) Shall require patrons to wear masks or face coverings to enter inside of the establishment unless the patron is under the age of two (2) years old or has a medical or mental health condition or a disability that prevents the patron from wearing a mask or face covering;

(p) Shall require, starting at 6 a.m. on January 15, 2022, that patrons who are twelve (12) years of age and older provide proof of vaccination against COVID-19 prior to entering the indoor premises. A patron shall not be required to provide proof of vaccination against COVID-19 to enter the on premises establishment for a quick and limited purpose such as placing or picking up a take-out order or to use the restroom. Persons who are entitled under law to a reasonable accommodation due to a medical condition or a sincerely held religious belief shall not be required to provide the establishment with proof of vaccination;

(q) Shall verify the identify along with the vaccination status of patrons who are eighteen (18) years of age and older with a valid photo identification, such as a state issued driver's license or limited purpose driver's license, any other state issued identification card, passport, military identification card, DC One card, or student identification document;

(r) Shall post a sign visible to patrons prior to entry, informing patrons of the licensed establishment's mask or face covering requirements;

(s) Shall post a sign visible to patrons prior to entry, informing patrons who are twelve (12) years of age and older that proof of vaccination is required to enter any indoor portion of a covered location.

Notice of Seventeenth Emergency Rulemaking, 23 DCMR §§ 810.1, 810.3(n), (o), (p), (q), (r), (s) (effective January 12, 2022 until May 12, 2022).

17. In this matter, it is uncontested and uncontroverted that between January 14, 2022, and January 22, 2022, the Respondent repeatedly violated requirements to have patrons and staff wear masks inside the premises; check for proof of vaccination by customers, and post the required signage as required by 23 DCMR § 810.3(n), (o), (p), (q), (r), and (s). *Supra*, at ¶¶ 7-13.

II. The Respondent's Continued Operation Poses an Imminent Danger to the Health, Safety, and Welfare of the Public.

18. The Board is further persuaded that the continued operation of The Big Board presents an imminent danger to the health and safety of the public based on its intentional and purposeful failure to comply with the mask and proof of vaccine checking requirement. At this time, COVID-19 continues to run rampant throughout the District. *Supra*, at ¶ 4. While COVID-19 may not pose a danger to every person, the high rate of prevalence puts a large portion of the population (e.g., unvaccinated persons) at risk for severe bodily harm or death. *Supra*, at ¶ 3. Moreover, the increase in hospitalizations and potential for medical staff shortages threaten the ability of everyone in the District to receive adequate, timely, and potentially lifesaving

healthcare. *Supra*, at ¶ 4. Consequently, the danger posed by COVID-19 is immediate and significant to people living and visiting the District of Columbia.

19. Despite this threat, at this stage in the pandemic, the District has developed various strategies to mitigate the virus while keeping the economy running instead of entering “lockdown” and completely closing down schools, businesses, and other activities. *Supra*, at ¶ 1. These measures include more effective and targeted mitigation tools, such as requiring the wearing of masks and requiring a proof of vaccination to enter facilities that data shows pose a high risk of causing an outbreak of COVID-19, such as bars and restaurants. *Supra*, at ¶ 4. Therefore, it is critical that The Big Board and other licensees follow these rules so that the District can move beyond this pandemic.

20. Turning to the case presented by the Respondent, the Board considered the ownership’s unelaborated objection to complying the mask requirement, the proof of vaccination requirement, and the sign posting requirement. The Board is not persuaded by the Respondent’s paltry non-legal argument that these measures are too intrusive or burdensome to comply with. As part of the Respondent’s obligation as a licensee, the Respondent must regularly check identifications to confirm a person’s legal age and comply with signage requirements; as a result, the Board has not requested anything beyond the capability of any licensee. D.C. Code §§ 25-711-25-713 (sign posting requirements); 25-783 (requiring the checking of patron identification). Furthermore, many workplaces in the United States have mask requirements, and even elementary school age children are capable of complying with mask requirements. As a result, the argument that these requirements are burdensome or overly intrusive is simply unavailing and unpersuasive.

21. The Board further considered the Respondent’s request to permit the carryout and delivery of alcohol on the condition that it comply with mask requirements. Nevertheless, the Board is not persuaded that Mr. Flannery is willing to diligently comply with any COVID-19 measures whatsoever. As the record in this case shows, investigators gave repeated warnings, provided copies of the relevant orders, and issued citations; yet, the Respondent continued to violate the law and threaten the health and safety of the public and his staff. *Supra*, at ¶¶ 7-13. Furthermore, the essence of a licensing system is that the holder can be trusted to comply with the law even when ABRA is not watching. Under these circumstances, where the ownership was directly involved in the violation, the Board simply cannot trust Mr. Flannery “to comply with the law when left to his own devices.” *In re Kiss, LLC, t/a Kiss Tavern*, Case No. 21-CMP-00008, Board Order No. 2021-134, ¶ 49 (D.C.A.B.C.B. Mar. 17, 2021). For these reasons, the Board rejects the Respondent’s proposed conditions and suspends the license indefinitely pending the lifting or expiration of indoor mask and vaccine checking requirements in the District at on-premise establishments.

III. The Respondent Waives the Right to Contest the Legality of the Board’s Regulations.

22. During the hearing, the Respondent suggested that various aspects of the Mayor’s Order and the Board’s regulations related to curbing the spread of COVID-19 were illegal without elaboration. Indeed, the Respondent never directed the Board to any authority in support of such

a position. As a result, the Respondent has failed to exhaust its administrative remedies related to the legality of the Board's regulations, which were the subject of the present hearing, and waived the right to raise those issues in this forum. *Davis & Associates v. Williams*, 892 A.2d 1144, 1148 (D.C. 2006) ("no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."). Indeed, raising of such claims during a summary suspension matter are not futile where had the Respondent demonstrated a likelihood of success of the merits of its legal challenge, the Board could have opted to lift the suspension or chosen to solely rely on the show cause enforcement process to address the alleged violations without a further suspension, as such a showing could influence the Board's determination regarding whether The Big Board's behavior constituted an imminent danger. *Dist. of Columbia Metro. Police Dept. v. Fraternal Order of Police/Metro. Police Dept. Labor Comm.*, 997 A.2d 65, 82 (D.C. 2010) ("the futility doctrine is ordinarily confined to situations in which the agency lacks the power to address the central issue, such as the scope of its authority or a constitutional claim, or in which there is no reasonable chance that it will do so.").

ORDER

Therefore, the Board, on this 14th day of February 2022, hereby **SUMMARILY SUSPENDS** the Retailer's Class CT License held by Dane Flannery Restaurant, LLC, t/a The Big Board.

IT IS FURTHER ORDERED that this suspension shall remain in effect indefinitely until all orders requiring the wearing of masks and the checking of vaccination status at on-premise establishments regulated by ABRA are no longer in effect and have been repealed, amended, or superseded. At such time, the Board will consider a motion by the Respondent to reopen the record and to modify the present Order, and upon receipt, the Board will consider returning the license and whether any further or substitute conditions are warranted.

IT IS FURTHER ORDERED that this matter and all pending matters related to the Respondent are forwarded to the Office of the Attorney General for review as to whether a show cause action is warranted.

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.

A copy of this Order shall be sent to the Respondent and the Government.

District of Columbia
Alcoholic Beverage Control Board

eSigned via SeamlessDocs.com
Donovan Anderson
Key: ac43cb9eb9d5f09e4b730093d1dccc8

Donovan Anderson, Chairperson

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Edward S. Grandis, Member

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, 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 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). Finally, in the case of a summary suspension, “A person aggrieved by a final summary action may file an appeal in accordance with the procedures set forth in subchapter I of Chapter 5 of Title 2.” D.C. Code § 25-826(d); 23 DCMR § 810.12.