

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

MEMORANDUM

TO: Fred P. Moosally
Director
Alcoholic Beverage Regulation Administration

FROM: Wayne C. Witkowski
Deputy Attorney General
Legal Counsel Division 

DATE: September 10, 2009

SUBJECT: Legal Advice Regarding the Imposition of License Suspensions that
Have Been Stayed as Part of an ABC Board Order
(AL-09-592) (MID265422)

This responds to the August 31, 2009 e-mail and memorandum by which your office submitted the above-referenced subject to this Office for legal advice.

Citing D.C. Official Code § 25-823 (1) (2009 Supp.), you state that the Alcohol Beverage Control Board (Board) is authorized to fine, suspend, or revoke the license of a licensee during the license period, if the licensee violates any provision of D.C. Official Code Title 25 (2001 and 2009 Supp.), the regulations promulgated thereunder, or any other District law. You further state that the Board often invokes this authority by suspending a license but staying a portion of that suspension for a one-year period. You now seek advice regarding the stayed suspension period.

You explain that often a licensee who is under a one-year stayed suspension penalty, commits another offense. In that regard you ask what constitutes the one-year stay of suspension period when the Board is required to make a decision regarding a subsequent violation. One interpretation, offered by you, is that the one-year period starts on the date of the Board's finding of the first violation. Another interpretation you suggest is that the one-year period starts from the date on which the first violation actually occurred, under the theory that the Board found the first violation occurred on an earlier date.

The second issue that you present is what procedural due process must the Board provide a licensee if a licensee is alleged to have committed a subsequent violation within the one-year stayed suspension period. Specifically, you ask whether the Board is required to have a full evidentiary hearing in order to determine that a subsequent violation has occurred, or whether the Board may have an abridged hearing? You posit that it would

seem that the Board may not need to have a show cause hearing, which you equate with a full hearing, for the subsequent offense, but that it may rather only be required to have an abbreviated fact-finding hearing to determine whether the previously stayed suspension should be imposed.

ISSUES:

Question: What constitutes the one-year stay of suspension period when the Board is required to make a decision regarding a subsequent violation?

Response:

As explained below, based upon the factual information that you provided to this Office, I conclude that it is more logical to construe the period of the stay as the time beginning with the Board's initial finding of a violation and ending one year from that date.

Question: What minimal due process must the Board provide a licensee who is alleged to have committed a subsequent violation within the one-year period of a stayed suspension?

Response:

As explained below, the Due Process Clause requires only such procedural protections as the particular situation demands, as determined by an analysis of the governmental and private interests affected.

DISCUSSION

What constitutes the one-year stay of suspension period when the Board is required to make a decision regarding a subsequent violation?

In order to better understand the reason for this question, Pollie H. Goff, Senior Assistant Attorney General, Legal Counsel Division, spoke with you. Ms. Goff asked whether: (1) there is a statutory or regulatory premise for the one-year stay provision; (2) the Board has stated its reason for imposing the one-year stay; and (3) the Board ever states the specific effective dates for the one-year stay.

You responded that the only statutory provision referencing the one-year stay is found in D.C. Official Code § 25-783 (c) (2001) concerning the sale of alcoholic beverages to a person who fails to produce a valid identification upon request and the sale of alcoholic beverages to minors. In that regard, D.C. Official Code 25-783 (c) (2001) provides a differing number of days, dependent upon whether it is a first, second, or third violation, whereby a portion of the suspension of a licensee's license may be stayed for one year.¹

¹ You explained that this statutory provision does not specifically address other situations in which a licensee's license is suspended and the suspension is stayed for one year.

You also stated that, in general, the Board's reason for providing the one-year stay is to permit the licensee an opportunity to demonstrate that it can be compliant with the law. Finally, you indicated that the Board does not make a practice of stating the effective dates of a stay when it imposes a stay.

Based upon the factual information that you provided to this Office, I conclude that it is more logical to construe the period of the stay as the time beginning with the Board's finding of a violation and ending one year from that date. I suggest this interpretation because, until the Board actually makes a finding of a violation, there is no factual basis upon which to determine that there has been a violation for which a penalty such as a suspension, including a stay, could be imposed. Once the Board has determined that a violation has occurred, it can then take the next step of deciding what to do about that violation, including what penalty should be imposed and whether there should be any stay of the penalty.

What minimal due process² must the Board provide a licensee who is alleged to have committed a subsequent violation within the one-year period of a stayed suspension?

Ms. Goff asked you to provide your understanding of a "full evidentiary hearing" and an "abbreviated hearing" as referenced in your memorandum. You responded that a "full evidentiary hearing" would, in your opinion, involve the government having the burden of proof to show, through the production of witnesses and testimony, that a statutory or regulatory violation occurred. On the other hand, an abbreviated hearing would, to some extent, rely upon the evidence already produced at the first hearing at which a violation was found and permit the parties to present their positions, either with or without witnesses, on whether additional violations have occurred that warrant the rescission of all or part of the stay based on the suspension imposed from the first hearing.

It is well-settled law that, where authorized government action has the purpose or effect of withdrawing (or revoking) an existing property interest, such as a license, the Due Process Clause requires only such procedural protections as the particular situation demands, as determined by an analysis of the governmental and private interests that are affected.³ Identification of the specific requirements of the Due Process Clause generally involves consideration of: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴ A full evidentiary hearing is neither required, nor is it always the most effective

² The Fifth Amendment to the U.S. Constitution provides, *inter alia*, that "No person shall be deprived of life, liberty or property, without the process of law...."

³ See, *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

⁴ *Id.* at 335.

method of decision-making. All that is required is that the process provided be tailored, in light of the decision to be made, to insure that the parties be given a meaningful opportunity to present their positions.⁵

In this case, based upon the factual information that you provided, it appears that minimally sufficient due process requirements will be met if the licensee is given adequate notice of the Board's proposed action, prior to the Board taking such action, and a meaningful opportunity to be heard through the presentation of evidence and argument.

With respect to a meaningful opportunity to be heard, where a licensee proffers persuasive evidence regarding material contested facts, the Board should probably grant the licensee an opportunity to introduce the evidence through witnesses and/or exhibits, with an opportunity for the government and other parties to cross-examine and rebut. The Board should probably provide a similar opportunity to the other parties who proffer persuasive evidence of other material and relevant contested facts, with an opportunity for the licensee to cross-examine and rebut. When resolution of a factual issue depends on the credibility of a witness, in-person testimony is usually required, giving the Board an opportunity to evaluate demeanor under both direct and cross-examination. However, in an abbreviated proceeding, it should not be necessary to afford the licensee and other parties an opportunity to present evidence previously presented at an initial hearing or evidence addressed only to subsidiary and non-material facts, which the Board can often be expected to resolve adequately based on the representations and arguments of counsel. Similarly, absent persuasive proffers concerning what the evidence will show regarding material and relevant contested factual issues, the Board will normally be justified in declining to conduct a hearing for the purpose of receiving evidence. Moreover, unless there are relevant key contested facts, the Board would be justified in restricting a hearing to argument only regarding whether a new violation warrants rescission of a stayed suspension. In short, given the Board's broad statutory authority to implement the laws regarding alcoholic beverages, the court would defer to the Board's reasonable decision regarding what constitutes a meaningful opportunity to be heard.⁶

Should you have questions regarding this memorandum, please contact either Pollie H. Goff, Senior Assistant Attorney General, Legal Counsel Division, at 724-5558, or me at 724-5524.

WCW/phg

⁵ *Id.* at 348-349.

⁶ *Id.* at 349 (In assessing what process is due..., substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals).