No. 19-AA-1059

DISTRICT OF COLUMBIA
COURT OF APPEALS

GREEN ISLAND HEAVEN & HELL, INC.,
T/A GREEN ISLAND
CAFE/HEAVEN & HELL,

Petitioner,

v.

D.C. ALCOHOL BEVERAGE CONTROL
BOARD,

Respondent.

On Petition for Review from the Alcoholic Beverage Control Board

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PETITIONER'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C.C.A. Rule 26.1, Petitioner Green Island Heaven & Hell, Inc., makes the following disclosure:

1. For non-governmental corporate parties please list all parent corporations: **None.**
2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: **None.**
3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: **None.**
4. Does this case arise out of a bankruptcy proceeding: **No.**

Signature: /s/ Kyle Singhal Date: December 31, 2020

Counsel for Petitioner Green Island Heaven & Hell, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction to hear this petition for review of the final order of the D.C. Alcoholic Beverage Control Board that was issued against Petitioner on October 9, 2019. *See* D.C. Code § 11-722.

ISSUES PRESENTED

1. Whether the Board's Order imposing a $90,000 fine violates Petitioner's Fifth Amendment right to Due Process when Petitioner lacked fair notice that the Board sought to impose a heightened penalty for a fourth or subsequent violation?
2. Whether the Board's Order sustaining Charge V (for failure to fill out an incident report according to Petitioner's Security Plan) was not supported by substantial evidence when nothing in the Security Plan required documentation of a purely medical incident, and when the Board's determination that Petitioner had not filled out an incident report was based only on an adverse inference from Petitioner's failure to produce such a report to an ABRA investigator?
3. Whether the Board's Order sustaining Charge II (for failure to station security personnel outside the Establishment to check identification) was not supported by substantial evidence when the alleged violation occurred during restaurant hours of 6:00-11:00 p.m., during which time Petitioner was permitted to check patrons' identification inside the Establishment?

STATEMENT OF THE CASE

This is a petition for review of orders of the D.C. Alcoholic Beverage Control Board (Board) imposing a $90,000 fine and 90-day license suspension upon Petitioner. On September 25, 2018, the Board executed a Notice of Status Hearing and Show Cause Hearing, setting forth various violations of D.C. Code, discussed below. *See* App. 337. On August 7, 2019, the Board held a show cause hearing in this matter. *Id.* On October 9, 2019, the Board issued an Order dismissing one of the five violations, issuing a warning for another, and imposing the above-mentioned penalty for the remaining three violations. App. 336-45. On November 20, 2019, Petitioner moved the Board for reconsideration. App. 471-72. The Board denied the motion on December 4, 2019, in part because Petitioner had already filed notice of appeal with this Court. App. 333-34. Also on December 4, 2019, Petitioner moved the Board again for reconsideration. App. 470. The Board denied that motion on December 11, 2019. App. 330-32. This petition seeks reversal of the $90,000 fine that the Board imposed and that Petitioner has paid.

STATEMENT OF FACTS

Petitioner is Green Island Heaven & Hell, Inc. (Petitioner). Petitioner owns and operates Green Island Café/Heaven and Hell (collectively, the Establishment), one of the longest-running establishments in the lively and historic Adams Morgan neighborhood of Northwest Washington, D.C. The first floor of the Establishment functions as a restaurant until 11:00 p.m., and the second floor may accommodate overflow from dinner service and also hosts musical performances and events. App. 163, 380.

Petitioner's owner, Mehari Weldemariam, moved to the U.S. from present-day Eritrea in 1976. Though he had a very successful business as a metal worker back home, he began work upon arriving in the U.S., like many immigrants, as a back-of-the-house restaurant worker while taking courses at Valley Engineering in Virginia. Alongside his education, training, and employment as a certified welder, Mr. Weldemariam had a second career working his way up from busboy to server to bartender, learning much about the hospitality industry along the way. After years of metal work, piping, and building boilers for a mid-size contracting company, he saved up enough money to pursue his passion for entrepreneurship, hospitality and entertainment, and by 1982, he broke ground on Green Island/Heaven & Hell at 2327 18th Street, Northwest, where the Establishment currently operates.

Petitioner was cited by the District of Columbia Alcoholic Beverage Regulation Administration (ABRA) for violating D.C. Official Code Title 25 on two occasions. First, Petitioner was charged with four violations that allegedly occurred on August 17, 2018:

Charge I	Failure to maintain ownership and control of the Establishment in violation of D.C. Code § 25-797(a) and (b)
Charge II	Failure to follow its Security Plan in violation of D.C. Code § 25-823(a)(6)
Charge III	Violating D.C. Code § 25-113(a)(1)(A)(ii)
Charge IV	Violating the terms of the Board approved Settlement Agreement

App. 337.

Second, Petitioner was charged with one additional violation (**Charge V**), namely that on November 11, 2018, Petitioner failed to follow its Security Plan, in violation of D.C. Code § 25-823(a)(6), because Weldemariam did not prepare an incident report after a medical incident at the Establishment. App. 337, 468.

Following a consolidated show cause hearing and arguments on June 26, 2019, the Alcoholic Beverage Control Board (Board) issued its findings on October 9, 2019 in Order No. 2019-683. App. 336-45. The Board dismissed Count III for lack of evidence, and it issued a warning for Count IV. App. 343. But Counts I, II, and V were sustained, and Petitioner was ordered to pay a fine of $90,000 and suffer a 90-day suspension of its liquor license ($30,000 plus 30 days per charge). App.

343-44. Petitioner paid the fine and the suspension was lifted on January 29, 2020. App. 1-2.

Petitioner's Security Plan

Under D.C. Code, a licensee must comply with the terms of the licensee's security plan. D.C. Code § 25-823(a)(6). Petitioner's Security Plan was approved by the Board on January 14, 2010. App. 30. The Security Plan sets forth, among other things, where Petitioner would station security personnel and how Petitioner would handle security incidents. App. 361-70. In a letter dated February 25, 2010, Petitioner clarified several provisions of its Security Plan to ABRA Investigator Susan Mitchell. App. 371-72. For example, Petitioner clarified that they would check IDs of patrons that might already be in the Establishment if they came in for dinner but stayed for club hours. App. 280, 371. But the Security Plan did not set out, for example, the hours during which security personnel were required to check IDs (after all, because Petitioner operated a restaurant on the ground floor, it was routine for patrons to dine during foodservice hours, during which time IDs were not checked at the door). App. 363, 371. Nor did the Security Plan define certain terms relevant to this appeal, such as what constitutes a "security incident" that requires completion and retention of a written incident report. App. 367.

Subsequent to the adoption of its Security Plan, Petitioner and the Board entered into a Settlement Agreement, signed on November 16, 2011, which sets forth

certain additional terms and conditions that govern the operation of the Establishment. App. 33, 373-75. The Settlement Agreement contains operational provisions such as the Establishment's hours of operation, when the Establishment is open to the public as a restaurant versus as a tavern, and descriptions of music and sound control. App. 377-87. According to the Settlement Agreement, the Establishment is open on Sunday through Thursday from 5:00 p.m. until 2:00 a.m. and on Friday and Saturday from 5:00 p.m. until 3:00 a.m. App. 377. The Establishment is open to "the public" as a restaurant from at least 6:00 p.m. to 11:00 p.m. daily. App. 380.

Alleged Violations

Charge I. The first violation sustained by the Board was that Petitioner unlawfully allowed a third-party to provide and control security at the Establishment in violation of D.C. Official Code §§ 25-797(a) and (b). App. 341. Under D.C. Code § 25-797:

> (a) The holder of an on-premises retailer's license or a manufacturer's license, class A, B, or C, possessing an on-site sales and consumption permit may rent out or provide the licensed establishment for use by a third party or promoter for a specific event; provided, that the licensee maintains ownership and control of the licensed establishment for the duration of the event, including modes of ingress or egress, and the staff of the establishment, including bar and security staff.
>
> (b) Under no circumstances shall a licensee permit the third party or promoter to be responsible for providing security or maintain control over the establishment's existing security personnel.

D.C. Code § 25-797(a)-(b).

On Friday, August 17, 2018, the Establishment hosted an annual event showcasing local bands. App. 74, 340. Petitioner hired William Wiggins, an independent contractor Petitioner has known for at least 25 years, to help facilitate and organize the event. App. 73. During the showcase, Wiggins testified that he was present at the Establishment and checked IDs at the front door, but was not considered security, nor was he paid to act as or manage security at the Establishment. App. 82, 84. Lead security for the Establishment, James Perry, testified that he scheduled one security officer for the duration of the event plus three other security personnel to arrive at 10:00 p.m., and two more at 11:00 p.m. after restaurant hours were over. App. 184-85.

That evening, during regular compliance monitoring, ABRA Investigators Kevin Puente and Mark Brashears saw two men standing behind a table outside the Establishment, collecting money from entering patrons. App. 348. Investigators Puente and Brashears solicited MPD officers and conducted an investigation at the Establishment. App. 249. According to Puente, two men[1] (not Wiggins) were standing on public property outside the Establishment, collecting money from patrons before letting them into the Establishment without checking the patrons'

[1] Wiggins testified that these two men were the promoters for the event. App. at 104.

identification. App. 12-14, 16. Puente did not ask whether the promoter had any affiliation with Petitioner. App. 36.

ABRA alleged that by allowing non-employees to take a cover charge and failing to check ID, Petitioner failed to maintain ownership and control of the establishment. App. 8. The Board agreed; it found that Petitioner "permitted non-employee third parties to check identifications and control ingress and egress into the establishment, which indicates that the [Petitioner] completely abdicated responsibility over security and admittance at the establishment's entrance," and therefore sustained Charge I. App. 342.

Charge II. The second violation sustained by the Board was that Petitioner did not comply with the terms of its Security Plan, in violation of § 25-823(a)(6), because Investigator Puente did not observe two security personnel at the Establishment's main entrance and witnessed several patrons enter without having their IDs checked. App. 342. Under § 25-823(a)(6), the Board may fine a licensee according to a civil penalty schedule if "[t]he licensee fails to follow its settlement agreement, security plan, or Board order" D.C. Code § 25-823(a)(6).

Per Petitioner's Security Plan, "[t]wo (2) [s]ecurity personnel should always be positioned in the main entrance. The front door staff checks IDs to ensure that people seeking entrance are of legal age (21)." App. 363. As described with respect to Charge I, Puente testified that he did not observe two security personnel stationed

at the Establishment's main entrance on August 17, 2018. App. 345. However, nothing in the Security Plan or the Settlement Agreement literally requires *around-the-clock* security personnel even during restaurant hours or, more obviously, during hours when the Establishment is not serving alcohol.

Weldemariam testified that he believed that security was not necessary during dinner hours, when IDs are not checked at the door, but rather at table and at the bar (such as when patrons order alcoholic beverages). App. 251. The Board was not persuaded by this distinction of "restaurant time" and found that Petitioner did not have the required two security personnel at its main entrance on August 17, 2018, and thus sustained Charge II. App. 342.

Charge V. The third and final violation sustained by the Board was that Petitioner did not comply with its Security Plan, in violation of § 25-823(a)(6), because Petitioner did not produce an incident report[2] related to a medical incident on November 11, 2018. App. 343. D.C. Code § 25-823(a)(6) requires a licensee to comply with the terms of its Security Plan. D.C. Code § 25-823(a)(6). The Incident Report section of the Security Plan states in full:

[2] The charges from ABRA initially included that Weldemariam was the only person working at the Establishment on November 11, 2018, and therefore also violated the Security Plan by failing to have two security staff at the front door and other inside security throughout the property. App. at 468. Weldemariam conceded that there was no security present that day. App. at 253-54. The Board did not include this fact as a basis for sustaining Charge V. App. at 343.

> Whenever an incident occurs inside or outside the establishment, security personnel involved must fill out an incident report. This report must include all the proper and correct information. Management must then review and approve the report for accuracy and then record the document in the security log.

App. 411. Notably, while the Security Plan requires security personnel involved in an incident to fill out an incident report, the Security Plan itself does not require Petitioner to produce such a report. *Id.* As head of security, James Perry was responsible for filling out incident reports. App. 242.

On November 11, 2018, a patron at the Establishment was served a drink that accidentally contained a cleaning agent. App. 400. Immediately recognizing a potential medical need, Petitioner offered to call an ambulance, but the patron declined medical assistance. App. 241, 400. An MPD officer at the scene called 911. App. 403. ABRA Investigator Puente conducted an investigation after the incident and concluded that Petitioner violated its Security Plan, in relevant part, because "the establishment could not produce an Incident Report." App. 397. Perry testified as to the type of incident that would warrant an incident report:

> Anything from an altercation with a fight, individual who is intoxicated who may have collapsed or got a serious injury that has to be transported to the hospital. Anything where anybody has to be transported to a hospital. If it's just like a regular altercation where there is a fight where you just break it up, I wouldn't do an incident report, but if you have to get transported to emergency, I mean, to a hospital, that's when you do an incident report.

App. 155.

The parties dispute whether the improperly served drink was the sort of "incident" that required the completion of an incident report under the Security Plan. Regardless of whether such a report was required to be *completed*, the Board's conclusion below was based not on a failure to complete a report but rather on Petitioner's failure to *produce* such a report to Investigator Puente, App. 339, or to ABRA or the Board, App. 343. The Board therefore concluded, based solely on an adverse inference, that Petitioner had failed to complete a required incident report, and it thus sustained Charge V. App. 343.

Penalty Imposed

On October 9, 2019, the Board subjected Petitioner to a combined penalty of a $90,000 fine and 90-day license suspension for Charges I, II, and V under 23 DCMR § 801.01(d), explaining as follows:

> The present violations constitutes (*sic*) three fourth level primary tier violations based on the Respondent's history of violations. 23 DCMR §§ 800, 801.1(b)(West Supp. 2019). The penalty for a fourth level violation gives the Board the option to revoke the license or impose a ***mandatory fine*** of "no less than $30,000" in conjunction with a 30 day consecutive suspension for each offense. 23 DCMR § 801.1(d) (West Supp. 2019).
>
> In this case, the Board finds that a fine and suspension constitute adequate penalty… In total, Respondent shall pay a fine of $90,000 and serve a ninety (90) day suspension. The Board imposes the following penalty on Green Island I/Heaven & Hell:
>
> (1) Charge III is dismissed;

> (2) The Respondent shall receive a WARNING for the violation described by Charge IV;
>
> (3) For the violation described in Charge I, the Respondent shall pay a fine of $30,000 and serve a mandatory suspension of 30 days;
>
> (4) For the violation described by Charge II, the Respondent shall pay a fine of $30,000 and serve a mandatory suspension of 30 days; and
>
> (5) For the violation described in Charge V, the Respondent shall pay a fine of $30,000[.]

App. 343-44 (emphasis added).

At no point prior to the Board's issuance of this October 9, 2019 order did the Board notify Petitioner that it would be treating the violations as "fourth level" primary-tier violations or that Petitioner was at risk of not one but multiple $30,000 "mandatory" fines. *See, e.g.*, App. 464-69 (Notice of Status and Show Cause Hearings) (putting Petitioner on notice of Charges I-V and the potential to "be fined and suspended" but omitting any mention that the Board was treating the Charges as "fourth level" primary-tier violations).

As discussed in Argument Section I, *infra*, this omission is critical because, based on Petitioner's course of dealing with the Board, Petitioner lacked notice that Petitioner was facing a "mandatory" fine and suspension rather than, for example, a $1,000-to-$6,000 fine as might be imposed under the applicable civil-penalty schedule, and as Petitioner has routinely faced over the past several years. *See* D.C. Code § 25-830(a)-(c), 23 DCMR § 801.1; *see also* App. 351-52, 398-99.

Indeed, the investigative history reports provided by ABRA list dozens of violations in the four years preceding the instant violations, but never before had the Board imposed the "mandatory" $30,000 fine and 30-day suspension for a "fourth" or subsequent primary-tier violation. App. 351-52, 398-99. Although some of those violations could well have been considered "fourth" or subsequent primary-tier violations within a four-year period, the Board previously imposed fines commensurate with a first, second, or third violation. *See* 23 DCMR § 801.1 (setting fine at $1,000-$2,000 for the first primary-tier violation, $2,000-$4,000 for the second within two years, and $4,000-$6,000 for the third within three years).

For example, on August 1, 2018 (in Case No. 17-CMP-00729), Petitioner was fined $2,100 for failing to comply with a Board Order on December 24, 2017, a primary-tier violation. App. 398. But Petitioner had previously been found to have committed three primary-tier violations on November 1, 2017 (in Case No. 17-CC-00118) and another primary-tier violation on July 25, 2015 (in Case No. 15-251-00146).

Similarly, on March 1, 2018 (in Case No. 18-251-00095), Petitioner committed a primary-tier violation by failing to comply with a Board Order, and was fined $2,000. *See* Board Order No. 2019-170. The same occurred for primary-tier violations on March 30, 2018 (in Case No. 18-251-00084), and on April 27, 2018 (in Case No. 18-251-00122): the Board imposed $2,000 fines—the fine established

for a "first" or "second" primary-tier violation. *See id.*[3] In none of these other proceedings did the Board impose a "mandatory" $30,000 fine for a fourth primary-tier violation. And at no point in the current proceeding (prior to the actual imposition of the fine) did the Board notify Petitioner that *this* would be the occasion on which the Board would in fact seek to impose such a fine; nothing in the show-cause order, for instance, lists any prior violations that would serve as predicate charges so as to render the instant violations "fourth" violations. *See* App. 464-69.

In any event, Petitioner paid the $90,000 fine, served the 90-day suspension, and instituted this appeal in order to recover all or part of the $90,000 paid.

[3] *See also* Board Order 2019-092 (fining Petitioner for its "second primary tier violation" for failure to comply with a Board order on Jan. 14, 2018 (Case No. 18-CMP-0050)); Board Order 2019-091 (fining Petitioner $4,000 for failing to comply with a Board order on Jan. 28, 2018 (Case No. 18-CMP-0049)). These orders are part of the public record and freely available at http://abra.dc.gov/page/abc-board-orders-year. *See* D.C.C.A. Rule 28(h).

SUMMARY OF ARGUMENT

This Court should reverse the Board's Order of October 9, 2019, imposing a $90,000 fine upon Petitioner.

First, the Order violated Petitioner's Fifth Amendment Due Process right to fair notice of the severity of the fine that the Board sought to impose. Decisions of the Supreme Court and this Court teach that a person must receive fair notice not only of prohibited conduct but also of the severity of the penalty that attends proscribed conduct. Examples from other contexts, such as the doctrine of issue-preclusion and the imposition of mandatory-minimum criminal sentences, also support a right to notice prior to the imposition of an enhanced penalty such as the fines that the Board imposed here for a "fourth" primary-tier violation. Here, however, Petitioner received no such notice of the Board's intent to treat Petitioner's violations as "fourth" violations that invoke a "mandatory" $30,000-per-violation fine. Nor did Petitioner receive constructive notice from the applicable statutes and regulations or from the papers served upon Petitioner by the Board. It was not until the Board sustained three charges and issued its order fining Petitioner $90,000 ($30,000 per violation) that Petitioner had notice of the magnitude of the fine. Had Petitioner been given fair notice, Petitioner would likely have taken steps to mitigate exposure, such as hiring different counsel or going to greater lengths to produce

evidence to support Petitioner's positions. The denial of fair notice violated Petitioner's Due Process rights. This Court should reverse.

Second, Charge V was not supported by substantial evidence. Charge V alleged that Petitioner failed to fill out an incident report documenting an improperly poured drink, in violation of Petitioner's Security Plan. But nothing in the Security Plan required documentation of non-emergency medical incidents such as minor food poisoning. Because there is no logical connection between the facts found by the Board and the conclusion that Petitioner violated the Security Plan, there is no substantial evidence to support the Board's Order sustaining Charge V.

Third, Charge II was not supported by substantial evidence. Charge II alleged that Petitioner failed to have security personnel stationed outside Petitioner's Establishment at approximately 10:00 p.m. on August 17, 2018. But Petitioner's Settlement Agreement permitted Petitioner to operate as a restaurant from 6:00 to 11:00 p.m., during which time Petitioner could check patrons' identification within the Establishment at the time of ordering an alcoholic beverage. The Board improperly relied only on the Security Plan, disregarding the subsequent Settlement Agreement, in rejecting this argument below. This Court should reverse.

ARGUMENT

I. The Board's Order Imposing a $90,000 Fine Was Contrary to Law Because It Violated Petitioner's Fifth Amendment Due Process Right to Fair Notice of the Severity of the Punishment to be Imposed.

This Court's review of agency decisions, including the Board's October 9, 2019 Order at issue in this case, is limited in scope. *See, e.g.*, *Panutat v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 272 (D.C. 2013) ("[W]e must affirm unless we conclude that the agency's ruling was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). But the deference this Court owes to the Board in factual determinations does not constrain this Court's review of legal questions. *See Recio v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 143, 141 (D.C. 2013) ("[W]here questions of law are concerned, we review agency's rulings de novo because we are presumed to have the greater expertise when the agency's decision rests on a question of law, and we therefore remain the final authority on issues of statutory construction."). Thus, this Court reviews de novo the question whether the Board's Order was "not in accordance with" the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

Under the Fifth Amendment, the government may not impose a deprivation of property without "due process of law." U.S. CONST., AMEND. V. Due process requires notice of the proposed deprivation of property and an opportunity to be heard. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Petitioner does not contest that Petitioner had an opportunity to be heard, but rather contends that Petitioner never received fair notice of the "mandatory" $90,000 fine that the Board imposed. Several sources of law confirm that Petitioner was thus deprived of due process:

First, the Supreme Court has held that a person must receive fair notice not only of the conduct that may result in punishment but also of the "severity of the penalty" to be imposed. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *see also State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408, 417 (2003). This Court has likewise upheld a due process right to notice of the severity of a penalty. *See, e.g.*, *Santos v. District of Columbia*, 940 A.2d 113, 117 (D.C. 2007) ("a driver's license cannot be suspended or revoked without due process, including both fair notice of a traffic violation charge *and the potential penalties*, and the right to a hearing") (emphasis added); *Revithes v. D.C. Rental Hous. Comm'n.*, 536 A.2d 1007, 1022 (D.C. 1987) (finding notice satisfied due process because "the original notice . . . informed [Petitioner] that any willful violations of the Act or failure to comply may result in a fine of not more than $5,000.").

Second, by way of analogy to the federal-courts doctrine of issue preclusion, the Due Process Clause imposes strong protections against the use of issue preclusion where it would cause a defendant to suffer a greater deprivation of property than what the defendant would fairly expect based on the prior litigation.

See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979) (explaining that it would be unfair to preclude a defendant from relitigating an issue in a second suit if the defendant faced only nominal damages in the first suit and thus could not foresee that a loss in the first suit would be the basis for a loss in a second suit for a greater sum of damages). The idea, again, is that a party must have fair notice of the extent of the deprivation of property that the party faces, prior to the imposition of the deprivation. *See also United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); Rest. 2d Judgments § 83(2)(a) (requiring adequate notice to persons bound by a prior adjudication). Other contexts also provide ready examples: imposition of a mandatory-minimum sentence for habitual offenders generally requires proof of the defendant's prior offenses by at least a preponderance of the evidence. *See, e.g.*, 18 U.S.C. § 922(g), 924(e); *United States v. Wilson*, 7 F.3d 828, 838 (9th Cir. 1993) (defendant must have notice of the specific prior convictions sufficient to permit the defendant to investigate and object to their validity).

Here, Petitioner never received fair notice of the Board's decision to impose a purportedly "mandatory fine," App. 343, of $30,000 per violation, in violation of the Fifth Amendment Due Process Clause. The first time Petitioner had notice of the amount of the fine was when it was imposed—that is, when the Order imposing the fine was issued on October 9, 2019. And had Petitioner been put on notice that a fine of such magnitude was to be imposed, Petitioner almost certainly would have taken

commensurate steps such as hiring more-equipped counsel or engaging in more thorough discovery (after all, Charge V is premised solely on the fact that Petitioner did not *produce* a report that Petitioner claims to have produced). Instead, Petitioner had no reason to suspect that Petitioner would face anything other than the usual $1,000 to $6,000 fine imposed for the sort of violations with which Petitioner was charged. *See* D.C. Code § 25-830(a)-(c), 23 DCMR § 801.1; *see also* App. 351-52, 398-99.

To be sure, Petitioner could theoretically have received constructive notice of the amount of the fines to be imposed. But such notice would have had to come from somewhere, presumably either from the statute or instead from the papers served upon Petitioner by the Board. But in this case, neither of those sources provided constructive notice.

First, as for the statute, it sets forth parameters within which regulations may set the punishment for primary-tier violations. D.C. Code § 25-830(a). Those regulations are codified at 23 DCMR § 801.1. The regulations in turn set forth a tiered punishment scheme that imposes greater and greater penalties with each successive primary-tier violation within a given time period, starting with a $1,000-$2,000 fine for a first primary-tier violation and rising to a $30,000 fine (plus 30-day suspension) for a fourth primary-tier violation within four years, and then revocation of the license for a fifth primary-tier violation within four years. 23

DCMR § 801.1. And in the ordinary case, such a scheme of statutes and regulations could certainly provide constructive notice of the potential to be fined the amount listed in the statute or regulation. But in this case, the Board's course of conduct as evidenced throughout the ABRA Investigative History Reports reveals that the Board does not actually impose punishment in conformity with the statutory scheme.

For example, on August 1, 2018 (in Case No. 17-CMP-00729), Petitioner was fined $2,100—a fine commensurate with a "second" primary-tier violation, for failing to comply with a Board Order on December 24, 2017. App. 398. But Petitioner had previously been found to have committed three primary-tier violations on November 1, 2017 (in Case No. 17-CC-00118) and another primary-tier violation on July 25, 2015 (in Case No. 15-251-00146). If the Board followed the penalty schedule to the letter, then Petitioner could not have received only a $2,100 fine for the December 24, 2017 primary-tier violation. And, as set forth in the Statement of Facts at 14-15, *supra*, the Board has also routinely imposed $2,000-to-$4,000 fines for Petitioner's other primary-tier violations. Thus, the Board's implementation of the statute vitiates any constructive notice that the statute might otherwise provide.

Second, as for the papers served on Petitioner, none of them makes any reference to a "fourth" primary-tier violation or to a "mandatory" fine of any amount, let alone $30,000 per charge. *See, e.g.*, App. 464-69 (Notice of Status and Show Cause Hearings). Nor did the Board set forth what the three prior violations might

have been, nor how it was calculating the look-back period in which to count prior violations, which can cause particular confusion. *See, e.g.*, *McCormick & Schmick Rest. Corp. v. D.C. Alcoholic Beverage Control Bd.*, 144 A.3d 1153, 1157 (D.C. 2016) (rejecting, in analyzing a similar heightened-penalty schedule, the Board's use of adjudication dates rather than violation dates to identify predicate violations); *cf. Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (an ordinance is void for vagueness under the Due Process Clause if "men of common intelligence must necessarily guess at its meaning"). Given the complexity of the applicable statutes and regulations, fundamental fairness requires at least minimal notice to a licensee, such as a statement in the show-cause notice stating that a violation is, for example, a fourth violation within four years, or perhaps even an enumeration of the prior violations that serve as predicates to the fourth violation. Petitioner received no such notice here.

Moreover, it is at least curious that *each* of Petitioner's three violations in this case counted as a "fourth" violation, even though they did not all occur on the same day. (Indeed, even if they had all occurred on the same day, the language of the statute indicates that multiple primary-tier violations, unlike secondary-tier violations, are counted separately for the purpose of climbing the penalty schedule. *See* D.C. Code § 25-830(b)(2).) If Charge V (which occurred in November 2018) was a "fourth" violation, then it is plausible that Charges I and II (which occurred in

August 2018) should have been treated as a "third" violation. It does not make sense to call all of them "fourth" violations and then impose the maximum permissible penalty for each charge (a penalty that, notably, is unavailable for a "fifth" violation, for which only revocation of the license may be imposed, raising the question whether the Board simply acted to maximize the financial penalty to Petitioner for the three violations that the Board sustained).

Such an outcome certainly is not reasonably foreseeable to a licensee like Petitioner based only on the content of the show-cause notice. The fines were thus imposed in violation of Petitioner's Fifth Amendment Right to Due Process, and this Court should reverse the imposition of the fines and direct the Board to return the funds paid to Petitioner by a date certain. Alternatively, this Court should vacate the fines as arbitrary and capricious given the fact that all the fines were treated as a "fourth" violation without any explanation or justification for such an outcome being provided in the Board's October 9, 2019 Order.

II. There Was No Substantial Evidence to Support Charge V Because Nothing in the Security Plan Required Petitioner to Document a Purely Medical Incident, and Because the Board's Determination That Petitioner Had Not Filled Out an Incident Report Was Based Only on an Adverse Inference from Petitioner's Failure to Produce Such a Report.

This Court must reverse a determination of the Board when that determination is not based on "substantial evidence." *Panutat*, 75 A.3d at 272; *see also 2461 Corp. v. D.C. Alcoholic Beverage Control Bd.*, 950 A.2d 50, 53 (D.C. 2008) (holding

Board's findings were not supported by substantial evidence where there was "not a logical connection between the facts that the Board found in this case and its conclusion that petitioner" engaged in sanctionable conduct). Although this Court owes deference to the Board's interpretation of the rules that it administers, no such deference is owed to the Board's interpretation of Petitioner's Security Plan, which is essentially a contract. *See Panutat*, 75 A.3d at 272; *cf., e.g.*, *S. Cal. Edison Co. v. United States*, 226 F.3d 1349, 1357 (Fed. Cir. 2000) ("it is inappropriate to give deference to an agency's interpretation of a contractual provision when the government is itself a party to the contract."); *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 605 (1st Cir. 1991) ("*Chevron* does not dictate a reviewing court's attitude towards the language of a contract, or of a document that resembles a contract, particularly under circumstances where too much court "deference" would seem to work at cross-purposes with Congress's likely statutory intent.").

Here, no substantial evidence supported Charge V, which accused Petitioner of failing to fill out an incident report as purportedly required by Petitioner's Security Plan. To be sure, the Security Plan required Petitioner to fill out a report of an "incident." App. 367. But nowhere does the Security Plan define "incident," leaving open the question of what kinds of incidents must be documented in a report. It would be implausible for "incident" to take its plain dictionary meaning: "a particular occurrence, especially one of minor importance," *Incident*, AMERICAN

HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5TH ED.), https://ahdictionary.com/word/search.html?q=incident (last visited Dec. 31, 2020). If it did, then every time a patron took a step, Petitioner would have to document the incident. It thus follows that "incident" must mean a certain *kind* of incident. Based on the context of its usage in the Security Plan, then, it makes sense that "incident" means a *security* incident, such as a fight or the commission of a crime. *See also Lemma Holdings, LLC v. D.C. Alcoholic Beverage Control Bd.*, 235 A.3d 802, 805 (D.C. 2020) (discussing violation of security plan where nightclub's manager failed to write a detailed incident report following a "scuffle" with grabbing, shoving, and an attempted punch); *1215 CT, LLC v. D.C. Alcoholic Beverage Control Bd.*, 213 A.3d 605, 612 n.4 (D.C. 2018) (affirming security plan violation for use of force prohibited by security plan and emphasizing that "it is not obvious to us why an establishment would include an enthusiastic exit greeting provision in its *security* plan."). Similarly, the statute that requires establishments to maintain a written security plan requires the plan to cover, for example, "conflict resolution," "*violent* incidents," protections against serving alcohol to minors, and "preserving a crime scene"—but it does not contemplate food-related incidents and non-emergency medical incidents. D.C Code § 25-402(d)(3).

The improperly poured drink in this case was a purely medical incident, not a security incident. The incident here was more akin to an improperly prepared meal

than to the "scuffle" in *Lemma* or the use of force in *1215 CT*. And no facts in the Board's Order set forth reasons why the incident here was the kind of incident that Petitioner must document in an incident report. That is, there was no "logical connection between the facts that the Board found in this case and its conclusion" that Petitioner violated a provision of its Security Plan. *2461 Corp.*, 950 A.2d at 53. Thus, no incident report was required, and this Court should reverse the Board's finding as to Charge V.

Moreover, even if an incident report was required, no substantial evidence supported the Board's finding that Petitioner failed to fill one out. All that the Security Plan requires is the completion of such a report, not its *retention*. The only basis for the Board's Order sustaining Charge V was an adverse inference from Petitioner's failure to produce such a report upon demand by Investigator Puente, App. 339 at para. 9, and the fact that Petitioner "has never shown it to ABRA or the Board," App. 343 at para. 26. But because an absence of evidence is not itself evidence, and because Petitioner had no obligation to produce the report under Petitioner's Security Plan, no substantial evidence supports the Board's Order sustaining Charge V. This Court should reverse.

III. There Was No Substantial Evidence to Support Charge II Because Petitioner Was Not Required to Have Security Personnel Stationed Outside the Establishment at the Time of the Alleged Violation.

Again, this Court must reverse a determination of the Board when that determination is not based on "substantial evidence." *Panutat*, 75 A.3d at 272. No substantial evidence supports Charge II.

Charge II alleged that Petitioner failed to have security personnel stationed outside the Establishment, in violation of a provision of Petitioner's Security Plan that says that security personnel "should *always* be positioned in the main entrance." App. 363 (emphasis added). Subsequent to the drafting of the Security Plan, Petitioner entered into an agreement with the Board allowing operation as a restaurant from 6:00 to 11:00 p.m., during which time the Establishment is "open to the public." App. 380. The alleged violation here happened "sometime around 10:00 p.m." App. 338, para. 4.

In the proceedings below, Investigator Puente testified that "you are supposed to adhere to the security plan at all times you are operating." App. 45. And that is true: "A licensee shall be required to comply with the terms and conditions of the licensee's . . . security plan . . . at all times that it is in operation." D.C. Code 25-823(c). But Petitioner's obligation to comply with the Security Plan "at all times" does not mean that Petitioner had to have security personnel stationed outside the Establishment at all times. That is true even though the Security Plan says security

personnel "should always" be stationed outside: in the context of the Security Plan, "always" means *outside of* restaurant hours, not literally around-the-clock. Although the Board discredited this argument on the grounds that restaurant hours are not discussed in the Security Plan itself, *see* App. 342, para. 23, the Settlement Agreement clearly contemplates a delineation of restaurant hours during which patrons' identification may be checked inside the Establishment upon ordering an alcoholic beverage.

Further, it would be implausible to interpret "always" to mean literally always because then Petitioner would be obligated to station security personnel outside the Establishment even when it is not open or not selling alcohol. And other uses of "always" in the Security Plan militate against such a literal interpretation. *Compare, e.g.*, App. 365 (stating, "[y]ou should always search/pat down customers" even though no one would argue that *every* customer must be subject to such a search) *with* App. 372 (clarifying that pat-downs are required only upon suspicion of contraband).

In short, the Board arbitrarily and capriciously disregarded the "restaurant time" argument, improperly basing its conclusion on the fact that the "security plan contains no such exception," when instead the Settlement Agreement supported Petitioner's position. No substantial evidence supports the claim that Petitioner was

required to have security personnel stationed outside the Establishment at the time of the alleged violation. This Court should reverse.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to reverse the Board's October 9, 2019 Order and return the $90,000 that Petitioner has paid, by a date certain. Alternatively, if this Court disagrees with Petitioner's Due Process argument but agrees with one or both of the substantial-evidence arguments, this Court should reverse the individual $30,000 fines corresponding to the violations that are not supported by substantial evidence, and this Court should order the Board to return those funds to Petitioner by a date certain.

Dated: December 31, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of D.C.C.A. Rule 32(a) because it is less than 50 pages in length.

2. This brief complies with the typeface requirements of D.C.C.A. Rule 32(a) because this brief has been prepared in Times New Roman, size 14.

Dated: December 31, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2020, I electronically filed the foregoing Brief using the D.C. Court of Appeals electronic filing system. I also sent a copy to opposing counsel by email.

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