

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
 BOARD OF APPEALS AND REVIEW

J. Brendan Herron, Jr.	)	
Appellant	)	
	)	
v.	)	Docket No. 02-5863-BP
	)	
Department of Consumer and	)	
Regulatory Affairs,	)	
Appellee	)	

DECISION AND ORDER

As described in the Board’s earlier orders in this matter, this appeal challenges the issuance by the Department of Consumer and Regulatory Affairs (“DCRA”) of a permit to raze the house at 2900 Albemarle Street, N.W. (raze permit B446310) and permits to construct two new houses at 2900 and 2902 Albemarle Street, N.W (building permits B446316 and B446312). Appellant alleged in his notice of appeal that DCRA allowed the owner to file an incomplete building permit application and to file permit applications prior to owning the subject properties; failed to fully evaluate the project under the D.C. Environmental Policy Act; did not allow the relevant Advisory Neighborhood Commission (“ANC”) 30 days to comment on the final plans and did not meet the statutory requirement to give “great weight” to ANC comments; failed to refer the permit applications to the D.C. Commission on Fine Arts; and violated the Freedom of Information Act (“FOIA”).

There are outstanding a number of motions: Appellee’s Motion for Adoption of Pleading and Document Index as Official Designation of Record, Appellee’s Motion for

Leave to File Amended Index of Record, and Appellee's Submission of E-Mails and Correspondence to Further Supplement the Record; a request by ANC 3F ("the ANC") for party status (the "ANC motion to intervene"), appellant's renewed motion for issuance of a subpoena; appellant's motion for an evidentiary hearing; and appellee's and intervenor's November 2002 "Briefs in Opposition to Mr. Herron's Appeal," requesting that the Board dismiss the appeal. The Board makes findings of law and rules on these motions as follows.

**Background: Board jurisdiction and the applicable standard of review.** The Board's limited jurisdiction and the standard of review that the Board is required to apply in cases such as this are central to resolution of each of the outstanding motions. Accordingly, we summarize the relevant law on these points.

The scope of the Board's jurisdiction is established by Mayor's Order 96-27 (March 5, 1996). *See* 43 D.C. Reg. 1367 (March 15, 1996).<sup>1</sup> Mayor's Order enumerates specific types of matters as to which the Board had jurisdiction, including "[s]uch other matters as the Mayor may delegate or assign or may otherwise be appealable to the Board pursuant to law, rule, or regulation." Mayor's Order 96-27, ¶2F. As the instant case does not fall under any of the other enumerated categories, the Board's jurisdiction must be traced to a statute or regulation.

The relevant regulation is section 122.2 of the Building Code, which states that:

The owner of a building or structure or any other person may appeal to the D.C. Board of Appeals and Review for a final decision of the code official. The appeal shall specify that the true intent of the Construction Codes or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of the Construction Codes do not

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<sup>1</sup> The appellant and intervenor refer to BAR Organization Order No. 112, dated August 15, 1955, but it is Mayor's Order 96-27 that currently governs Board operations.

fully apply, or an equally good or better form of construction can be used.

D.C. Mun. Regs., title 12A, § 122.2.

The regulations specifically governing the Board procedures are found at D.C. Mun. Regs. Title 1, §§ 500.1 *et seq.* As established by D.C. Mun. Regs. title 1, § 510.1, the Board is to conduct its review on the basis of the agency record except where an evidentiary hearing is required by the Constitution or by statute, regulation, or order of the Mayor. When the Board's review is on the basis of the agency record, the Board's inquiry is limited to whether the agency's action was arbitrary or capricious or contrary to law. D.C. Mun. Regs., title 1, section 510.14.

**DCRA's motions to supplement and officially designate the record.** It is appropriate for the record to be supplemented to include all of the documents that were in the agency's files relating to this matter by the time the subject permits were issued, which the parties agree was June 13, 2002. Counsel for appellee has also compiled a useful index of the pleadings and orders in the Board Docket. Neither the appellant nor the intervenor has objected to the index or to inclusion of any of the documents that appellee has proffered. Accordingly, the Board will grant the motions.

**The ANC motion to intervene.** The ANC asserts that it has a unique perspective that no other party can represent and that its status as a party is essential so that, among other things, it can present accurate information to the Board and advise it about misinformation from others, and have its views weighed by the Board.

The Board is not persuaded. ANC 3F states that it has an interest in this case because DCRA has violated the ANC laws and frustrated ANC 3F's exercise of its authority and responsibilities under those laws. However, as the ANC acknowledges,

appellant "Herron's appeal specifically references DCRA's failure to allow the ANC 30 days to comment and failure to give great weight" to the ANC's comments. Appellant also submitted to the Board with his Notice of Appeal and in other submissions copies of comments about the Albemarle Street project that ANC 3F has submitted to DCRA. Thus, appellant has already placed before the Board most (if not all) of the issues that the ANC wants to be heard. To the extent that the ANC believes there is erroneous information in the parties' briefs, it can point this out to appellant (with whom, the record discloses, the ANC has worked closely). It also appears that the ANC has been kept informed as to the status of the Board's proceedings and the parties' arguments.

Although the ANC asserts that "no other party can represent ANC 3F," the law is that ANC-area residents (such as appellant) "have standing to initiate legal action to assert the rights of the ANC itself." *Kopff v. D.C. Alcoholic Beverage Control Board*, 381 A.2d 1372, 1377 (D.C. 1977). That is because "ANCs exist . . . for the benefit of the neighborhood residents they represent. If an ANC's statutory rights are violated, . . . the actual injury is suffered by the residents themselves." *Id.* Taken together, the facts that appellant resides in the area served by ANC 3F, that he has asserted grievances of the ANC, that he apparently has shared information with ANC 3F, and that the ANC has not cited any inaccuracy in his presentation, persuade the Board that denying the ANC's motion for party status is unlikely to deprive the Board of material information, insight or advocacy.

The ANC also argues that it is entitled to party status because it has a statutory right to advise the Board with respect to all proposed matters of District government policy that affect the ANC area, including decisions by the Board in this matter, and to

have the Board give the ANC's comments "great weight." However, the requirement that District agencies and boards give great weight to the views of the ANC (*see* D.C. Code §§ 1-309.10(c)(1) and 1-309.10(d)(3)(A)) exists with respect to "formulation of any final agency policy decision or guideline with respect to . . . permits affecting said Commission area." By contrast, the Board's decision in this case is a legal decision about the sufficiency of appellant's challenge, not a policy decision with respect to issuance of the challenged permits. The decision that the Board is called upon to render is not among the types of agency action with respect to which 30 days' notice is owed to the ANC, and the Board has no obligation to give great weight to the views of the ANC in arriving at its decision. *See Office of the People's Counsel v. Public Service Commission*, 630 A.2d 692, 698 (D.C. 1993).

Finally, the Board agrees with intervenor that ANC 3F's motion for party status, which was not submitted until December 27, 2002, is untimely. The Board's rules do not establish a limit for filing of a motion for party status or a motion to intervene, but the rules do require appeals to be timely. *See* D.C. Mun. Regs., title 1, § 503.2. Construing a general timeliness rule that was applicable to the Board of Zoning Adjustment, the D.C. Court of Appeals instructed that it "conceive[d] of two months between notice of a decision and appeal therefrom as the limit of timeliness." *Sisson v. District of Columbia Board Of Zoning Adjustment*, 805 A.2d 964, 969 (D.C. 2002). The ANC has cited no reason why it could not have sought party status within two months of the issuance of the subject permits, as appellant did.

For all these reasons, the Board denies ANC 3F's request for party status.

**Appellant's motion for issuance of a subpoena.** The Board's rules provide for issuance of subpoenas "when appropriate." D.C. Mun. Regs., title 1, § 507.1. We interpret this to mean that a document subpoena should not issue unless it is directed at obtaining documents that are pertinent to the limited inquiry before the Board, which in this case, in the terms of section D.C. Mun. Regs., title 12A, § 122.2, is whether DCRA incorrectly interpreted or misapplied the provisions of the Construction Code. Accordingly, the Board will not issue a subpoena to enable a party to obtain documents that do not appear to bear on that narrow issue. Furthermore, it is not "appropriate" to issue a subpoena in the absence of good cause. A party cannot establish good cause merely by making generalized statements about agency errors or by citing suspicions about the possible existence of error in an agency's processing of an application. Even in criminal proceedings where heightened protections apply, the party adverse to the government is "not entitled to go on a fishing expedition through the government's files in the hopes of finding some damaging evidence." *Munoz v. Keane*, 777 F. Supp. 282, 287 (S.D.N.Y. 1991), *aff'd*, 964 F.2d 1295 (2d Cir.), *cert. denied*, 506 U.S. 986(1992). In addition, it is not appropriate to issue a subpoena for documents that are already in the Board record.

The Board concludes that no subpoena should issue because the documents that appellant seeks either are irrelevant to the issue of whether DCRA misinterpreted or misapplied the law in issuing the permits; or relate to vague allegations of error for which appellant has cited no specific evidence, or to alleged deficiencies in the subject permit applications that do not appear to be material errors; or have already been made available by the parties.

The parties agree that DCRA issued the raze and building permits on June 13, 2002, after the initial building permit documents had been corrected and supplemented in various ways. In his subpoena request, however, appellant seeks "(i) the initial application and all supporting documents and attachments for all permits filed with DCRA on April 4, 2002," all pre-April 19 modifications and correspondence, and all amendments after April 19, 2002" -- in other words, he seeks various versions of the permit-application documents as they existed at various dates prior to June 13, 2002. The issue, however, is whether DCRA erred in issuing the permits on the basis of the record as it existed on the approval date. *Cf. Step Now Citizens Group v. Town of Utica Planning & Zoning Commission*, 2003 Wisc. App. LEXIS 394 (Ct. App. Wisc. April 16, 2003) (finding no authority for and therefore rejecting petitioner's contention that permit was issued in error because no site plans accompanied the permit application and because the application could not have been approved on the date it was filed); *Juanita Bay Valley Community Association v. City of Kirkland*, 510 P.2d 1140, 1155 (Ct. App. Wash. 1973) (even if original permit application was defective, permit could properly issue if application was modified and brought into conformance with applicable ordinances).

The record establishes that DCRA interprets the building code regulations to permit corrections and modifications to be made to permit applications and accompanying materials while the applications are being processed.<sup>2</sup> We must accord great deference to DCRA's interpretation of its regulations and internal operating procedures. *Dupont Circle Citizens Association v. District of Columbia Zoning Commission*, 431 A.2d 560, 565 (D.C. 1981).

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<sup>2</sup> For example, the record contains a copy of a DCRA form entitled "Plan Correction List," which contains a space for listing "Changes Required on Plans Prior to Approval."

Accordingly, we hold that whether the application and supporting documents were approvable on April 4, 2002 or April 19, 2002 is irrelevant for purposes of the Board's limited inquiry,<sup>3</sup> and we reject the subpoena requests under discussion. We likewise reject appellant's request for a subpoena for "any other applications filed for 2900 or 2912 Albemarle Street," which appellant seeks to justify by explaining that various other permits are listed as a condition to work commencing and "there is no evidence these permits were granted." Appellant's Response to Intervenor's Opposition to Motion for Board of Appeals and Review to Issue Subpoena for Certain Records, at 3. The issue in this appeal is not whether intervenor improperly commenced work without other permits, but whether DCRA erred in approving the permits under its jurisdiction.

A number of appellant's requests are for documents that appellant suspects will substantiate or explain factual inconsistencies and misstatements in the permit application documents. For example, appellant asserts that intervenor Zuckerman Brothers was not yet the owner of the Albemarle Street property on the date (April 4, 2002) the building permit applications were filed,<sup>4</sup> that ZB L.L.C. rather than Zuckerman Brothers is listed as the owner on the raze permit application, and that there is no evidence that either entity was the agent of the then-owner of the property. However, a variety of persons with

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<sup>3</sup> We note that appellant acknowledges that "in many cases" the dates of adjustments to the as-submitted application and accompanying documents have no significance. *See* Appellant's Opposition to Property Owner's Motion to Dismiss or in the Alternative to Oppose the Appeal, at 6. Appellant believes that the completeness of the application documents on various pre-approval dates is pertinent to the question of whether, for purposes of the zoning regulations, there was a substantially complete application filed before the April 19, 2002 Zoning Commission set-down date for the Forest Hills Tree and Slope Overlay. The precise state of the documents on that date may be relevant for Zoning Commission purposes, but it is not relevant here. As the Board has already ruled, it is without jurisdiction to determine when the permit applications should be deemed filed for purposes of the zoning regulations. DCRA reasoned that the application was filed on April 4, 2002. Whether or not its determination was correct or reflects the intent of the zoning regulations, we find that the agency's determination was not arbitrary or capricious under the building code.

<sup>4</sup> Appellant states in his Notice of Appeal that the intervenor became the record owner of the property the next day, *i.e.*, April 5, 20002.

interests in a property may file a permit application, and the alleged errors or discrepancies that appellant cites appear to be immaterial and to provide no basis for invalidation of the permits. See D.C. Mun. Regs., title 12A, § 107.1.2 (specifically referring to owners, lessees, agents of either, and engineers, architects, and designers employed in connection with a project as persons who may file permit applications); see also *Lakewood Homes, Inc. v. Bd. of Adjustment of City of Lima*, 258 N.E. 2d 470, 480 (Ohio Ct. Common Pleas 1970) (reasoning that the term “owner” has flexible meaning for purposes of land use regulations, making it appropriate to consider developer of proposed apartment complex the “owner” for permit application purposes), *rev'd on other grounds*, 267 N.E.2d 595 (Ohio Ct. App. 1971); *Hudson Properties, Inc. v. Westwood*, 310 P.2d 936, 937 (Kan. 1957) (finding that although relationship between plaintiff and entity and individual named on building permit was unclear, there was “no evidence that defendants were misled as to the real parties in interest, and holding that an “immaterial discrepancy in the application is no ground for refusal of the permit and does not affect its validity”); *Loew v. Falsey*, 127 A.2d 67, 73-74 (Conn. 1956) (holding that there was no jurisdictional defect by reason of the incorrect name of the owner on permit application and that the application complied substantially with code requirements); *Green v. Board of Appeals of Norwood*, 358 Mass. 253, 260 (Mass. 1970) (permit application substantially conformed to the building code and there was no basis for revocation of the permit even though applicant stated on application that land was “dry” and evidence showed that some portions were “wet”).

Accordingly, the Board concludes that the alleged errors that appellant cites do not justify the issuance of a subpoena. Appellant may not use the Board’s limited-scope

proceeding and subpoena power to search for evidence that the permits were approved on the basis of other, material erroneous information.

For the reasons and on the basis of the persuasive authority cited above, the Board denies appellant's request for a subpoena for contracts between the intervenor and others and for a list of agents and copies of agency agreements (documents that appear to relate to appellant's allegation that the individuals who filled out and submitted or are identified on the permit applications were not actually agents of the owner and that intervenor did not own the premises on the date that the application was filed); and for documents showing the ownership of the intervenor Zuckerman Brothers and its relationship with the raze permit applicant ZB, LLC.

We decline to issue a subpoena as to other categories of documents that appellant seeks because they appear to be designed to carry out a fishing expedition for as-yet-unidentified defects in DCRA's processing of the permit applications. Accordingly, appellant is not entitled to a subpoena for documents evidencing "all payments to DC since January 2002" (a request that appellant seeks to justify on the vague ground that "it does not appear that the proper amount was paid"); for documents pertaining to intervenor's and ZB L.L.C.'s licenses to do business in the District; for any and all correspondence sent to or communications with the District since January 1, 2002; for cost estimates and marketing materials for the project (requests that appear to relate to appellant's unsupported allegation that the "construction costs seem low" by reference to the prices that will be asked for the houses to be constructed); for a list of all consultants and advisors retained by intervenors in connection with the project and for all studies produced (which appellant seeks on the ground that intervenor "may know about")

hazardous materials on the property); and for project reports, time cards and other documents that, appellant explains, may show whether intervenor performed illegal work prior to the permits being issued..

Appellant argues that DCRA and intervenor should be required to produce documents to “back up their claim” that DCRA made no error in approving the permits, but this argument appears to reflect an erroneous assumption that DCRA has the burden of establishing that the permit approvals were lawful.<sup>5</sup> Quite the contrary, there is a presumption that DCRA’s approval actions were lawful. *See Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment*, 364 A.2d 610, 615 (1976) (there is a “strong presumption of regularity” that supports the inference that “when administrative officials purport to decide weighty issues within their domain, they have conscientiously decided the issues.”) Appellant has the burden to identify and demonstrate that DCRA actions were unlawful, and he may not shift the burden to DCRA (or to intervenor) to prove that the agency acted lawfully.

We likewise deny appellant’s request for a subpoena for copies of insurance policy endorsements and amendments since March 2002, which appellant presumably wants to use to establish whether and when the permit holders were insured. Like counsel for appellee, the Board has been unable to locate any specific statutory or regulatory requirement for a building or raze permit applicant to be insured. *See*

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<sup>5</sup>The same assumption appears to underlie appellant’s argument that

The Appellee has alleged that the permit was properly accepted and processed. This has [sic] is a central issue to the appeal and this it is important to the Appellant to be able to cross examine the people who processed the permit to understand if this is true.

Appellant’s Motion for Evidentiary Hearing at 4.

Appellee's Brief in Opposition to Mr. Herron's Appeal at 4 n.2.<sup>6</sup> It appears, therefore, that the Board would have no basis for invalidating the subject permits as contrary to law even if appellant were able to establish deficiencies in the insurance information that the permit applicants provided. Accordingly, we reject appellant's request that the Board compel the production of insurance documentation. (We note, moreover that although the agency record contains an insurance certificate that shows builders' risk coverage only for Zuckerman Brothers, appellee has already filed with the Board an amended insurance certificate, covering the same period, that identifies both Zuckerman Brothers and ZB, L.L.C. (the entity listed as the owner on the raze permit application) as insureds.)

**Appellant's motion for an evidentiary hearing.**<sup>7</sup> As discussed above, the Board's review is to be upon the agency record unless a statute or regulation, Mayor's order, or the Constitution requires an evidentiary hearing. D.C. Mun. Regs. title 1, § 510.1. The parties have identified no statute or regulation that requires the Board to hold an evidentiary hearing in this case.<sup>8</sup> Accordingly the issues are (i) whether any other law

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<sup>6</sup> By contrast, the building code regulations elsewhere require specific proof of insurance coverage. See, e.g., D.C. Mun. Regs. title 12A, § 124.4.4.2.

<sup>7</sup> Although DCRA, too, requested an opportunity to call witnesses, it withdrew that request in its submission dated December 9, 2002, stating that the appeal can and should proceed on the basis of the official documentary record in this case.

<sup>8</sup> If the Constitution were to require a hearing in this matter, it would have to be on the basis of the prohibition against governmental deprivation of life, liberty or property without due process. Appellant has not alleged, and there appears to be no basis for an allegation, that DCRA's issuance of the subject permits has deprived him of life or liberty. For the due process clause to apply at all, appellant must be understood to be alleging a deprivation of a liberty interest, e.g., deprivation of appellant's liberty to be free from unwanted construction in his neighborhood. It is not at all clear there is such a constitutionally-cognizable liberty interest, but assuming for the moment that there is, the issue becomes what process is due when such a purported liberty interest is at stake. What authority exists on the issue indicates that a trial-type hearing is not required in such a circumstance. See *Hi Pockets, Inc. V. The Music Conservatory Of Westchester, Inc.*, 192 F. Supp. 2d 143 (S.D.N.Y. 2002) (action challenging the issuance of a building permit in which the court reasoned that plaintiff's due process claim could survive only if there were inadequate post-deprivation procedures, and then held that plaintiff's opportunity to make arguments before a zoning board and to seek judicial review was a "perfectly adequate post-deprivation remedy" that satisfied the requirements of due process). In other words, persuasive authority from other jurisdictions

requires an evidentiary hearing in this case, and (ii) if so, whether there are any material factual issues to be resolved through a hearing.

Appellant is correct that the rationale of *J.C. & Associates v. D.C. Board of Appeals and Review*, 778 A.2d 296 (D.C. 2001) (involving an appeal by an aggrieved permit applicant, a type of appeal mentioned in ¶ II.C of Mayor's Order 96-27), is that by providing generally that proceedings before the Board are to be governed by the D.C. Administrative Procedure Act, paragraph VII.B.1 of Mayor's Order 92-27 implicitly requires the Board to conduct trial-type hearings. *See* 778 A. 2d at 305-06. The decision is difficult is difficult to reconcile with the regulations that implement Mayor's Order 96-27, which contemplate that evidentiary hearings will not be required absent other orders of the Mayor or other laws. *See* D.C. Mun. Regs., title 1, §§ 506.1 and 510.1. We conclude that we need not attempt that reconciliation here, because the decision in *J.C. & Associates* also acknowledges that some circumstances "might obviate the need" for an evidentiary hearing." 778 A. 2d at 305 n. 6. Surely, one such circumstance is where the evidence a party seeks to present at such a hearing would be irrelevant or immaterial. *See* D.C. Mun. Regs., title 1, § 508.3 (authorizing the Board to exclude such evidence); *see also* 778 A.2d at 305.

We find that even if an evidentiary hearing generally would be required in cases challenging the issuance of building permits, no evidentiary hearing is required here, because the facts that appellant contends are disputed are not material to the Board's resolution of this case.

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suggests that due process is satisfied in a case such as this if the complainant has an opportunity to air his grievances at non-evidentiary hearing and an opportunity to appeal an adverse determination.

Appellant states that there are a number of disputed material facts, "including but not limited to insurance and corporate ownership, the procedures DCRA followed, and whether DCRA addressed ANC's issues and gave great weight to its comments." Appellant's Reply to Intervenor's Reply to Appellant's Motion for Evidentiary Hearing at 5. Appellant wants to question the intervenor about "what was filed and the accuracy of what was filed," and about the individuals who signed the raze permit application and the building permit applications, asserting that "it is hard to know if DCRA properly processed the permit if [it] not know what was filed and if it was accurate." Appellant's Motion for Evidentiary Hearing at 5-6. However, for the same reasons why appellant is not entitled to a subpoena to search for possible factual misstatements in the permit application documents and for possible agency errors, he is not entitled to an evidentiary hearing on the basis on the mere hope that it will expose material factual errors in the permit application materials and/or defects in DCRA's approval process.

Appellant seeks to elicit testimony from DCRA officials and staff (including the "individual responsible for accepting this permit at permit desk, "the individual in permits branch who made ruling on insurance certificate," the individual who drafted raze permit procedures, and "all individuals consulted by [DCRA Deputy Director] Theresa Lewis in responding to ANC resolutions") about "the exact nature of the permit process, what they looked at in evaluating the permit, [and] what they considered in their approval and why they allowed the permit to be processed." Appellant's Motion for Evidentiary Hearing at 5). Our courts have made clear, however, that it is "not the function of the court to probe the mental processes" or deliberations of administrative officers. *Braniff Airways v. Civil Aeronautics Board*, 379 F. 2d 453, 460 (D.C. Cir.

1967). Courts “must not allow recitals by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations.” *Braniff Airways*, 379 F.2d at 462. Appellant has not offered any persuasive reason why the broad-ranging inquiry of DCRA staff he wants to conduct should be permitted.

Appellant also wants to examine DCRA staff as to “what Great Weight they gave to the ANC.” Appellant’s Motion for Evidentiary Hearing at 5. However, no hearing is required to determine whether DCRA gave great weight to the ANC’s views because that is a question that can and must be answered from the agency documentary record. *See* D.C. Code § 1-309.10(d)(3)(A)-(B). As the DC Court of Appeals has explained,

“great weight,” as used in the ANC Act, does not build in some kind of quantum or presumption of deference to be accorded to ANCs. It means, rather, that an agency must elaborate, with precision, its response to the ANC issues and concerns. . . . In doing so an agency must focus particular attention not only on the issues and concerns as pressed by an ANC, but also on the fact that the ANC, as a representative body, is the group making the recommendation. That is, the agency must articulate why the particular ANC itself, given its vantage point, does -- or does not -- offer persuasive advice under the circumstances.

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. . . [W]e believe that "great weight" implies explicit reference to each ANC issue and concern *as such*, as well as specific findings and conclusions with respect to each. . . . [S]uch acknowledgment . . . is necessary not only to assure compliance with the ‘great weight’ mandate but also to facilitate judicial review.

*Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1384

(D.C. 1977) (construing section 1-261(d), the predecessor of section 1-309.10(d))

(emphasis in original); *see also Neighbors on Upton Street v. DC Board of Zoning*

*Adjustment*, 697 A.2d 3 (1997). In short, the Board can determine whether DCRA gave great weight to any ANC 3F comments by seeing whether the agency responded to each comment in writing and specifically acknowledged the ANC as the source of the comment. The “great weight” standard is not a license to probe the mental processes of DCRA officials.

Appellant states that he also wishes to question the environmental engineer at the Department of Health (“DOH”) who signed off on the permits. Appellant’s Motion for Evidentiary Hearing at 5. In addition to the reasons discussed above about why an evidentiary hearing to probe that individual’s mental processes would not be appropriate, an evidentiary hearing for this purpose is not necessary. As a matter of law, DCRA did not err in relying on the approval of DOH. If DCRA had gone behind the DOH “to ascertain whether [its approval] was properly issued, [it] would have been acting in effect as a court of appeals over other coordinate administrative departments,” something that it has “neither the jurisdiction nor the expertise” to do. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 413 A.2d 152, 154 (D.C. 1980). The “correct avenue” for appellant to pursue any alleged violation by DOH is a complaint to DOH.

Appellant explains in addition that at an evidentiary hearing he would seek to examine the Assistant Secretary of the D.C. Commission on Fine Arts (“CFA”) if a statement from him submitted by intervenor (in support of its position that the Albemarle Street property is not subject to CFA jurisdiction) is accepted as part of the record. This statement is part of the Board record, but it does not necessitate an evidentiary hearing because the Board will not rely on it to appellant’s prejudice. The Board has determined that it must dismiss appellant’s claim that the permits were issued in error on the ground

that DCRA failed to refer the permit application for CFA review. The issue of whether Albemarle Street is subject to CFA jurisdiction requires interpretation of D.C. Code § 6-611.01, which is contained in a chapter entitled “Zoning and Height of Buildings.” In other words, section 6-611.01 is a zoning provision. The D.C. Court of Appeals has recently admonished that the Board is without jurisdiction to rule on appeals involving the laws relating to zoning, even when zoning issues are merely tangential to the main issue presented to the Board.<sup>9</sup> *See Felicity’s, Inc. v. DCRA*, 817 A.2d 825 (D.C. 2003). Moreover, the D.C. Code § 2-1803.01 states specifically that the Board shall not exercise jurisdiction in appeals involving chapter 6 of Title 6 of the D.C. Code. Because we hold that we must dismiss appellant’s CFA-review allegations for lack of jurisdiction, appellant’s perceived need to cross-examine the CFA official described in his motion does not justify an evidentiary hearing.<sup>10</sup>

**Appellee’s and intervenor’s motions to dismiss the appeal.** With dismissal of appellant’s CFA-review allegations following upon the Board’s earlier dismissal of appellant’s other allegations relating to zoning matters, there remain only a few issues that are cognizable in this appeal.

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<sup>9</sup> A jurisdictional issue such as this may be raised at any time and may be raise *sua sponte* by the Board, as we do now.

<sup>10</sup> Appellant also contends that an evidentiary hearing is required because in, denying appellant’s motion for a stay, the Presiding Board Member relied on representations by agency counsel. *See* Appellant’s Reply to Intervenor’s Reply to Appellant’s Motion for Evidentiary Hearing at 3. The Board relied on those representations in the course of weighing the likelihood of irreparable injury that could warrant a stay of permit work while the Board considered the appeal on the merits. Because the representations that contributed to the Board’s findings as to irreparable injury are not relevant to the merits of this appeal, appellant is not entitled to a hearing to explore those representations.

Appellant states in addition that he “reserves the right to call” an insurance expert and the ANC 3F commissioner. Appellant does not explain why he might need to examine an insurance expert and the ANC 3F Commissioner. His indecision as to such witnesses, taken together with the Board’s findings above as to why other testimony is not needed, mean that appellant has not made a persuasive case that there is a need for an evidentiary hearing.

As to appellant's allegation that DCRA violated FOIA requirements, we agree with the intervenor that this claim does not fall within the Board's jurisdiction as described in D.C. Mun. Regs., title 12A, § 122.2. Furthermore, appellant has already pursued that claim through an appeal to the Secretary of the District of Columbia, as authorized under D.C. Code section 2-537.

The remaining issues are (i) whether DCRA's issuance of the permits was inconsistent with provisions of the Construction Codes; (ii) whether DCRA erred by not requiring the permit applicants to submit an Environmental Impact Statement before determining whether to issue the permits; and (iii) whether DCRA issued the permits in contravention of the ANC statute. The parties' submissions have addressed these issues at some length, and the Board finds that it is appropriate to rule on each now without further briefing or argument.

**Whether DCRA's issuance of the permits was inconsistent with provisions of the Construction Codes.** The Board's review of the pleadings reveals that appellant's claims – that DCRA violated sections 107.12, 107.13, 107.15, 107.1.1, 107.16, and 108.1 of the Building Code by approving the permits – rest on appellant's assertion that the permit application and accompanying documents as filed on April 4, 2002 did not satisfy all requirements for issuance of a permit on that date. (Appellants asserts, for example, that no site plan and no storm water management plan had been submitted as of that date.) Appellant makes a similar allegation as to the application and attachments as they existed at April 19, 2002 and contends that DCRA was without authority to allow intervenor to supplement and to make changes to the accompanying documentation without requiring intervenor to submit a new building permit application (that, appellant

believes, would then be subject to the Forest Hills Tree and Slope Overlay). We do not find in the Notice of Appeal or other pleadings any specific allegation that the application and accompanying materials *as approved* failed to comply with the building code in any material way.

Appellant relies on D.C. Mun. Regs., title 12A, § 108.1 (“If the application or the plans do not conform to the requirements of all pertinent laws, the code official shall reject such application . . .”). The Board does not read section 108.1 to require DCRA to reject any permit application that does not meet all requirements of law as initially filed. The record shows that DCRA’s interpretation is that “[p]art of the [permit] review process may include working with applicants to correct deficiencies found by revising the plans to comply with the building codes.” See e-mail from Theresa Lewis to ANC Commissioner Phil Kogan dated May 9, 2002. As noted above, the Board is required to accord deference to DCRA’s interpretation. See *Dupont Circle Citizens Ass’n*, 431 A.2d at 565; see also *Shopper’s World, Inc. v. Beacon Terrace Realty, Inc.*, 228 N.E. 2d 446 (Mass. 1967) (board had “inherent administrative power” to allow modification of application to conform to legal standards). Accordingly, the Board rejects appellant’s contention that the building permit approvals were invalid because the applications as initially filed were deficient.<sup>11</sup> (Appellant’s Notice of Appeal acknowledges, for example, that the building permit application materials were supplemented with an erosion and sediment control and building site plan before the permits were approved.)

**Whether DCRA erred by not requiring intervenor to submit an**

**Environmental Impact Statement.** Appellant contends that intervenor was required to

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<sup>11</sup> The Board also rejects the view that disapproval of a building permit application is required for any defect or omission; substantial compliance with application requirements is sufficient. See generally *Corpus Juris Secundum, Zoning & Land Planning*, § 205.

file an Environmental Impact Statement (“EIS”) because its plans call for building two or more residential units, a circumstance in which the filing of an EIS may be required. *See* 20 D.C. Mun. Regs., title 20, § 7202.2(c). Appellant states that section 7202.2(c) is a “carve-out” from the general exemption for residential structures in zoning districts R-1 through R-5-A. Intervenor and appellant respond that the provision pertaining to two or more single-family residences applies only outside zones R-1 through R-5-A, and that no EIS was required.

Both sides of the argument have at least facial merit (meaning that we cannot conclude that it was unreasonable for DCRA to interpret the District’s Environmental Policy Act regulations not to require an EIS before approving the subject permits). We conclude that we need not resolve the issue, however, because we find that even if the 2900-2902 Albemarle Street project was not exempt from EIS requirements under D.C. Mun. Regs., title 20, § 7202.2(k), it was exempt on another basis. D.C. Mun. Regs. title 20, § 7201.3 states that no EIS shall be required for a project whose cost is less than \$1,000,000 in 1989 dollars. The DCRA Environmental Intake Form in the record shows this amount to be \$1.42 million at the time of permit applications. *See* Ex. E (second page, question 13) to Appellant’s Opposition to Property Owner’s Motion to Dismiss or in the Alternative, to Oppose the Appeal. The information entered on line 59 (“Estimated Cost of Work”) of the building permit applications that intervenor submitted to DCRA was that the cost of the construction was estimated to be \$500,000 per house. *See id.*, Ex. B. In light of the total estimated construction costs of \$1 million, it appears that the project was exempt from EIS requirements under section D.C. Mun. Regs., title 20 §§ 7202.1 and 7201.3 (there being no allegation that it “imminently and substantially affects

the public health, safety, or welfare"). Accordingly, it appears to the Board that even if DCRA erred in treating the application as exempt from the EIS requirement under section 7202.2(k), this was harmless error. The Board's rules require it, in deciding all appeals, to apply the rule of harmless error. D.C. Mun. Regs., title 1, § 511.1. *See also Shiflett v. D.C. Board of Appeals and Review*, 431 A.2d 9, 11 (D.C. 1981)(applying harmless error standard in case involving failure to notify ANC).

**Whether DCRA issued the permits in contravention of the ANC statute.**

The relevant requirements are found at D.C. Code § 1-309.10. Section 1-309.10

(Advisory Neighborhood Commissions -- Duties and responsibilities [Formerly § 1-261])

states in relevant part:

(a) Each Advisory Neighborhood Commission ("Commission") may advise the Council of the District of Columbia, the Mayor and each executive agency, and all independent agencies, boards and commissions of the government of the District of Columbia with respect to all proposed matters of District government policy including, but not limited to, decisions regarding planning, streets, recreation, social services programs, education, health, safety, budget, and sanitation which affect that Commission area. For the purposes of this part, proposed actions of District government policy shall be the same as those for which prior notice of proposed rulemaking is required pursuant to § 2-505(a) or as pertains to the Council of the District of Columbia.

(b) Thirty days written notice, excluding Saturdays, Sundays and legal holidays of such District government actions or proposed actions shall be given by first-class mail to the Office of Advisory Neighborhood Commissions, each affected Commission, the Commissioner representing a single-member district affected by said actions, and to each affected Ward Council member, . . .

(c) (1) Proposed District government actions covered by this act shall include, but shall not be limited to, actions of

the Council of the District of Columbia, the executive branch, or independent agencies, boards, and commissions. In addition to those notices required in subsection (a) of this section, each agency, board and commission shall, before the award of any grant funds to a citizen organization or group, or before the formulation of any final policy decision or guideline with respect to grant applications, comprehensive plans, requested or proposed zoning changes, variances, public improvements, licenses, or permits affecting said Commission area, the District budget and city goals, and priorities, proposed changes in District government service delivery, and the opening of any proposed facility systems, provide to each affected Commission notice of the proposed action as required by subsection (b) of this section. Each District of Columbia government entity shall maintain a record of the notices sent to each Commission pursuant to subsection (b) of this section.

...

(3) The Department of Consumer and Regulatory Affairs shall ensure that each Advisory Neighborhood Commission is provided at least twice a month by first-class mail with a current list of applications for construction and demolition permits within the boundaries of that Advisory Neighborhood Commission. All notices shall also be provided to the Office of Advisory Neighborhood Commissions. Each Commission and the affected ward Councilmember shall also be provided at least twice a month with a current list of applications for public space permits.

(d) (1) Each Commission so notified pursuant to subsections (b) and (c) of this section of proposed District government action or actions shall consider each such action or actions in a meeting with notice given in accordance with § 1-309.11(c) which is open to the public in accordance with § 1-309.11(g). The recommendations of the Commission, if any, shall be in writing and articulate the basis for its decision.

(2) At the close of business of the day after which the notice period concludes as provided in subsection (b) or (c) of this section, the affected District government entity may proceed to make its decision.

(3) (A) The issues and concerns raised in the

recommendations of the Commission shall be given great weight during the deliberations by the government entity. Great weight requires acknowledgement of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns.

(B) In all cases the government entity is required to articulate its decision in writing. The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

(C) The government entity shall promptly send to the Commission and the respective ward Councilmember a copy of its written decision.

(i) (1) Each Commission shall have access to District government officials and to all District government official documents and public data pursuant to § 2-531 et seq. that are material to the exercise of its development of recommendations to the District government.

Appellant contends that DCRA violated section 1-309.10 by failing to give the ANC the requisite notice.<sup>12</sup> However, the record does not support this claim. The raze permit application was filed on March 1, 2002. The construction permit applications were filed on April 4, 2002. It is undisputed that ANC 3F received actual notice of both. The record does not establish precisely when the ANC received notice, but it contains copies of ANC Resolution 02-24 (pertaining to the raze permit application ) and 02-23

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<sup>12</sup> The Board is persuaded that the building permit proposals were "matters of significance to neighborhood planning and development" as that term was construed by the D.C. Court of Appeals in *Office of the People's Counsel*. See 630 A.2d at 697.

(pertaining to the building permit application), dated April 29, 2002, an indication that the ANC had notice of both by that date. The permits were not issued until June 13, 2002, well over thirty days after the ANC Resolutions (and an even longer period after the date(s) of actual notice). Thus, the record establishes that the ANC had the statutory 30-day notice.

Appellant complains, however, that DCRA refused to give the ANC access to the permit application and documents, thereby depriving it of 30 days to offer meaningful comments. ANC 3F Resolution 02-23 and ANC correspondence to DCRA confirm that three individuals did review plans and drawings on April 25, 2002 and shared their observations with the ANC, but it is asserted that these individuals were not official representatives on the ANC, that Resolution 02-23 and the ANC's May 3, 2002 letter to DCRA conveyed those individuals' (and not the ANC's) comments on the application, and that the ANC, denied access to documents when it requested them from DCRA, could not comment meaningfully.

The Board rejects the interpretation of the ANC statute that appellant urges. We hold that the statute does not impose a require that an agency afford an affected ANC 30 days from the date when the ANC has complete information or all of the information it has requested to comment on a proposal. To rule otherwise would be to hold that each time there is a change to a pending application, the ANC's review period commences again. This is not the law. *See Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177 (D.C. 1982) (construing the language of the ANC statute "to require thirty days' notice of the body of proceedings arising from a permit application, not each stage of such proceedings"); *Neighbors on Upton Street*, 697 A.2d 3 (holding

that the ANC law did not require that the ANC be afforded 30 days to respond to the Levine School's revised transportation management plan).

It would likewise be inappropriate to construe the section 1-309.10(b) and (c) 30-day-notice requirement as a mandate that agencies to afford an ANC 30 days to review information received in response to a FOIA request, because, under D.C. Code § 2-532(c), agencies have 10 days -- and sometimes more time -- within which to make records available; and because, although section 1-309.10(i)(1) establishes that ANCs shall have access to public data under FOIA (§2-531), neither that section nor section 1-309.10(d) establishes any deadline by which an ANC must make a request for data that it seeks in connection with a proposal subject to the 30-day requirement of sections 1-309.10(b) and (c). The interpretation that appellant urges has the potential to eviscerate the 30-day notice standard and (especially in light of the possibility of appeals from FOIA request denials) unduly burden and complicate the administrative approval process.

Since agencies have no obligation to defer to or to abide by the recommendations of an affected ANC (but only to give the ANC's comments great weight) (*see* Kopff, 381 A.2d at 1383-84), we see no basis for implying an obligation for an agency to assure that an affected ANC has full information as to all aspects of a proposal subject to section 1-309.10(b) or (c), before the agency may act on the proposal.

As already noted, the record establishes that at least three individuals who shared information with ANC 3F did review the subject plans and drawings on April 25, 2002, and that on May 3, 2002, ANC 3F conveyed comments (seven specific "concerns") to DCRA based on those individuals' observations. In the same letter, ANC brought to DCRA's attention that the Albemarle Street properties were within the boundaries of the

Forest Hills Tree and Slope Overlay proposal that was the subject of a Zoning Commission filing and set-down. On May 9, 2002, Theresa Lewis of DCRA replied via e-mail to ANC Commissioner Kogan, stating that DCRA would not issue permits before June 3 (thus, we find, affording the ANC a further opportunity for review of the plans and drawings). In her e-mail, Ms. Lewis specifically responded to the ANC's comment about the Forest Hills Tree and Slope Overlay proposal and Zoning Commission activity (explaining that because the building permit applications were filed prior to the set-down date, "the proposed overlay will have no impact on the processing of the application").

It appears that, notwithstanding that additional waiting period to which DCRA agreed, the ANC conveyed no additional comments to DCRA. Appellant's Notice of Appeal states that on May 28, 2002, Ms. Lewis met with the ANC 3F Commissioner and others with respect to the permit proposals. On June 11, 2002 DCRA issued a letter addressed to both appellant and to ANC 3F Commissioner Phil Kogan that acknowledged the "concerns" that the ANC had conveyed in its May 3 letter and that responded to each. See Ex. B to Intervenor's Brief in Opposition to Mr. Herron's Appeal.

The Board finds that, through DCRA's May 9 and June 11 correspondence, DCRA satisfied the statutory requirements to respond in writing and to give great weight to the ANC's comments on the building permit proposals.<sup>13</sup> Even if we assume that not all of the comments that ANC 3F conveyed were its official comments, we find that the ANC's comments on the Forest Hills Tree and Slope Overlay were the ANC's own comments (and, it appears to the Board, may have summarized the ANC's principal

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<sup>13</sup> Because we hold that the 30-day notice and "great weight" requirements were satisfied, we do not specifically address DCRA's argument (*see* Appellee's Brief in Opposition to Mr. Herron's Appeal at 6) that, residential construction being a matter of right in a residential zone district, 30 days notice to ANC 3F and "great weight" were not required in conjunction with the building permit application.

interest in this matter), as to which the statutory written response and great weight requirements were met.

The Board acknowledges the importance of the legal requirement that ANCs have access to District government officials, documents and public data that are material to their development of recommendations to the government. However, in this case -- which is to say, in the absence of an explanation about what as-yet-unidentified grounds for disapproval of the permits ANC 3F might have been able to identify if the permit approval action had been delayed until after the ANC was given full access to DCRA records and officials -- we will not interpret the law to permit the ANC to delay its comments on the permit applications even though it had timely notice of the applications and access to substantial (if not complete) information about them, either from DCRA, appellant or others. The harmless error rule appears to be implicated here as well.

While D.C. Code § 1-309.10(i)(1) requires agencies to afford ANCs access to information, it does not tie the 30-day waiting period of section 1-309.10(b) and (c) to such access. The Board notes that it appears that even though DCRA records have been made available to appellant (through a FOIA request filed and pursued by appellant), and presumably have been available to the ANC for some time, the ANC has not added a single substantive comment pertinent to the sufficiency of the as-approved building proposal. The Board will not invalidate the permits based on speculation that something that the ANC might have learned, if it had been given access earlier to all of the agency record, would have led it to make a recommendation that would have caused DCRA to act otherwise on the building permit applications.

As to the raze project, ANC 3F transmitted to DCRA a copy of its Resolution 02-24 with comments pertaining it. The gist of the comments was an assertion that razing work had commenced and should be stopped "until such time as all public health and environmental issues are resolved." We find in the record no evidence of a written response by DCRA (although the record contains what appears to be evidence of DCRA staff having looked into the matter). If Resolution 02-24 had constituted ANC 3F's recommendations as to a proposed policy decision on the raze permit application, a written response from DCRA giving great weight to the ANC's views might have been required before the permit could be issued. (The issue, as we see it, would have been whether the raze proposal was a "matter of significance to neighborhood planning and development.") However, the subject of Resolution 02-24 was allegations about work being done without a permit. The Resolution did not present ANC recommendations about approval of a raze permit. We find, therefore, that the law did not require DCRA to provide a written response giving great weight to the ANC's recommendations.

WHEREFORE, appellee's motions to settle and index the record are **GRANTED**; ANC 3F's motion for party status is **DENIED**; appellant's requests for a subpoena and an evidentiary hearing are **DENIED**; and appellee's and intervenor's motions to dismiss the appeal are **GRANTED**. The appeal is denied.

SO ORDERED this 22nd day of May, 2003.

  
Phyllis D. Thompson, Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Laura Elkins, et ux.	)	
	)	
Appellants	)	
	)	
v.	)	Docket No. 03-5961-BP
	)	
Department of Consumer and	)	
Regulatory Affairs,	)	
	)	
Appellee	)	

DECISION AND ORDER

This appeal is from the December 23, 2002 decision by the Director of the Department of Consumer and Regulatory Affairs ("DCRA") refusing to dissolve a Stop Work order ("SWO") dated November 13, 2002. The SWO directed appellants to stop certain construction work that was underway at their house located at 20 Ninth Street, N.E., pursuant to building permit 436647 and subsequent revisions. The SWO appears to be premised on a Notice of Violation ("NOV") dated May 17, 2002. Appellants have contended that both the SWO and the underlying NOV are invalid on a number of grounds.

By order issued on December 17, 2003, the Presiding Board Member scheduled an evidentiary hearing in this matter to address issues relevant to the validity and enforceability of the SWO. Subsequently, the parties advised the Board that by correspondence dated December 17, 2003, DCRA proposed to revoke appellants' building permits on the grounds that appellants misrepresented the intended work in their permit application, and that the actual construction has deviated from the approved plans and has not been abated; that appellants have appealed the proposed revocation to the DCRA Office of Adjudication ("OAD"); and that the matter is now in the hands of OAD for hearing.

Apprised of these developments, the Presiding Board Member conducted telephone conferences with counsel for the parties, Assistant Corporation Counsel William Bennett and John Scheuermann, Esq., on January 13 and 14, 2004. The

focus of the telephone conferences was whether the scheduled evidentiary hearing should go forward. The Presiding Board Member pointed out that the OAD presumably will conduct a hearing that, it appears, will call for presentation of the same evidence that would be presented here (raising issues of judicial economy and of the desirability of having the agency rule on these issues in the first instance). In addition, it appeared that because of the narrow focus of the Board's inquiry -- the validity of the NOV insofar as it pertains to the work whose completion the Stop Work order has blocked -- a ruling by the Board would afford appellants no real relief even were they to prevail (since they might still be required to tear down completed supporting structures, which would not be the focus of the Board's inquiry, that were erected in reliance or purported reliance on the building permits that DCRA has threatened to revoke).

From the urgency of communications by appellants' counsel (including his September 3, 2003 letter to the Presiding Board Member advising that appellants "continue to be deprived of the full use and enjoyment of their home" and his reference to the pending expiration of "construction financing extensions"), the Presiding Board Member had understood that there was in fact additional construction to be completed on appellants' home in reliance on the permits. During the January 14, 2004 telephone conference, the Presiding Board Member learned for the first time that the construction work on appellants' home has been completed. The Presiding Board Member advised the parties that it appeared that this appeal seeking dissolution of the SWO order therefore is moot and should be dismissed. Cf. *Ormond Civic Association v. Parish of St. Charles*, 445 So. 2d 1311 (La. Ct. App. 1984) (dismissing an appeal from a SWO where construction work had been completed).

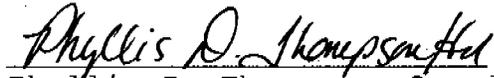
The Presiding Board Member nevertheless deferred dismissing the appeal until she could review the record in a recently filed appeal, *Robbins v. DCRA*, BAR Docket 03-OAD-1751E, which recites facts that, appellants' counsel argued, demonstrate that the instant appeal is not moot. Appellant Robbins, spouse of appellant Laura Elkins, is one of the appellants in the instant case and the appeal in Docket 03-OAD-1751E relates to the same building permits and property in issue here. The appeal is from an OAD decision finding that certain work that appellants performed was beyond the scope of their permits. The OAD

dismissed without prejudice the additional charge that appellants had violated the November 13, 2002 SWO (a charge for which appellants were fined), on the ground that the legitimacy of the SWO would be decided by the Board in this case or in a pending Superior Court proceeding.

It appears that the issue of validity of the SWO may well still be alive, since appellants dispute the propriety of the fine assessed against them for continuation of work in violation of the SWO. However, that issue (and the interrelated issues of the validity of the NOV and the permits) must be resolved by the OAD in the first instance. The narrow issue presented in the instant appeal was whether appellants are entitled to dissolution of the SWO. There being no work that has been interrupted and that would resume if the SWO were dissolved -- i.e., there being no relief that the Board can grant -- the instant appeal is moot.

WHEREFORE, this appeal is dismissed as moot.

SO ORDERED this 16th day of January, 2004.

  
Phyllis D. Thompson, Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Nebraska Avenue Neighborhood	)	
Association,	)	
	)	
Appellant	)	
	)	
v.	)	Docket No. 02-5872-BP
	)	
Department of Consumer and	)	
Regulatory Affairs,	)	
	)	
Appellee	)	
	)	
	)	
Sunrise Assisted Living, LLC,	)	
	)	
Intervenor	)	

DECISION AND ORDER

This appeal, received by the Board on July 18, 2002, relates to building permit B435464, issued by the Department of Consumer and Regulatory Affairs ("DCRA") on March 8, 2001, and building permit B442149, issued by DCRA on January 22, 2002. Permit B435464 authorized the construction of a seven-story community residential assisted living facility for the elderly and handicapped at 5111 Connecticut Avenue, N.W. Permit B442149 authorized a modification to the roof plan to include an elevator.

By Board order dated November 14, 2002, the Board permitted Sunrise Connecticut Avenue Assisted Living, LLC, to intervene. The Board held a telephone conference with the parties on July 30, 2003, and thereafter, during August and September 2003, the parties briefed the issue of whether the appeal should be dismissed as untimely filed.

DCRA and intervenor argue that the appeal by Nebraska Avenue Neighborhood Association ("NANA") is untimely under D.C. Mun. Regs. title 1, § 503.2. Section 503.2 states:

An aggrieved person, owner of the property, or licensee shall file the notice of appeal with the Board within fifteen (15) days after service of the notice of the act, decision or order with respect to which the appeal is filed. Filing may be accomplished by mail, but filing shall not be deemed timely unless the notice of appeal is received by the Board within the prescribed period.

DCRA and intervenor contend that because the appeal was filed sixteen months after issuance of permit B435464 and six months after issuance of permit B442149 -- i.e., as to both permits, well after the 15-day period specified in section 503.2 -- the appeal is time-barred.

Appellant's argument that that the appeal is timely rests on two lines of reasoning. First, NANA argues that the section 503.2 limit does not apply to an appeal such as this one alleging that an existing building project is violating life-safety and building regulations. "Non-compliant conditions are not vested 15 days after issuance of permits" appellant argues.

Second, NANA argues that its Board appeal is timely because it came on the heels of NANA's appeal to DCRA (which NANA initiated through a letter to the Director of DCRA dated June 25, 2002) and subsequent inaction by DCRA. D.C. Mun. Regs. title 12A, § 122.1. describes an appeal process within DCRA that may be followed by an appeal to the Board if the DCRA Director denies the appeal or does not act on it within three working days. NANA contends that its appeal to the Board, which it filed within a reasonable time after determining that a prompt response would not be forthcoming from DCRA, was timely even if the section 503.2 15-day limit applies. NANA also notes that it did finally receive a response from DCRA dated July 30, 2002, denying its appeal and advising that any further appeal must be to the Board. The fact that NANA's appeal to the Board actually pre-dated what NANA characterizes as DCRA's belated response is another reason why, in NANA's view, its appeal to the Board should not be regarded as too late.

Having carefully considered the parties' arguments and the record, the Board agrees with DCRA and intervenor that the appeal must be dismissed as untimely. The Board does not necessarily conclude that *all* appeals challenging building

permits must be filed within 15 days of the issuance of the permit. As NANA points out, under section 503.2, the time limit for appealing runs from the date of "service of the notice" of the agency decision with respect to which an appeal is filed. Thus, under section 503.2, the timeliness of an appeal may depend upon when an appellant had actual notice of the issuance of a building permit. In some cases, determining when an appellant received notice and therefore when an appeal was due might be difficult; in this case, however, the Board need not linger over these questions. NANA clearly had notice of both permits long before it appealed to the Board, because, as DCRA and intervenor point out and NANA does not contest, NANA challenged both permits before the Board of Zoning Adjustment ("BZA") in appeals submitted on March 16, 2001 and on March 19/20, 2002. (Reportedly, in its Orders 16716A, 16716B, and 16879, the BZA rejected appellant's contention that the building permits violated the zoning regulations and held that it did not have jurisdiction to rule on alleged building code violations.)

The Board also rejects NANA's argument that, as a matter of public policy, section 503.2 does not apply to appeals that allege that a building project violates the building code and poses life-safety risks. NANA is correct, of course, that the issuance of a building permit does not afford anyone a right to unfettered pursuit of construction that is unlawful or risky. But that does not mean that private litigants such as appellant may challenge a permit at any time to prevent such a result. DCRA has enforcement authority that it can exercise through stop work orders, citations and other means, and the Office of Corporation Counsel also has enforcement authority that can be used to stop unlawful construction. See D.C. Mun. Regs. title 12A, §§ 116.2 and 116.3. There is no need to circumvent section 503.2 to foster the public policy goals that appellant cites.

Finally, the Board agrees with DCRA and intervenor that the D.C. Municipal Regulations should not be read to create a mechanism whereby a claimant can re-open review of a building permit at any time -- such as more than sixteen months after permit issuance -- by first appealing to DCRA and then appealing DCRA's denial to the Board within a short time thereafter. DCRA is correct that for the Board to entertain appeals in such circumstances could create a never-ending spiral of reconsiderations and appeals.

Intervenor's point is well taken that if the June 30, 2002 letter from the DCRA Director -- which intervenor characterizes as "simply a response to the relentless stream of complaints from NANA" -- is regarded as a new appealable act or order, there could be a chilling effect on the ability of District officials to be responsive to community comments. We also agree with intervenor that it is important for each permittee in the District to be able to calculate when an act or decision of a District agency is final and no longer subject to review, so that the permittee knows that it can proceed safely in accordance with its permit. Intervenor asserts that this principle is especially applicable here because -- a fact that NANA did not dispute -- the permits in issue were subjected to an extraordinary level of scrutiny, with the first one issued only after an eight-month review process.

The Board notes that the grounds appellant cites for challenging the permits relate to matters -- such as whether the submitted plans include stairway egress from the 7th floor of the facility, whether there is an excessively steep grade for the loading dock, whether the plans are ambiguous, whether an environmental impact analysis was required, whether there are adequate toilets and parking spaces for the intended occupancy, and whether the plans lack an approvable elevator system -- that could have been raised (and possibly were raised) at the permit approval stage.<sup>1</sup> Not surprisingly, the DCRA Director's decision dated July 30, 2002, appears to be little more than a re-affirmation of his original building permit decision, rather than a separate appealable action.

The Board notes that, despite the foregoing strong reasons for denying the appeal as untimely, it did wrestle with the issue of how to apply D.C. Mun. Regs. title 12A, § 122.1 ("Appeals with the Department [DCRA]"). Section 122.1 does not specify a time limit for appeals within DCRA, and does appear to create a route for appeals to the Board within 15 days after DCRA acts or fails to act. The Board believes

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<sup>1</sup> The Board does note that, a few weeks before the July 30, 2002 telephone conference in this matter, NANA filed a "motion to Supplement Case No. 02-5872-BP," in which it requested the Board to issue a stop work order and made a number of allegations about construction at 5111 Connecticut Avenue deviating from the approved permit plans. The Presiding Board Member informed NANA's representative that the request for a stop work order should be directed in the first instance to DCRA. The Board accordingly denied the Motion to Supplement the appeal.

it is important to explain how we reconcile our holding here with section 122.1.

We believe the proper reading of section 122.1 is that it authorizes appeals within DCRA from actions other than issuance of building permits. We believe the text of section 122.1 supports this conclusion:

**122.1 Appeals Within the Department:** The owner of a building or structure or any other person may initiate an appeal, within the Department from official order, interpretations, refusals to grant approval or modifications, and other official actions or decisions, including appeals related to the D.C. Fire Prevention Code. Claimants shall appeal using a form provided by the code official, on which they shall state the grounds for the appeal, which shall be based on a claim that the true intent of the Construction Codes or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of the Construction Codes do not fully apply, or that an equally good or better form of construction can be used.

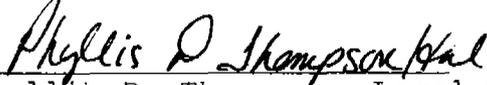
**122.1.1 Official Notice of Action:** The official inspector, or other person whose action or decision is being appealed shall provide the claimant written notice of the action or decision, which shall state as a minimum the name of the claimant, address of the property in question, nature of violation or non-compliance, section of the construction codes providing the basis for the action or decision taken, and the reviewing official within the Department to whom the appeal should be taken.

**122.1.2 Action of Appeal:** Within three (3) working days of receipt of the appeals form, the reviewing official shall affirm, modify, or reverse the previous action or decision. If the reviewing official affirms or modifies the previous action or decision, the claimant may request a review of the matter by the Director. The Director will act on the request within an additional three (3) working days. The decision of the Director shall be the final decision of the Department. If the Director does not act within the three working day period, or denies the appeal, the claimant may appeal the matter directly to the Board of Appeals and Review.

The procedure that section 122.1 describes -- an inspector or other person providing the claimant written notice of the decision, specifying the "reviewing official" to whom an appeal should be taken, and the opportunity to request further review by the DCRA Director -- appears to pertain to appeals of *actions that are directed to the attention of a claimant*. Section 122.1 does not appear to describe the process by which the public in general, including interested persons such as appellant, become aware of and

seek review of building permits. We think that it is section 122.2, which describes appeals directly to the Board that pertains to appeals of building permits. We note that although NANA attempted to avail itself of section 122.1, it did not follow all of the steps described in sections 122.1.1 and 122.1.2 (most of which simply did not suit the circumstances). We conclude that appellant's having attempted to avail itself of section 122.1 did nothing to relieve it of the necessity of filing its appeal to the Board within 15 days after receiving notice of the allegedly non-complying permits.

WHEREFORE the Board concludes that this appeal must be dismissed as untimely. SO ORDERED this 30th day of December, 2003.

  
Phyllis D. Thompson, Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Columbia Hospital for Women, )  
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 Appellant, )  
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 )  
 v. )  
 )  
 District of Columbia State Health )  
 Planning and Development Agency, )  
 )  
 Appellee )  
 )  
 )  
 Sibley Memorial Hospital, )  
 )  
 Intervenor )

BAR Docket No. 01-5725-CON

Appeal of Issuance of CON

No. 00-3-3

ORDER

This is an appeal by Columbia Hospital for Women (“Columbia” or “appellant”) challenging the April 30, 2001 decision by the District of Columbia State Health Planning and Development Agency (“SHPDA” or “appellee”) denying Columbia’s request that SHPDA reconsider its February 2001 grant of a certificate of need (“CON”) to Sibley Hospital (“Sibley” or intervenor). The CON permitted Sibley to convert a number of its surgical/medical beds to OB/GYN beds and to add two labor/delivery/recovery rooms and 12 bassinets to its bed complement. Columbia alleged competitive harm from the decision granting the CON and asserts on appeal that the SHPDA’s decision was improper because, *inter alia*, SHPDA based its determination on a finding of institutional need (*i.e.*, Sibley’s need) rather than system-wide need for

maternity beds and also ignored the obstetrical bed occupancy rate standard established by the District's State Health Plan.

During May 2002, after the parties and intervenor had submitted their briefs on the merits but before the Board was able to hear oral argument, Columbia closed its doors. On July 9, 2002, Sibley moved to dismiss the appeal on the ground that Columbia no longer had standing to prosecute the appeal since it no longer had a competitive interest to protect. Columbia opposed dismissal, asserting that it was exploring the possibility of securing funding to re-open its hospital and also explaining that the Board's decision could affect the valuation of its assets should it decide to sell its hospital facility.

On August 30, 2002, Sibley filed a supplemental reply brief, advising the Board that Columbia had sold its building, reportedly to a developer whose intention is to convert the property into condominium units; and that Columbia's license was due to expire at the end of August, 2002, after which time Columbia would no longer be licensed to operate a hospital in the District of Columbia. Sibley contends in its supplemental brief that Columbia now lacks standing to maintain this appeal for the additional reasons that it no is longer a "[h]ealth care facility[y] . . . which provide[s] services similar to the services of the facility under review" (citing D.C. Mun. Regs. tit. 22, § 4313.4(b), which sets out a list of "persons adversely affected" who may appeal a SHPDA final decision). Sibley also contends that the expiration of Columbia's license and the sale of its property for residential development mean that the Board's decision about the CON granted to Sibley cannot impact the valuation of Columbia's assets, and that Columbia now is "indifferent" to the definition of the D.C. market for medical

services. Sibley argues that the appeal now is moot because appellant Columbia "no longer has any legitimate interest in Sibley's CON application."

Columbia has not responded or sought leave to respond to Sibley's supplemental submission.

Although the Board finds that the issues of standing and mootness are neither as straightforward nor as easily resolved as Sibley contends, in the end we agree with Sibley that the appeal should be dismissed as moot.

#### **Background: The Doctrines of Standing and Mootness**

The D.C. Court of Appeals has explained that the requirement of standing is an element of jurisdiction, which helps to "insure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Speyer v. Barry*, 588 A.2d 1147, 1160 (D.C. 1991), quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). For federal courts established pursuant to Article III of the U.S. Constitution, the requirement of standing flows from the constitutional "case or controversy" requirement. *See, e.g., Flast v. Cohen*, 392 U.S. 83 (1968). Although the District of Columbia courts were not established pursuant to Article III, the D.C. Court of Appeals generally looks to federal standing jurisprudence, both constitutional and prudential, to determine whether a party has standing. *See Friends of Tilden Park, Inc. v. District of Columbia*, 806 A. 2d 1201, 1206 (D.C. 2002); *Community Credit Union Servs., Inc. v. Federal Express Servs. Corp.*, 534 A.2d 331, 333 (D.C. 1987). This means that generally a party must satisfy both the constitutional requirement of a "case or

controversy," which requires a plaintiff to show "that it has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, that the injury fairly can be traced to the challenged action, and that it is likely to be redressed by a favorable decision," 534 A. 2d at 333; and the "prudential" prerequisites of standing, which require that a plaintiff "assert only its own legal rights" rather than "attempt to litigate generalized grievances, and . . . assert only interests that fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*

As the U.S. Supreme Court has recognized, the issue of standing "bears close affinity" to the issue of mootness. *See Warth v. Seldin*, 422 U.S. 490, 499 n. 10 (1975). Both standing and mootness involve the consideration of whether a case or controversy exists. *See id.* at 498. Mootness represents "a time dimension of standing, requiring that the interests originally sufficient to confer standing persist throughout the suit." WRIGHT, *Federal Practice and Procedure*, § 3533.1, at 220 (1984). Mootness "asks whether a party who has established standing has now lost it because the facts of [its] case have changed over time." *Artway v. Attorney General*, 81 F.3d 1235, 1246 (3d Cir. 1996); *see also* Tribe, *American Constitutional Law*, § 3-14 (3d. ed. 2000) (mootness focuses on the issue being litigated, standing on the party asserting the claim).

A case is moot if "(1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the violation." *In re Morris*, 482 A.2d 369, 371 (D.C. 1984). The mootness doctrine applies when a party no longer has a legally cognizable interest in the outcome. *McClain v. United States*, 601 A.2d 80, 81

(D.C. 1992), citing *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). Like the doctrine of standing, the doctrine of mootness serves to ensure that cases are decided on the basis of full argument on a developed record. “In the absence of adversarial argument motivated by a real threat of detriment, there is less assurance that the issue presented for decision will be fully aired. Lack of full exploration of issues may limit the value of [court] decisions.” *Hardesty v. Draper*, 687 A.2d 1368, 1371 (D.C. 1997). “[P]rudent principles . . . caution against acting where a judicial determination is incapable of providing effective relief,” *Hardesty, id.* at 1372, so that in general a court should not “render in the abstract an advisory opinion.” *Holley v. United States*, 442 A.2d 106, 107 (D.C. 1981).

Nevertheless, decisions of the U.S. Supreme Court on the issue of mootness are not binding on District of Columbia courts. See *Atchison v. District of Columbia*, 585 A.2d 150, 153 (D.C. 1991). Accordingly, District of Columbia courts have declined to adhere strictly to the test for exceptions to the mootness doctrine set out in cases such as *Weinstein v. Bradford*, 423 U.S. 147 (1975) (describing an exception to the mootness doctrine in cases involving challenges to conduct that is “capable of repetition but evading review”). D.C. courts have “discretion to reach the merits of a seemingly moot controversy,” *McClain*, 601 A.2d at 82, and sometimes have chosen to rule in spite of valid mootness concerns in cases involving “overarching issues important to the resolution of an entire class of future [cases].” *In re Barlow*, 634 A.2d 1246, 1249 (D.C. 1993). In other words, “[i]n some cases, the termination of an individual controversy and the absence of a reasonable expectation that the same defendant would be subject again to the challenged conduct have not dissuaded [D.C.] courts from deciding issues where they

are important.” *McClain*, 601 A.2d at 82. The quasi-class action nature of a case is one factor to be considered where there is a mootness challenge. *See Lynch v. United States*, 557 A.2d 580, 582 (D.C. 1989).

### Analysis

#### a. Standing

In light of the apparently undisputed facts that Columbia has ceased doing business as a hospital and has sold its facility to a buyer intending to put it to a non-health care use, the standards discussed above would appear to make it an easy decision to dismiss Columbia’s appeal on either standing or mootness grounds.<sup>1</sup> As Sibley argues, even if the Board were to reach the merits of the appeal and find that the SHPDA decision was in violation of the District’s CON laws, a decision in favor of Columbia invalidating the Sibley CON would not redress the competitive injury of which Columbia complains. A Board order requiring the SHPDA to comply with the law presumably would benefit the public and possibly would benefit other would-be providers of hospital maternity services; however, under the doctrine of prudential standing, the interests of these groups are not interests that Columbia is entitled to assert. And although it is true in this case that the speed of events caused Columbia’s appeal to evade review while it was still a live controversy, the issues of whether the D.C. State Health Plan establishes mandatory limits and whether the SHPDA may consider convenience to patients in

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<sup>1</sup> Our reasoning is that the authorities discussed above appear to make dismissal appropriate, *not* that they compel the Board to dismiss. As Columbia notes, the doctrines of standing and mootness do not apply in administrative proceedings. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (“An administrative agency ... is not subject to Article III of the Constitution of the United States,” . . . so the petitioner would have had no need to establish its standing to participate in the proceedings before the agency”).

certain geographic areas of the city or must consider only system-wide need are not issues that evade review (as one of the Board's own recent decisions demonstrates<sup>2</sup>).

We hesitate to dismiss on standing grounds, however, because District CON law recognizes a wide zone of interests and appears to confer standing on persons who have participated in SHPDA proceedings without regard to whether they can allege ongoing injury from a SHPDA action. *See Speyer*, 588 A.2d 1147 at 1159ff. D.C. Mun. Regs. tit. 22, § 22-4313.1 (2002) provides that reconsideration decisions of the SHPDA may be appealed to the Board "by any person directly affected, including the applicant, the person who requested reconsideration, previously appearing parties, and the SHCC, within thirty (30) days of the date of the final SHPDA reconsideration decision." Similarly, the CON regulations permit appeals from Board decisions to be taken by any person "adversely affected" and states that "[p]ersons adversely affected by the SHPDA's final decision may be any of the following," including *inter alia* "[a]ny person who participated in the proceedings before the SHPDA or the Board of Appeals and Review" and "[a]ny person residing within the geographic area service or to be served by the applicant." D.C. Mun. Regs. tit. 22, § 4314.4(b).

The parties agree that Columbia is a "person who requested reconsideration" as well as a "previously appearing" party in the SHPDA proceedings. The language of the regulations is not clear on its face as to whether such persons by definition are "directly affected" and thus are entitled to maintain an appeal; or whether such persons are listed merely as examples of those who, if "directly affected" or "adversely affected" by a

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<sup>2</sup> See *Bio Medical Applications of D.C. v. SHPDA*, Board Docket No. 01-5619-CON (November 30, 2001).

SHPDA decision, may appeal.<sup>3</sup> The former interpretation, which recognizes a broad statutory grant of standing -- and which would appear to override any narrower rules of standing that might otherwise apply -- is the one which the D.C. Court of Appeals appears to have embraced in *Speyer*. See 588 A.2d at 1161 (reasoning that because the CON regulatory definition of "person adversely affected" contained in section 4313.4 includes any person residing in the geographic area serviced by the applicants, Georgetown residents would have standing to seek judicial review of a CON granted to a residential treatment center located in Georgetown, even though the residents asserted "generalized grievances" about the District's failure to comply with applicable laws and even though the "various criteria which are applied as part of the SHPDA review process do not include the types of neighborhood harms which the Georgetown residents claim to be seeking to avert").<sup>4</sup>

At least arguably then, under District law, a former competitor that appeared in SHPDA proceedings to contest a CON application and that alleges it was driven out of business by the improper grant of the CON retains standing to appeal the SHPDA's decision. In other words, the District's CON regulations some provide support for Columbia's argument that a CON decision that has the effect of driving a competitor out

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<sup>3</sup> Sibley urges the Board to follow *ATX, Inc. v. U.S. Dep't of Transportation*, 41 F. 3d 1522, 1529 (D.C. Cir. 1994), as persuasive authority for the proposition that laws conferring standing to sue on "any person" or any similarly broad category of potential litigants must be read to exclude persons who have no legitimate interest in the outcome of a proceeding.

<sup>4</sup> *But see Friends of Tilden Park*, 806 A.2d at 1201 (explaining that *Speyer* did not imply that standing can exist without concrete injury).

of business<sup>5</sup> should not be shielded from review by the mere fact that the competitor cannot allege ongoing competitive injury.<sup>6</sup>

**b. Mootness**

That is not the end of the discussion, however, because the mootness doctrine, which the CON regulations do not address, and the various prudential considerations that it serves, also come into play. The facts do appear readily to establish that this case is moot. With Columbia having closed and sold its facility, “it can be said with assurance that there is no reasonable expectation” that SHPDA will render another CON decision that will cause Columbia competitive harm, *see In re Morris*, 482 A.2d at 371; and “interim . . . events have completely and irrevocably eradicated the effects” of the challenged CON on Columbia. *Id.* We agree with Sibley that Columbia “no longer has a legally cognizable interest in the outcome.” *McClain v. United States*, 601 A.2d at 81. That Columbia may continue to regard the SHPDA decision as unlawful does not save this appeal from being moot. *Cf. Radiofone, Inc. v. FCC*, 759 F.2d 936 (D.C. Cir. 1985) (holding that where radio paging service company went out of business while appeal was pending, case brought by competitors to challenge FCC determination that the company

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<sup>5</sup> We emphasize, however, that we reach no conclusion about the merits of Columbia’s argument that its financial difficulties and closure are traceable to the CON in issue here.

<sup>6</sup> The Board’s own regulations permit filing of the notice of appeal by “[a]n aggrieved person, owner of the property, or licensee.” D.C. Mun. Regs. tit. 1, § 503.2 (2002). Sibley contends that Columbia is no longer an aggrieved person. The Board concludes that, for purposes of an appeal from a SHPDA reconsideration decision, it is appropriate to interpret the reference in section 503.2 to an “aggrieved person” in a manner that is consistent with the review provisions of the CON regulations. Since, under the authority discussed above, Columbia would have standing to appeal further to the D.C. Court of Appeals on the basis of its participation in the SHPDA proceedings, we see no reason to interpret the term “aggrieved” in our own regulations to exclude Columbia from maintaining this appeal on standing grounds.

was a private land mobile radio operator rather than a common carrier was moot, despite continuing abstract dispute over the FCC's reasoning, because appellant's "injury must . . . arise from the particular activity which the agency adjudication had approved . . . and not from the mere precedential effect of the agency's rationale in later adjudications"); *Powers v. American Honda Motor Co., Inc.*, 1998 WL 173310 (N.D.N.Y. 1998) (case was moot because plaintiff that went out of business no longer could complain of franchisor terminating it by reason of failure to adhere to safety directives).

Nevertheless, we should not dismiss on mootness grounds without considering whether this appeal presents "circumstances adequate to persuade us to depart from the principle that an adversary system can best adjudicate real, not abstract conflicts." *McClain*, 601 A.2 at 83. In other words, we must consider whether this appeal implicates important rights or presents important and overarching public policy issues that make it appropriate for us to rule on the merits despite the current factual posture.

Columbia asserts that this appeal, in which it would function as a sort of private attorney general, raises fundamental questions concerning the District's CON law, resolution of which will offer valuable guidance for future health planning by the SHPDA apart from resolution of the specific CON at issue here. It asserts that the District is not well-served by adding maternity beds at Sibley, which serves far Northwest D.C. and portions of neighboring counties, and that, even with Columbia's closure, Sibley should be required to show public need in light of new circumstances.<sup>7</sup>

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<sup>7</sup> If important, the review could go forward despite Sibley's having implemented what it proposed in its CON. The CON regulations put applicants on notice that they proceed at their own risk pending the outcome of any appeal. *See* D.C. Mun. Regs. tit. 22, § 4000.5 (advising that CONs are valid upon issuance but that "because a Certificate of Need may be revoked or modified by the SHPDA as a result of a reconsideration or appeal decision, each applicant shall proceed solely at their own risk during the period in which

No doubt, most if not all people would agree that it is important to have an adequate supply of maternity beds in the District; and so Columbia's argument might have force if the challenged SHPDA decision could be characterized as an unlawful decision that stands in the way of maternity-bed additions that might be proposed to meet the needs of District residents residing in sectors of the city not generally served by Sibley. But Columbia's complaint instead is that the SHPDA gave priority to the need in Sibley's service area rather than city-wide need. Whatever the merits of the Sibley CON decision, the Board has been presented with no reason to surmise that the SHPDA would not use the same approach in determining whether to grant a CON to another hospital proposing to add maternity beds to serve the population residing in other sectors of the city. That being the case, in light of Columbia's closure, the record gives the Board no basis for concluding that District residents are being harmed by maintenance of the additional maternity beds at Sibley and that a ruling on the lawfulness of the Sibley CON is needed at this time.<sup>8</sup>

We conclude therefore that this is not a case presenting issues of overarching public importance in which we should rule despite mootness.<sup>9</sup>

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reconsideration or appeal may be requested and during any period that any reconsideration or appeal is in process").

<sup>8</sup> In addition, as noted above, Columbia has not responded to Sibley's supplemental brief asserting additional reasons why the appeal should be dismissed. To the extent that it is appropriate to think of this action as a quasi-class action to enforce the District's CON laws, it may very well be that Columbia no longer is willing or able to prosecute this appeal as quasi "class representative."

<sup>9</sup> At this point it appears to be nothing more than a dispute between two former competitors that should be dismissed. *Cf. Charter Lakeside Behavioral Health System v. Tennessee Health Facilities Commission*, 2001 Tenn. App. LEXIS 58 (Jan. 30, 2001) (where plaintiff mental health provider filed complaint challenging defendant/competitor's opening of a new facility without a CON, subsequently filed for

WHEREFORE, it is ORDERED this 14th day of March 2003 that this appeal is  
DISMISSED as moot.



Phyllis D. Thompson, Legal Member

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bankruptcy and sold its assets other than its lawsuits, and no longer operated a mental health facility, case was moot because plaintiff was no longer at odds with defendant and court could not provide meaningful relief).

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

GOOD HOPE INSTITUTE, INC. ,	)	
	)	
<i>Appellant,</i>	)	
v.	)	BAR Docket No. 02-5783-CON
	)	
DEPARTMENT OF HEALTH,	)	
STATE HEALTH PLANNING AND	)	
DEVELOPMENT AGENCY,	)	
	)	
<i>Appellee,</i>	)	
	)	
FAIRLAWN CITIZENS ASSOCIATION, INC.,)	)	
	)	
<i>Intervenor.</i>	)	

**DECISION AND ORDER**

The Board of Appeals and Review ("Board") has before it a Joint Motion for Expedited Approval and Issuance of Proposed Decision and Order filed by, Appellant, Good Hope Institute, Inc. ("GHI"), and, Appellee, the State Health Planning and Development Agency ("SHPDA") of the Department of Health, requesting the Board to approve and issue this Decision and Order as the Board's Decision and Order and thereby to terminate this proceeding.

Upon consideration of the Joint Motion and the entire record on appeal, and for the reasons that follow, the Board hereby issues this Decision and Order requiring SHPDA to issue to GHI a Certificate of Need ("CON") for a freestanding outpatient methadone maintenance treatment facility at 1320 Good Hope Road, S.E., Washington, D.C.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW****A. STANDARD OF REVIEW**

In reviewing a decision of SHPDA, the BAR must "take due account of the presumption of official regularity, the experience, and specialized competence of the SHPDA, and the purpose of [the D.C. laws governing issuance of Certificates of Need]." D.C. Code § 44-413(b) (2001). SHPDA supports the granting of a CON to GHI pursuant to this Decision and Order. In deciding to grant the CON, the Board has accorded due deference to SHPDA's experience and specialized competence.

Pursuant to the D.C. Code § 44-413, the final decision of SHPDA, however, is that of the Board. The Board, in the light of the applicable statutory and regulatory standards, has reviewed the voluminous record, including the additional evidence which was presented on behalf of the parties to the appeal, pursuant to the Board's several procedural orders, and, independently of the settlement agreement reached by GHI and SHPDA, the Board come to the conclusion that GHI has met its burden of proof and that the it should be granted the CON for which it had applied.

**B. CERTIFICATE OF NEED CRITERIA**

Six regulatory criteria apply to CON applications generally and to GHI's CON application 00-6-7: quality, continuity, financial feasibility, acceptability, need and accessibility. *See* 1989 District of Columbia State Health Plan, ch. VII.

GHI's proposed methadone maintenance treatment program at 1320 Good Hope Road, S.E. in Anacostia meets all six criteria.

**1. Quality, Continuity, Financial Feasibility and Acceptability**

GHI has demonstrated that its proposed methadone treatment clinic satisfies the regulatory criteria of quality, continuity, financial feasibility and acceptability. The

Board adopts by reference SHPDA's findings regarding these four criteria set forth on pages 12-16 of SHPDA's September 10, 2001, Findings in the Matter of Good Hope Institute, Inc. Certificate of Need Registration No. 00-6-7 ("September 10, 2001 SHPDA Decision").

2. Need

GHI has demonstrated that its proposed methadone treatment clinic satisfies the regulatory criterion of need. The criterion of need refers to need "on a system-wide basis." 22 DCMR § 4050.6. According to the State Health Plan, "[t]he capacity of the [drug] treatment system should be adequate to meet the demand for treatment . . . ." 1989 District of Columbia State Health Plan at VII-B-35. SHPDA's review of GHI's CON application properly included consideration of the "service and/or facility levels required for the District" as a whole. 22 DCMR § 4050.6.

The Board adopts by reference SHPDA's findings regarding the criterion of need set forth on pages 5-8 of the September 10, 2001, SHPDA Decision, including:

- APRA has estimated a probable shortage of methadone treatment slots city wide of 2,000 to 2,500; and
- Demand for methadone treatment in the District exceeds the existing capacity.

The Board further adopts SHPDA's finding, set forth on page 9 of the September 10, 2001, SHPDA Decision, that GHI "has demonstrated the overall need for establishing a methadone treatment program." GHI's proposed methadone treatment facility would help meet the District's need for methadone treatment. The Board concludes that the above findings fully satisfy the criterion of need.

3. Accessibility

GHI has demonstrated that its proposed methadone treatment clinic satisfies the regulatory criterion of accessibility. The accessibility criterion takes into account many factors, including standards for admission to a clinic, the populations a clinic will treat, compliance with federal and District laws, and accessibility by both public and private transportation. *See* 22 DCMR §§ 4050.12, 4050.13, 4050.16; 1989 District of Columbia State Health Plan at VIII-B-50.

The Board adopts by reference SHPDA's findings regarding the criterion of accessibility set forth on page 11 and in the first two paragraphs on page 12 of the September 10, 2001, SHPDA Decision, including:

- GHI's proposed clinic will accept patients on referrals from public and private physicians, hospitals, HMOs, community-based health and social services agencies, and self-referrals;
- GHI's proposed clinic would be accessible to all populations, including minorities, disabled, women and formerly incarcerated individuals.
- GHI will not turn away patients based solely on an inability to pay for treatment; and
- GHI's proposed clinic will comply with all District and federal laws and guidelines.

The Board also adopts by reference SHPDA's finding, set forth on page 12 of the decision, that GHI "indicates that the proposed facility is located near public transportation making it accessible not only to the residents of Anacostia but to other residents of the District as well."

Furthermore, the State Health Plan states that drug treatment services should be geographically accessible and that "[t]here should be at least one outpatient program in each ward in the District." 1989 District of Columbia State Health Plan at VII-B-50. In

accordance with the State Health Plan, SHPDA and, therefore, the Board may consider ward boundaries, together with other factors, in determining whether GHI's proposed methadone treatment program satisfies the accessibility criterion for a CON.

The Ward Redistricting Amendment Act of 2001, which was signed by the Mayor on June 29, 2001 (more than two months before the September 10, 2001, SHPDA Decision) and became law on October 2, 2001, made changes to the District's ward boundaries, effective January 1, 2002. In reviewing GHI's CON application, SHPDA considered, among other factors, the ward boundaries as they existed prior to January 1, 2002. *See* September 10, 2001 SHPDA Decision at 10.

As a result of the ward boundary changes, the proposed location for GHI's methadone treatment program at 1320 Good Hope Road, S.E., which previously was in Ward 6, is now in Ward 8. Ward 8, situated entirely east of the Anacostia River ("East of the River"), has not had any methadone treatment services either before or after the ward boundary changes. Moreover, the only methadone treatment located East of the River is the Umoja Methadone Treatment Clinic, located in the area of Ward 7 that is furthest from Ward 8. *See* September 10, 2001, SHPDA Decision at 10 (map of District of Columbia showing locations of existing methadone clinics).

The Board has discretion to consider these ward boundary changes as "additional evidence presented on behalf of the parties to the appeal." D.C. Code § 44-413(b) (2001). The Board finds that because no methadone treatment programs are currently located in Ward 8 and the only methadone clinic located East of the River is not near Ward 8, GHI's proposed clinic in Ward 8 would enhance the geographic accessibility of

methadone treatment services and further the State Health Plan goal of having at least one treatment facility in each ward.

The Board concludes that the above findings fully satisfy the criterion of accessibility.

C. COMMUNITY INPUT

Under the applicable statute and regulations, residents of the affected neighborhood have “the right to participate in the proceedings before [SHPDA],” whether or not SHPDA is “likely to address issues pertinent to the kinds of concerns . . . being expressed by neighborhood residents.” *Speyer v. Barry*, 588 A.2d 1147, 1161 (D.C. 1991); see 22 DCMR § 4201.2 (persons entitled to notification of SHPDA’s review include “members of the public who reside in . . . the geographic area . . . to be served by the applicant”); 22 DCMR § 4050.14 (CON criteria include “[i]nvolvement of the community in the process of project planning and/or development); cf. D.C. Code § 1-309.10(d)(3)(A) (2001) (“issues and concerns raised [by Advisory Neighborhood] Commission shall be given great weight during the deliberations of the [District] government entity”).

GHI complied with the public notice requirements of the CON regulations, 22 DCMR § 4201.2, by providing public notice of its proposed methadone treatment clinic at 1320 Good Hope Road, S.E., including publication of such notice in a newspaper of general circulation in the District as well as notice to the affected Advisory Neighborhood Commission.

SHPDA received numerous comments on GHI’s CON application from the affected community, including, Intervenor, the Fairlawn Citizens Association, Inc. (“Fairlawn Citizens Association”), at public hearings held on June 20, 2000, August 15,

2000, and October 12, 2000. *E.g.*, September 10, 2001, SHPDA Decision at 16-19 (summarizing concerns expressed by community at Aug. 15, 2000 hearing). These public comments are part of the record in this appeal. In addition, the Fairlawn Citizens Association intervened in this proceeding before the Board, and, as such, had an opportunity to conduct discovery, to submit evidence and to advance legal arguments. The Fairlawn Citizens Association filed a brief on the merits and three Opposition statements challenging the propriety of the Joint Motion for approval and issuance of this Decision and Order.

In essence, Fairlawn Citizens Association maintains that the Joint Motion was the product of a secret settlement of the dispute between GHI and SHPDA, motivated, in part, at least, by the desire to conclude the pending court case, C. A. No. 02-1372 (LFO), Good Hope Institute, Inc. v. Anthony Williams, et al., before the United States District Court for the District of Columbia, as well as the instant appeal. Fairlawn Citizens Association argues that, if SHPDA now has changed its mind, the appropriate action for the Board to take is to dismiss GHI's appeal from SHPDA's decisions of September 10 and November 22, 2001, which denied GHI's CON Application, and to oblige GHI to file a new, third Application for a CON. Fairlawn Citizens Association seems to believe that the Board cannot take into account in reaching its conclusion the fact that the methadone clinic which GHI proposes to operate will be located in Ward 8 and that Ward 8 contains no other free standing outpatient methadone maintenance treatment facility. The Association, moreover, seem to overlook that the Board may consider not only the record as developed before the instant appeal was filed but also the testimony and exhibits which were introduced subsequent to the filing of the appeal, as authorized by the Board's

several procedural orders. The objections of Fairlawn Citizens Association are not well taken. Singularly lacking from its several statements in opposition to the Joint Motion are any allegations that GHI has failed to satisfy the statutory and regulatory standards for securing a CON. Neither does the Fairlawn Citizens Association offer any grounds why the Board, independently of the Joint Motion, could not reach the conclusion that, since GHI has met the requirements for being granted a CON, SHPDA should be required forthwith to issue the CON. The Association offers no sound reason why it would be in the public interest to further delay the issuance of the CON and to oblige GHI to go through yet another, third Application process. The Association's opposition to GHI's methadone clinic is a matter of record and need not be articulated yet another time.

The parties are to be commended rather than condemned for amicably resolving the disagreement which led to GHI's appeal and this proceeding. Their settlement agreement is not binding upon the Board, and the Board is obligated to reach its own conclusion based on the record as a whole, according the prior decisions of SHPDA the deference to which they are due. This the Board has done.

The Board has considered the community's views to the extent that they relate to the applicable criteria, including the view that there are already numerous substance abuse treatment facilities and other social services programs in the area in which GHI proposes to locate its methadone treatment clinic.

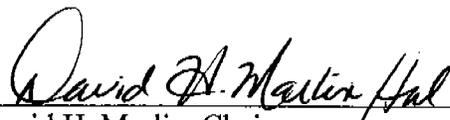
#### ORDER

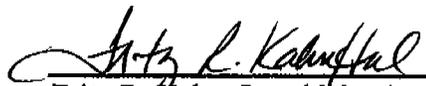
Having considered the entire appellate record, the relevant statutes and regulatory criteria, the community input, the fact that SHPDA supports the issuance of this Decision and Order, and SHPDA's experience and specialized competence in health planning for the District, the Board finds that GHI's application for a CON for a freestanding

outpatient methadone maintenance treatment facility at 1320 Good Hope Road, S.E. should be granted.

SHPDA shall, within three business days of the date of this Decision and Order, issue the attached letter and Certificate of Need (Attachment A) authorizing GHI to establish a freestanding outpatient methadone maintenance treatment facility at 1320 Good Hope Road, S.E. This Decision and Order shall be deemed final agency action (*see* D.C. Code § 44-413(b) (2001)), and the Board shall not entertain any appeal from the Certificate of Need that SHPDA issues in compliance with this Decision and Order. Any appeal from this final decision shall be made directly to the District of Columbia Court of Appeals, pursuant to D.C. Code § 2-510 (2001) and 22 DCMR § 4313.2.

Dated: December 23, 2003

  
\_\_\_\_\_  
David H. Marlin, Chairman

  
\_\_\_\_\_  
Fritz R. Kahn, Legal Member

MAY 21 2004

[Date]

Neal Berch  
President  
Good Hope Institute  
1320 Good Hope Road, S.E.  
Washington, D.C. 20019

**Re: Establishment of a Freestanding Outpatient Methadone Maintenance Facility --  
Certificate of Need Registration No. 00-6-7.**

Dear Mr. Berch:

The D.C. State Health Planning and Development Agency ("SHPDA") has approved your application for a Certificate of Need as referenced above. The Certificate of Need is enclosed.

This Certificate of Need is being issued pursuant to the Decision and Order of the D.C. Board of Appeals and Review in BAR No. 02783-CON ("Decision and Order"), which is deemed to be the final decision of SHPDA. Any appeal from the Decision and Order should be made directly to the D.C. Court of Appeals, pursuant to D.C. Code § 2-510 (2001) and 22 DCMR § 4313.2 (2003).

If you have questions concerning this matter, please do not hesitate to contact me.

Sincerely,

[Name]  
[Director or Acting Director]

Enclosure

cc:

Attachment A

**DISTRICT OF COLUMBIA  
STATE HEALTH PLANNING AND DEVELOPMENT AGENCY (SHPDA)  
Notice of Official Action  
Certificate of Need  
Number 00-6-7**

Good Hope Institute is hereby awarded this Certificate of Need in conformance with the District of Columbia Certificate of Need statute, D.C. Code § 44-401 et seq., to establish a freestanding outpatient methadone maintenance treatment facility at 1320 Good Hope Road, S.E.

This issuance is based on the [date] Decision and Order of the D.C. Board of Appeals and Review in BAR No. 02783-CON to issue to Good Hope Institute a Certificate of Need and on all specifications contained in the Certificate of Need application and related documents in the record. Deviations from the specifications are allowable pursuant to the statute. The capital expenditure associated with this project is \$699,400. The State Health Planning and Development Agency herewith makes all findings applicable to this issuance as required by the statute.

This Certificate of Need is valid for one year from date of issuance unless: (1) its issuance is revoked following further proceedings in accordance with D.C. Code § 44-414; (2) it is withdrawn by Good Hope Institute; or (3) it is terminated because the State Health Planning and Development Agency has certified that operations may begin, in accordance with D.C. Code § 44-409 (j).

Unless this Certificate of Need has been revoked, withdrawn, or terminated, quarterly progress reports must be submitted to the State Health Planning and Development Agency three months, six months, nine months and twelve months from the date of this Certificate of Need.

Notification of the proposed date for the initiation of operation of the facility or service approved here should be provided to the State Health Planning and Development

Agency no later than thirty days prior to the proposed date for the initiation of operation so that the review required by D.C. Code § 44-409 may be conducted.

Signed this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

Sincerely,

[Name]

[Director or Acting Director]

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

BRICE WARREN CORPORATION, INC.  
RCM OF WASHINGTON, D.C.

Appellant,

v.

DEPARTMENT OF HEALTH,  
MEDICAL ASSISTANCE ADMINISTRATION,

Appellee.

BAR Docket No.  
98-5358-PA

FINDINGS OF FACT, CONCLUSIONS OF LAW

AND ORDER

This matter was continuously heard before a panel committee (committee), the first hearing, consisting of Shirley S. Henderson, Public Member, James L. Thorne, Esq. Public Member, and Francine Howard James, Director, on November 30, 1998. The first continued hearing occurred on December 2, 1998, and was conducted, before committee, consisting of Claude L. Matthews, ESQ., Chairperson, Shirley S. Henderson, Public Member, and James L. Thorne, ESQ., Public Member. The second continued hearing occurred on June 2, 1999, before committee, consisting of Claude L. Matthews, Chairperson, and MaryAnn Miller, District Government Member. The third continued hearing occurred on July 15, 1999, before committee, consisting of Claude L.

Matthews, ESQ., Chairperson, and MaryAnn Miller, District Government Member. The fourth continued hearing occurred on July 16, 1999, before committee, Claude L. Matthews, ESQ., Chairperson, MaryAnn Miller, District Government Member. The following persons presented testimony: Amy L. Brooks, President, RCM of Washington, Marsha L. Brevard, Executive Director, RCM of Washington, Mary Elizabeth Rulow, auditor, Bert Smith and Company, Abigail Williams, Partner, Bert Smith and Company, Jane Young, Chief of Long-term Care and Economic Recovery Office, District of Columbia, Department of Health, Medical Assistance Administration ("MAA"), Jane D. Yorkman, Supervisory Public Health Analyst, District of Columbia MAA, Yvette Cheeks, Financial Manager, District of Columbia, Department of Health, MAA, Appellant.

2. The Appellant filled this appeal on September 21, 1998, to the Board of Appeals and Review after the District of Columbia, Department of Health, MAA (intermediary), terminated four Medicaid Provider Agreements for RCM of Washington.

#### FINDINGS OF FACT

On October 11, 1989, Brice Warren became incorporated in the District of Columbia.

July 15, 1992, IRS, DEA and, OHIO law enforcement officials raid and seize property of Carl Peterson, as Carl Peterson Enterprises, Inc.

In February 1994, Carl Peterson, indicted in U.S. District Court for the Southern District of Ohio Eastern District, for Medicaid fraud. Resulting from an investigation through the Ohio

Medicaid Program, Bureau of Long Term Care Administration for (False filings for calander years 1990, 1991 and 1992).

In May of 1994, Bert Smith and Company (BSC), an independent contractor, was contracted by MAA, Health Care Finance Administration, to conduct and audit for financial data from Brice Warren for the fiscal years 1991-1992.

On July 15, 1996, Brice Warren dissolved its' corporate status in the District of Columbia.

February 27, 1996, Carl Peterson indicted US District Court (OHIO).

On May 7, 1997, Carl Peterson, Ph.D. purported to be the sole member of Brice Warren Corporation, a District of Columbia nonprofit corporation elected five members as directors of the Corporation.

On May 7, 1997, five of the Directors to expand its' [BWDC] Directors to six and voted Milton Roberts, as Vice President & Secretary and Amy Brooks, as Vice President & Treasurer. The Board of Directors were Eric Mumford, Marsha Brevard, Amy Brooks, Gwendolyn Tucker and Milton Roberts.

On May 7, 1997, Carl Peterson resigned as President of Brice Warren and relinquished any "membership interest" in the company [BWDC].

11. On July 17, 1997, Diane Spence, Program Director, for Brice Warren Corporation, sent a letter to Ms. Judith McPherson, of the Office of Consumer and Regulatory Affairs regarding organizational changes within Brice Warren.
12. On September 16, 1997, Brice Warren, obtained an Agreement for intermediate Care Facility participation in the Title XIX Medical Assistance Program.
13. On December 3, 1997, Carl Peterson was convicted of , among other things, Medicaid violations.
14. On January 8<sup>th</sup>, 1998, RCM of Washington, Inc., was formed. The Initial Board of Directors, was Milton W. Roberts.

On January 9, 1998, the unsigned and undated "Minutes of First Annual Meeting" of the RCMs' Board were held and Amy L. Brooks became (President), Marsha Brevard became Treasurer, and Milton Roberts became Secretary, also included Gwendolyn Tucker.

16. On January 8, 1998 RCM filed OMB 0938-0086, "Disclosure of Ownership and Control Interest Statement".
17. On January 16, 1998, Marsha L. Brevard, wrote Ms. Judith McPhearson, Program Director of the D.C. Department of Health Licensing Regulation Administration, that "As of 12:00 p.m. January 7<sup>th</sup>, 1998 Brice Warren Corporation was dissolved as a corporation. As of 12:01 a.m. January 8<sup>th</sup>, 1998 a new corporation was formed...the new corporation is RCM of Washington, Inc.
18. In January 1998, Amy Brooks, Marsha Brevard, and Milton Roberts brought Carl Peterson's conviction to the attention of Jane Yorkman, Supervisory Public Health Analyst, (MAA) \* Ms. Yorkman, met and knew Carl Peterson (BWDC), in 1990 and continued to oversee BWDC in a related capacity until the filing of this appeal.
19. On February 6, 1998, Brice Warren filed OMB 0938-0086, "Disclosure of Ownership and Control Interest Statement
20. On February 1998, BSC, requested BWDC for audit data for calendar year 1995-1995.
21. On March 30, 1998, (BSC), contacted BWDC to conduct audit "entrance conference".
22. On April 1, 1998, BWDC requested BSC to reschedule "entrance conference", to April 3, 1998.
23. On April 15, 1998, RCM contacted BSC to reschedule 'entrance conference'.
24. On June 8, 1998, BWDC provided several non-labeled boxes to BSC, absent General Ledgers and Trial Balance Statements for audit purposes.
25. Also, on June 8, 1998 BSC determined the data could not be audited and left the premises.

On June 12, 1998, MAA notified RCM of its Intent to Terminate your Medicaid Provider Agreements for the four subject facilities.

27. Sometime in June 1998, Kate Acuff, legal counsel for MAA , left the organization..
28. On September 1,1998, MAA, notified RCM of Washington ("RCM"), of it's decision to terminate Medicaid Provider Agreement with RCM for the facility located at: 401 C Street, N.E., )formerly, 1129 Delaware Avenue, SE, Washington, D.C. (Medicaid Provider Number 09G112).
29. On September 1, 1998, MAA, notified RCM of it's decision to terminate Medicaid Provider Agreement with RCM for the following facilities: (1)1131 45<sup>th</sup> Place,SE., (Medicaid Provider Number 09G085 (2) 3117 11<sup>th</sup> Street, NW, (Medicaid Provider Number 09G095 and, (3) 1428 Independence Avenue, SE, (Medicaid Provider Number 09G065.
30. On September 1,1998, MAA, notified RCM of Washington ("RCM"), of it's decision to terminate Medicaid Provider Agreement with RCM for the facility located at: 401 C Street, N.E.,) formerly, 1129 Delaware Avenue, SE, Washington, D.C. (Medicaid Provider Number 09G112).
31. On September 1, 1998, MAA notified RCM of its decision to terminate Medicaid Provider Agreement with RCM for the following facilities: (1) 1131 45<sup>th</sup> Place, SE. (Medicaid Provider Number 09G085 (2) 3117 11<sup>th</sup> Street, NW, (Medicaid Provider Number 09G095 and,(3) 1428 Independence Avenue, SE, (Medicaid Provider Number 09G065.
32. MAA, rendered its decision on three bases: (A) "RCM cannot claim the benefits of Brice Warren's (BWDC), Provider Agreements without also assuming the legal obligation to maintain and upon request, produce financial records", pursuant to Section 1902(a)(4) of the Social Security Act: 42 CFR 442.14, in the District of Columbia's Agreement of Intermediate

Care Facility Participation in the Title XIX Medical Assistance Program. (B) “Whether as successor in interest or assignee to the Brice Warren provider Agreements, RCM assumed Brice Warren’s obligations under those Agreements. These obligations clearly included the duty to inform MAA of Dr. Peterson’s Medicaid fraud conviction...” pursuant to 42 CFR 455.106, and (C) “for good cause”, pursuant to 42 CFR 442.12(d).

33. Subject Appeal filed September 21, 1998.

### CONCLUSIONS OF LAW

#### General Failure to produce financial records:

33. Chapter 13 DCMR at 1300.2, state, “This Chapter shall be construed in conjunction with title XIX of the Social Security Act, applicable to federal regulations, pertinent District laws, regulations governing the District’s Medicaid program pursuant to SS1-359, D.C. Code 1981 ed., and the District of Columbia Office of Health Care Financing Provider Manual.” Therefore, the District of Columbia has also enabled itself, as a “state agency”, to enforce Title XIX provisions. The provisions cover mentally retarded persons.
34. Section 1902(a)(27) of Title XIX, subsection (B) provides that [providers], furnish the State agency with such information regarding payments claimed by such persons or institutions for providing services under the State Plan as the state Agency may from “time to time” request. On the other hand, at A (1), of the Health Care Provider Agreement, the Agreement requires ICF-MR providers, “To furnish a cost report “annually.”
35. The term “time to time”, in Title X, subsection (B), is vague, but it may not on its face be unreasonable. Because MAA officials did not submit a copy of, or portions of, the “District of Columbia Office of Health Care Financing Provider Manual”, the BAR does not know the

District's determination of what "time to time" means, with respect to its regulatory audit enforcement procedures.

36. In contra-distinction to the term "annually" which is imposed on ICF-MR providers, it is clear that the "state agency" might not audit financial records of an ICF-MR provider annually, but rather "from time to time".
37. In early 1994, District officials requested audit information from BWDC for 1991 – 1992 fiscal years. In 1998 MAA, finally determined to terminate BWDC's ICF-MR provider agreement, based on BWDC's non-compliance of audit ready compiled data, which also included 1991-1992 fiscal years.
38. The law is silent regarding the length of time ICF- MR providers must maintain cost records, other than compiling them annually. Although, MAA did not present its' operational manual, MAA officials testified that the manual and the District regulations sprang from Federal regulations.
39. 42 CFR 413.20 also provides that ICF-MR audits are to be conducted from "time to time".
40. Appellant argues that MAA required BWDC to maintain its' records beyond that which is required by District law. The Board disagrees with Appellant, that BWDC was required to maintain records beyond that which "is required by DC law".
41. Appellant failed to identify what District provision or, any specific Federal provision to support its claims. The BAR notes that because of the vagueness of the law and regulations that a fundamental flaw in law exists with respect to the discretion a state agency has in providing a time certain to conduct ICF-MR audits, other than from time to time.
42. Moreover, Appellant failed to compile and maintain local audit ready financial (cost data), per facility, including Trial Balance Sheets and General Ledgers pursuant to any Federal or local

standard. Refer: 42 CFR. 413.24(a) and (b), 42 CFR 413.17(b)(2), and 42 CFR 400.300.

Specifically, 44 U.S.C., Chapter 35 forbids agencies to engage in a "collection of information."

43. Therefore, MAA officials could not collect nor compile cost information on behalf of BWDC as requested by BWDC in furtherance of BWDC's audit.

**Specific failure to produce record-keeping data:**

44. Board must take notice that apart from infants and toddlers, the mentally ill are perhaps the next most vulnerable segment of our society. During the month of December 1999, the Washington Post published a series of articles that about this cities mentally ill patients. It reported that many patients residing in ICF-MR facilities have suffered loss of life or, have sustained substantial injuries allegedly due to improper medical treatment at these facilities.
45. It also noted that one of the facilities, cited by the Washington Post, was owned and operated by Carl Peterson. Summarily, despite the flaw, in regulating the time a state agency may request cost data pursuant to 42 CFR 413.20, it is specific, in stating the requirements of financial data and cost reporting that an ICF-MR provider shall adhere to.
46. 42 CFR 413.20(a), entitled, "Financial Data and Reports", state in part, "The principles of cost reimbursement require that providers maintain sufficient financial records and statistical data for proper determination of costs payable under the program. Standardized definitions, accounting, statistics, and reporting practices that are widely accepted in the hospital and related fields are followed.
47. Subsection (b), provides for the frequency of cost reports, and it states, in part, "Cost reports are required from providers on an annual basis with reporting periods based on the providers accounting year."

Subsection (d), entitled, "Continuing provider record-keeping requirements", under (1), state that, "The provider must furnish such information to the intermediary as may be necessary to (1) Assure proper payment by the program, including the extent to which there is any common ownership or control (as described in 413.17(b)(2) and (3)) between providers or other organizations, and as may be needed to identify parties responsible for submitting program costs." Emphasis supplied.

49. Moreover, 42 CFR 413.20 (d)(iii)(2), states, "The provider must permit the intermediary to examine such records and documents as are necessary to ascertain information pertinent to the determination of the proper amount of program payments due. This record includes, but are not limited to, matters pertaining to:

- (1) Provider ownership, organization, and
- (2) Operation; Fiscal, medical, and
- (3) Other record-keeping systems;
- (4) Franchise or management arrangements;
- (5) Costs of operation; and
- (6) Flow of funds and working capital."

50. 42 CFR 413.24, entitled "Adequate cost data and cost finding", provide in (a), supra, that cost must be capable of verification by qualified auditors. The cost data must be based on an approved method of cost finding and on the accrual basis of accounting."

51. Further, 413.24 (c) entitled, "Adequacy of cost information." states, in relevant part, that, "Adequate cost information must be obtained from the provider's records to support payments made for services furnished to beneficiaries." "The requirement of adequacy of data implies the data is adequate and in sufficient detail to accomplish the purposes for which it is intended.

Adequate data capable of being audited is consistent with good business concepts and effective management of any organization, whether it is operated for profit or on a nonprofit basis.”

52. 42 CFR 400.300 provides for regulating control of the paperwork burden on the public. It cites 44 U.S.C. Chapter 35, which requires that, “agencies shall not engage in a “collection of information” without obtaining a control number from OMB.”
53. 42 CFR 400.310, entitled, “Display of currently valid OMB control numbers”, identifies current 42 CFR sections that contain provisions for collections of information. None of provisions cited, in the instant matter, enable MAA, or its designates, to “compile” information.
54. Subpart B (1), of the District of Columbia Agreement (“Agreement”) For Intermediate Care Facility Participation, provides that the Provider,” furnish a cost report annually including a form reflecting individual Medicaid Patient assets and resources.”
- In the instant case, the conviction of Carl Peterson occurred in December 1997.
56. Carl Peterson owned Carl Peterson Enterprises, Inc., (CPE) located in Ohio. CPE owned Brice Warren (Ohio) and Brice Warren (DC). Part of the evidence that was obtained by IRS, DEA, and Ohio law enforcement officials was cost data of Brice Warren (Ohio) for the fiscal years 1991 through the first half of 1992.
57. Prior to Carl Peterson’s conviction the current principals of BWDC and RCM were employees or officers of Carl Peterson Enterprises Inc., they did not own any equipment or furnishings of BWOH or BWDC.
58. Appellants claim that all records generated by BWDC were sent to BWOH, including General Ledgers and Trial Balances.

In 1994, MAA officials requested BWDC/RCM audit data for the 1991 - 1992 fiscal years.

Subsequently MAA requested 1993 through 1998.

60. BWDC advised MAA that it could not provide audit data for fiscal years 1991-1992 because all of the information was sent to BWOH, and as such, it was among the data seized in the Federal and State raid of Carl Peterson Enterprises, Inc., in Ohio.
61. Evidence indicated that the 1991-1992 material was returned to BWOH, in 1994, as indicated in a sworn Affidavit of Richard Lewis, Special Agent, Criminal Investigations Division, Internal Revenue Service, submitted to the District of Columbia Board of Appeals and Review (BAR) dated September 24 1999.
62. Notwithstanding, BWDC claimed that it also sent cost data, including Trial Balance Sheets and General Ledgers, to CPE, for subsequent years, because Carl Peterson requested it for his appeal.  
  
When BWDC did furnish cost data, to MAA auditors, it was not properly compiled, and it did not contain General Ledgers or Trial Balances for 1991-1992.
54. To date neither BWDC nor RCM have furnished MAA with properly compiled cost data, including Trial Balanced Sheets and General Ledgers, for 1991-1997.
55. As cited above, 42 CFR 413.20, are flawed concerning what "time to time" means with respect to state audits of ICF-MR, it is clear that financial data must be compiled, to be "furnished annually" by each ICF-MR provider, for each facility.
56. Although, BWDC was obligated to forward financial data to Carl Peterson; it was required by law to maintain its financial data at each facility, as well.
7. BWDC/RCM woefully failed to comply with Federal and District law and regulations in furnishing its financial (cost) data to MAA audit authorities.

MAA, in its' discretion, also could have moved to terminate BWDC's Provider Agreements before 1994 for non-compliance of having audit ready documentation available. It certainly could have done so before 1998. It certainly could have done so before 1998.

69. MMA enforcement behavior highlights the flaw in statute and regulatory language of "from time to time".
70. Appellant failed to establish a prime facie case with respect to this issue.

**Disclosure – Notice of Conviction**

71. Legal Counsel for MAA, knew of Carl Petersons/ Carl Peterson Enterprises Inc., investigation by Federal and State law enforcement officials. Legal Counsel and other MAA officials knew of Carl Peterson's indictment and conviction in December 1993.
72. It is unclear exactly when MAA officials learned of Carl Peterson's conviction. The record tends to indicate that MAA legal counsel Kate Acuff, who left the agency in June 1999, knew of Carl Peterson's investigation, indictment and conviction. Moreover, Jane Young, Chief of the Long Term Care and Economic Recovery Office of MAA testified, she became aware of Carl Peterson's criminal prosecution when he was sentenced [1993], and a subordinate Jane York man, Supervisory Health Analyst, told her about the District of Columbia "being asked to participate in the prosecution of Dr. Peterson".
3. MAA, presented BWDC/RCM filing of OMB form #0938-0086, entitled "Disclosure of Ownership And Control Interest Statement (Questionnaire), dated February 6, 1998 and January 8, 1998 respectively, to prove that BWDC/RCM did not answer truthfully when asked, "Are there any individuals or organizations having a direct or indirect ownership or control interest of 5 percent or more in the institution, organization, or agency that have been convicted of a criminal offense related to the involvement of such persons, or organization in any of the

programs established by Titles XVII, XIX, or XX? See: Appellee exhibits 6A, 6B, 6C, 6D, 6E, and 6F.

74. MAA failed to furnish any evidence or "concise statement" to determine the "material issue" of whether Carl Peterson owned "5 percent or more" interest in BWDC/RCM.
75. 42 CFR 455.106(c), does not have a "5 percent or more" threshold.
76. DCAPA 1-1509(e) requires findings on "each contested issue of fact". The findings of basic fact shall consist of a "concise statement" of the conclusions upon "each contested issue of fact."
77. Moreover, the facts show that MAA officials had knowledge of Carl Peterson's conviction in December 1993, and MAA officials failed to notify the Inspector General pursuant to 42 CFR 455.106(b)(1) (a), and (2).  
However, 42 CFR 455.106(a)(1)&(2), entitled Disclosure by providers: Information on persons convicted of crimes, states that "Before the Medicaid agency enters into or renews a provider agreement, or at any time upon written request by the Medicaid agency, the provider must disclose to the Medicaid agency the identity of any person who (1) has ownership or control interest in the provider, or is an agent or managing employee of the provider; and (2) Has been convicted of a criminal offense related to that person's involvement in any program under Medicaid, or Title XX services program since the inception of those programs."
79. Dr. Carl Peterson, a convicted felon, is the founder/ owner of BWOH and BWDC; therefore, he "has been convicted in any program under Medicaid...since the inception of those programs".
30. BWDC has an affirmative duty to report Carl Peterson's conviction to the Medicaid agency, MAA.

Amy Brooks an employee of BWOH, and subsequently co-principal of BWDC and RCM testified at BAR that she sat through the trial of Dr. Peterson, however, she had no knowledge of his conviction date.

82. On the other hand, she further testified, that she felt obliged to forward BWDC financial records, for fiscal years 1992 through 1997, to Dr. Peterson to assist him in the appeal of his 1993 criminal conviction.
83. Appellant offered no evidence of an exception in law of the requirement to inform MAA officials of Dr. Peterson's conviction, pursuant to 42 CFR 455.106(c), despite actual agency knowledge of Dr. Peterson's investigation and conviction.
84. BWDC/RCM willfully failed to notify MAA since the beginning December 1993, and by operation of law, RCM failed to notify MAA officials of Dr. Peterson's conviction as required by law. Refer: "Successor in Interest" discussion below.
- Therefore, Appellant failed to establish a prime facie case on this issue.

**Successor in Interest:**

86. BWDC and RCM principals proffered evidence and testified at BAR that, "AS of 12:00 p.m. January 7, 1998, Brice Warren [DC] dissolved as corporation. As of 12:01 a.m. January 8, 1998, a new corporation was formed to "continue" the care and treatment of the customers that were under then care of Brice Warren Corporation [DC]."
87. Neither, BWDC or RCM, appellants, presented evidence that an assignment or "management agreement" was made between BWDC and RCM. Appellants did not present evidence that BWDC was a gift, nor did present evidence of a purchase agreement between Carl Peterson and Carl Peterson Enterprises Inc. Appellant, co-principal), admitted that a new corporation

was formed to "to continue" the care and treatment of customers that were under the care of BWDC.

88. BWDC failed to comply with District of Columbia law, regarding the dissolution or "winding up" of a District corporation.
89. Title 29-386(3), (4) provides that adequate provision must be made for debts, liabilities, and obligations of the corporation have been discharged, and all of the remaining property and assets of the corporation have been distributed to its shareholders, articles of dissolution shall be executed in duplicate by the corporation,..."
90. BWDC cannot divest to RMC any interest greater than it has. Refer: D.C. Title 29, subsections: 376, 377, 379, 380, 381, and 387.
91. Dr. Carl Peterson, and/or Peterson Enterprises, Inc., owned Brice Warren in Ohio (BWOH) and BWDC. On May 7, 1997, Carl Peterson, as president of Brice Warren corporation relinquished his "membership interest" in Brice Warren Corporation.
92. On May 7, 1997, Dr. Peterson appointed Eric Mumford, Chairman of the Board. The Board consisted of Marsha Brevard, Amy Brooks, Gwendolyn Tucker, and Milton Roberts. The appointed officers were Milton Roberts-Vice President/Secretary and Amy Brooks-Vice President/Treasurer. No evidence was presented to show that any of these individuals "owned" any interest in Carl Peterson Enterprises Inc, BWOH and BWDC.
93. On December 3, 1997, Carl Peterson was convicted of (1) Making false statements, (2) Theft of Government Property, (3) Mail Fraud and (4) Money Laundering. The convictions involved operations at four (4) Intermediate Care Facilities, for the Mentally Retarded (ICF-MR), in Cincinnati, Ohio for 1991 through the first half of 1992. Subsequently, Carl Peterson was incarcerated.

There is nothing in the record that shows Carl Peterson or Carl Peterson Enterprises, Inc., relinquished ownership interests in fixed assets, such as beds, computers, and etc., used by Carl Peterson, Carl Peterson Enterprises, Inc., BWOH, BWDC and RCM.

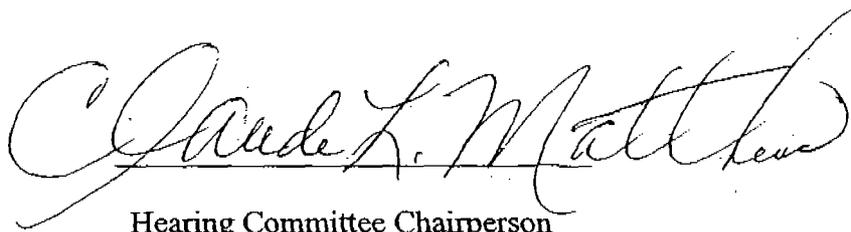
95. On November 12, 1998, in MBM Leasing Limited Partnership v. Carl Peterson, et al., C.A. No 98-1998, the Superior Court of the District of Columbia, Civil Division held, in an order, "because RCM has expressly agreed to assume some of Brice Warren's debts, RCM is a "mere continuation" of BWDC." See: Bingham v. Goldberg, Marchesan, Kohlman, Inc., 637 A.2d 81,89 (D.C. 1994).
96. The BAR concurs with the Court's characterization of RCM's creation and purpose. RCM, did more than "seize a business opportunity", they attempted to seize property assets subject to superior vested ownership interests.
97. RCM is a successor in interest for continuation of BWDC business. Principals of BWDC and RCM admitted that Carl Peterson maintained actual and apparent authority of BWDC and RCM, after his incarceration through January 5, 1998. Thus, Carl Peterson is a principal.
98. After January 7, 1998, the purported date of dissolution of BWDC, RCM deposited Medicaid checks drawn of behalf of BWDC in BWDC bank accounts, and Appellants "switched" the payment to RCM bank accounts. RCM not only by operation of law, but factually is a "mere continuation" of BWDC.
99. The Bar finds that as a matter of fact, and by operation of law RCM is a "mere continuation" of BWDC, thus, RCM is a successor in interest of BWDC. Therefore, Appellant failed to establish a prime facie case on this issue.

For Good Cause:

100. The BAR finds Appellants cumulative behavior with respect to furnishing adequate compiled financial data is in non-compliance with Federal, and District of Columbia laws enacted pursuant to Title XIX, 42 CFR 413.20, because BWDC/RCM failed to compile, maintain and furnish annual audit ready financial data for fiscal years 1991-1992 and 1993-1994. Therefore, Appellant failed to establish a prime facie case.
101. Moreover, pursuant to 42 CFR 455.106 the BAR also finds Appellant failed in its duty to affirmatively disclose Carl Peterson's conviction to MAA, as required by Federal law and regulations. Therefore, Appellant failed to establish a Prime Facie case.
102. The BAR finds Appellant violated 42 CFR 442.12(d) and 29 DCMR 1302.1(c). To wit: Appellant "Did not comply substantially with the provisions of Title XIX or with provisions of the provider agreement and pertinent District laws and regulations."

ORDER

NOW THEREFORE, it is ORDERED this 8<sup>th</sup> day of February, 2000, that MAA's decision to terminate provider agreements with Appellant, BWDC/RCM, is **AFFIRMED**. Further, the BAR **REMANDS** MAA to initiate further action, and to determine Medicaid reimbursement adjustments for BWDC/RCM for fiscal years beginning in 1991 through the first half of 1998. Moreover, the BAR **REMANDS** to the District of Columbia Licensing Regulatory Agency to determine whether BWDC, the non-profit corporation, was (1) in fact dully certified as a corporation in the District of Columbia and (2) whether RCM, Inc., had a qualified resident agent or was the person purported to be a resident agent, only a domiciliary of the District pursuant to District Law.



Hearing Committee Chairperson

Board of Appeals and Review

**Mailing List**

**In the matter of:** Brice Warren Corporation, Inc., RCM of Washington DC, Inc.  
v. Department of Health, Medical Assistance Administration.

BAR Docket No. 98-5358-PA

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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW  
WASHINGTON, D.C. 20001

Children's National Medical Center,

Appellant,

v.

D.C. Department of Health  
(Medical Assistance Administration),

Appellee.

Docket No. 95-5113-NPR

**ORDER**

This matter came before a panel of the Board, Samuel S. Sharpe, Esq., and Mr. Horace Kreitzman. Before the panel's Order could be entered and served, Mr. Sharpe left the Board, and Fritz R. Kahn, Esq., undertook to familiarize himself with the record, including the briefs of the parties. Pursuant to DC Code §1-1509(d), the proposed order was served upon the parties, and their exceptions or comments and reply comments were invited by Order of the panel, dated January 24, 2001.

Mr. Ronald N. Sutter, Esq., argued the case and was on the briefs for the Appellant and the appellant's Comments on the proposed order.

Mr. Arthur J. Parker, Esq., Assistant Corporation Counsel, D.C. argued the case and was on the briefs for the Appellee. Ms. Sherlyn Johnson, Esq., Attorney-Advisor, D.C. Department of Health, assisted Mr. Parker during oral argument and was on the Appellee's Exceptions to the proposed Order.

**Background**

The Appellee, D.C. Department of Health ("DOH"), issued a Final Notice of Program Reimbursement, dated March 3, 1995 ("FNPR"), to the Appellant, Children's National Medical Center ("Children's Center").<sup>1</sup> The FNPR was issued pursuant to DOH's audit of the Children's Center's Medicaid Hospital and Hospital Health Care Cost Report for the fiscal year beginning July 1, 1991, and ending June 30, 1992 ("FY '92").

<sup>1</sup> The FNPR was actually issued by the predecessor agency to DOH, the D.C. Department of Human Services.

The FNPR concluded that the Children's Center was entitled to reimbursement for, among other things, the inpatient hospital services it furnished to a disproportionate number of Medicaid or low-income patients. The Children's Center appealed from the FNPR, contending that the amount of the reimbursement was much lower than what it should have been, because DOH used an incorrect commencement date for applying the increase in the rate for calculating the disproportionate share payment to it.

### Statement of Issue

The principal issue presented by the parties in this appeal relates to the effective date of 29 DCMR §908.10, initially published as *emergency* rulemaking at 39 D.C. Register 3676-3677 (May 29, 1992) and then later published as *final* rulemaking at 39 D.C. Register 7432 and 7433 (October 21, 1992). See Brief for the Appellant at 2, Brief on behalf of Appellee at 1 and final hearing Tr. at 5-7. The parties agree that the provisions of §908.10 increased the rate of disproportionate share payment adjustments to be made by DOH to the disproportionate share hospitals, including the Children's Center. See final hearing Tr. at 30 and 56. The text of both the emergency and final regulation, codified at 29 DCMR §908.10, in part, read:

“The payment adjustment under subsection 908.4 shall apply to days or discharges occurring on or after October 1, 1991...”

### DOH's Position

It is DOH's position that §908.10 did not become effective on October 1, 1991, as expressly stated in the regulation, but, rather, became effective about eight months later on May 29, 1992 -- the publication date of the emergency regulation. DOH says it was for this reason that the FNPR applied the reimbursement formula referenced in the §908.10 to hospital days or discharges that occurred on or after May 29, 1992. See Brief on behalf of the Appellee at 3.

In support of its position, DOH argues that it is an established principle that an agency may not promulgate rules with retroactive application unless it has express legislative authority to do so, which is not the case here. See Brief of Appellee at 3. For its position, DOH relies principally on Peterson v. District of Columbia Lottery, etc., 673 A.2d 66 (D.C. App. 1996); Bowen v. Georgetown University Hospital, 488 U.S. 204, 208, 109 S.Ct. 468 (1988) and Landgraf v. USI Film Prods., 511 U.S. 244, 114 S.Ct. 1483 (1994).

DOH, moreover, relies upon the Medical Voluntary Contribution and Provider Specific Tax amendments of 1991, Pub. L. No. 102-234, 105 Stat. 1793-1805 (December 12, 1991), contending that the provisions of section 1923(c)(1) foreclosed DOH from making DSH payments except on or after January 1, 1992. DOH, also, cites to 42 C.F.R. §447.205, requiring the publication of a notice of the change in DSH payments before the effective date of the change. The May 29, 1992, effective date, maintains the DOH, is consistent with the State Plan Amendment, SPA #91-10, which was later superceded by

SPA #93-18. Finally, DOH finds support for its position in the plan language of 29 DCMR §908.10 and in the provisions of the Anti-Deficiency Act, 31 U.S.C. §1341.

### Children Center's Position

It is the Children's Center's position that, pursuant to 29 DCMR §908.10, its disproportionate share payments should have been applied as of October 1, 1991, and not May 29, 1992, contending that DOH's regulation confers a benefit rather than upsets settled expectations. See Appellant's Reply to Appellee's Post Hearing Brief at 4-6 and 9. The Children's Center states that whether §908.10 is made applicable on October 1, 1991, or May 29, 1992, involves a difference to it of about \$6 million in disproportionate share payments from DOH. See final hearing transcript, at 34.

The Children's Center maintains that section 1923(f)(2)(B)(ii) of the 1991 Act specifically provides, in part:

No State DSH allotment shall be less than the minimum amount of payment adjustments the State is required to make in the fiscal year to meet the requirements of [section 1923(c)(1)] . . .

It contends the Children's Center thoroughly analyzed the Federal statutory provisions in its Brief, at 3-5, 9-11, Reply Brief, at 7-8, and Post Hearing Brief, at 1-4, 12-13, and that DOH failed successfully to rebut its analysis.

The Children's Center argues that 42 C.F.R. §447.205 is inapplicable, since it does not apply to a Medicaid agency regulation that adopts Medicare payment standards. It maintains that the State Plan Amendment expressly required application of the §1923(c)(1) DSH payment methodology to be "effective for days or discharges occurring on or after October 1, 1991 . . ." Finally, it contends that DOH misplaced its reliance upon the plain language of 29 DCMR §908.10 and upon the provisions of the Anti-Deficiency Act.

### Analysis

The panel notes at the outset that the retroactivity issue presented here appears not to have been squarely addressed by the D.C. Court of Appeals. We begin our analysis of the issue with Peterson v. District of Columbia Lottery and Charitable Games Board, *supra*. In Peterson, the Lottery Board notified Peterson (a 1986 Lotto game winner) that it would not honor the assignment of his winnings to another party because an anti-assignment regulation that was published in 1992 precluded it. *Id.* at \_\_\_\_\_. The Court held that the 1992 anti-assignment regulation published by the Lottery Board was not retroactive and therefore did not bar Peterson's assignment of his winnings. The Court reached this holding because: (1) the regulation itself revealed no clear intent to cover prizes won before its effective date and (2) nothing in the Board's enabling statute gave it the express power to adopt retroactive regulations. *Id.* at 699 and 670.

The Court notes in Peterson that while it is not strictly bound to do so, it has consistently looked to Supreme Court law for guidance in [the area of statutory retroactivity]. "Id. At 699, n 6. The Supreme Court law it looked to in reaching its holding was enunciated in Bowen v. Georgetown University Hospital, *supra* and Landgraf v. USI Film Prod., *supra*. The Court cited Bowen (488 U.S. 208, 109 S.Ct. 468) for the principle that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive express terms." (Emphasis added.) Peterson, *supra* at 699. Landgraf was cited for several propositions: (1) in each case of statutory retroactivity, the question is "whether the new provision attaches new legal consequences to events completed before [the statute's enactment (511 U.S. 270, 114 S.Ct. 1499.) and whether [the statute] would impair rights a party possessed when he acted..." 511 U.S. 281, 114 S. Ct. 1505. Peterson at 699; (2) legislative retroactivity embraces "all statutes, which, though operating only from their passage, effect vested rights and past transactions. " 511 U.S. 270, 114 S.Ct. 1499.) Peterson at 699; and (3) it is a traditional presumption that a law does not operate retroactively "absent clear [legislative] intent favoring such a result." 511 U.S. 270, 114 S. Ct. 1499. Peterson at 670.

It is most important to understand the retroactivity context in which the cited Supreme Court propositions in Landgraf and Bowen and ruling in Peterson were made. In all three cases, there was at issue the divestiture of one's vested right. This was expressed in issue the divestiture of one's vested right. This was expressed in Peterson when the Court stated "There seems to us no question that when Peterson won his prize in 1986 he acquired the right to assign his winning in keeping with the normal rule of free assignability of contracts. "Peterson at 699. It was expressed in Landgraf when the Court stated: "Section 102 [of the Civil Rights Act of 1991] significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to backpay under prior law... Section 102 also allows monetary relief for some forms of workplace discrimination that would not previously have justified any relief under Title VIII." 511 U.S. 270, 114 S.Ct. 1499. In Bowen, the Court outlines the decisional context by stating that the "question presented here is whether the Secretary may exercise [his] rulemaking authority to promulgate [Medicate] cost limits which are retroactive... On June 30, 1981, the Secretary issued a cost-limit schedule... [which included a change affecting] the method for calculating the 'wage index'... Various hospitals in the District of Columbia area brought suit... seeking to have the 1981 schedule invalidated" 488 U.S. 204, 205, 109 S.Ct. 470, 471.

The retroactivity issue in the instant case is very different from the retroactivity issue presented in Peterson, Landgraf, and Bowen in that it concerns the granting of a benefit by §908.10 or the government to the target individuals rather than the taking away or impairment of a vested right. This factual difference raised the question of whether the exact same principles should be applied here that were relied on in Peterson, Landgraf, and Bowen. As pointed out by DOH (see Appellee's Post Hearing Brief at 2.), the Court in Landgraf stated that "[w]hile the great majority of [its] decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private

parties, [it has] applied the presumption in cases involving new monetary obligations that fell only on the government. In this connection, the Court called attention to the vintage cases of United States v. Magnolia Petroleum Co., 276 U.S. 160, 48 S. Ct. 236 (1928) and White v. United States, 191 U.S. 545, 24 S. Ct. 171 (1903).

In Magnolia, the taxpayer petitioner maintained that interest on a refund of income and excess profit taxes should be computed according to §§1019 and 1324 (a) of the Revenue Act of 1921. See 48 S. Ct. at 237. The Court disagreed, stating that there was no intention expressed in the Act that §1019 would operate retrospectively. Id. Citing several prior Supreme Court decisions, the Court in Magnolia stated, "Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears." Id.

The claim in White arose under an act commonly known as the "Navy personnel act". The claimant contended that, under the Act, as an officer appointed to the Navy from civilian life, he was entitled to be credited with five (5) years service as of the date of his appointment. 24 S.Ct. 172. After engaging in a considerable amount of statutory construction, the Court held that the Act operated prospectively and not retrospectively. Id. At 174. In construing the Act, the Court stated that "[w]here it is claimed that a law is to have retrospective operation, such must be clearly the intention, evidenced in the law and its purpose, or the court will presume that the lawmaking power is acting for the future only and not for the past." Id. At 172. The Court expressed the view that if the Congress wanted the Act to operate retrospectively, it would have "declared the purpose of the Act." Id. The Court affirmed that retrospective legislation is not favored and observed that the retrospective laws which have been sustained in the courts have ordinarily had the effect to remedy irregularities in legal procedure, assessment of property for taxation and the like. Id. At 173.

DOH urges that the principles announce in Magnolia and White "apply equally to limit the authority of an agency to promulgate retroactive rules [and an] agency may not promulgate retroactive rules absent the agency having been granted the express power to do so by the legislature." Appellee's Post Hearing Brief at 3 and 4. It is of paramount importance to understand that the concerned a statute as distinct from a regulation. Thus, in the situation where, as here, a regulation imposes a monetary obligation only on the government, the statutory test in Magnolia and White for determining retroactivity would not apply but rather an analogous rule test. The analogous rule test would be whether the regulation itself (and not any related statute) plainly stated or expressed a clear intention that it is to have retroactive effect. This test, of course, contemplates that there is no legislative provision which prohibits the retroactivity.

Aside from Magnolia and White, DOH argues that Bowen (109 S.Ct. 472, 488 U.S. 208) mandates that an agency cannot promulgate a retroactive regulation unless it has been "granted the express power to do so by the legislature." Appellee's Post Hearing Brief at 4. We disagree. Bowen like the instant case concerns a regulation. This, however, is where the similarity ends. As we have already pointed out, the

retroactivity issue in the instant case is materially different from the retroactivity issue presented in *Bowen*. The retroactive issue in the case before us concerns the granting of a benefit by 908.10 and the imposition of a monetary obligation only on DOH and no one else. Whereas, in *Bowen*, the retroactive cost-limit regulation the U.S. Health and Human Services (HHS) promulgated changed the prior method for calculating the wage index, "a factor used to reflect the salary levels for hospital employees in different parts of the country." 488 U.S. 204, 109 S.Ct. 469. Based on this new regulation, the Secretary, HHS proceeded to recoup sums he had previously paid to the respondent Georgetown University Hospital and other hospitals. Georgetown University Hospital brought suit to have the cost-regulation invalidated.

In concluding that the HHS regulation was invalid because it had not been expressly authorized by a congressional enactment, the Court made clear why it felt an expressed congressional authorization was needed. For it said:

"The power to require readjustments for the past is drastic. It... ought not to be extended so as to permit unreasonably harsh action without very plain words."

(Citation omitted.) 488 U.S. 208, 109 S.Ct. 472. In light of this view, we feel *Bowen* and *Peterson* require that we ask ourselves with respect to this case whether the drastic action the courts were concerned with exists here. We have already said it does not for the reason that §908.10 does not seek to recoup payments already made but rather seeks to *enlarge* the disproportionate share payments to be made to the Children's Center and other hospitals. A Court constructed rule should not be applied indiscriminately. In other words, if the rationale or reason for the establishment a particular rules does not exist in a given case then that rule should not be applied to the case. Instead, another appropriate rule should be applied to the case. Since §908.10 does not arouse the same concern expressed in *Bowen* and *Peterson*, the principle expressed in *Bowen* and *Peterson* that an expressed statutory grant of authority is needed for a retroactive regulation to be valid does not apply here.

Returning to the rule test (the test we consider to be analogous to the plain purpose and expressed intention tests applied in *Magnolia* and *White*) and applicable here, we think the pertinent inquiry in this case should be whether a clear intention that §908.10 is to have a retroactive operation is evidenced in the in the regulation and its purpose. We note first that the notice in the D.C. Register for the emergency and final rulemaking for §908.10 expressly states at the outset that the rulemaking action is being taken by the "Director of the Department of Human Services".

Second, we note §908.10 says:

"The payment adjustment under subsection 908.4 shall apply to days or discharges occurring on or after October 1, 1991..."

(Emphasis added.) The quoted language couldn't be much clearer in expressing the Director's intent that the §908.4 payment adjustment referred to in 908.10 is to be

applied "on or after October 1, 1991". Third, we note that the reason or purpose for making §908.10 retroactive is explained in the D.C. Register notice for the emergency rulemaking. The explanation reads:

This emergency rulemaking is the minimum action necessary to ensure that during Fiscal Year 1992 each disproportionate share hospital is paid at least the minimum payment adjustment required by section 1923 (c) of the Social Security Act... The emergency rules were adopted May 22, 1992 and shall govern all disproportionate share payment adjustments due to made to hospitals for days or discharges occurring on or after October 1, 1991."

(Emphasis added.) Language similar to this language appears in the notice for the final rulemaking. The construction given here to the textual language of §908.10 is consistent with the declared purpose of the regulation. Thus, both the text of §108.10 and the purpose statement regarding the regulation speak to giving §908.10 retroactive effect.

The statutory and other authority of DOH to promulgate §908.10 is also stated in the notice section of the emergency and final rulemaking. It appears neither party questions DOH's authority to promulgate rules regarding the subject matter of 908.10. We think it important to note we find nothing in the record which precluded DOH from promulgating 908.10 and publishing it in the D.C. Register on October 1, 1991 and, thereby, making the effective date stated in the text of the regulation read the same as the publication date of the RULE. The reason why it did not do this is not revealed in the record. It, therefore, seems unfair and absurd to say DOH could not lawfully give 908.10 retroactive effect as it did here when it could have lawfully published the rule on the same date as the effective date stated in its text.<sup>2</sup>

DOH contends for the first time in its posthearing brief that §908.10 did not meet the public notice requirement of 42 C.F.R. 447.205. DOH supported its position with a copy of a letter from the federal Department of Health and Human Services ("HHS"). Because we do not feel we have the authority to interpret a federal regulation and because there was no prior argument on this matter, we do not comment on the merits of the view articulated in HHS's letter as reiterated by DOH.

For all of the foregoing reasons, we are of the opinion that the provisions of 29 DCMR §908.10 as published at 39 D.C. Register 3676 and 3677 and 39 D.C. Register 7432 and 7433 apply retroactively, i.e., as of October 1, 1991. In reaching the conclusion we have come to here, we think it appropriate to call attention to the following observation made by the Landgraf Court:

"The conclusion that a particular rule operates retroactively comes at the end of a process of judgment concerning the nature and extent of the change in the law and

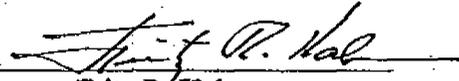
<sup>2</sup> The Children's Center states DOH argued that making 908.10 retroactive would impermissibly make its authorizing statute retroactive. See Appellant's Reply to Appellee's Post Hearing Brief at 4. This statement does not cite where DOH made the argument attributed it, and we were not able to find such an argument. We are, therefore, unable to address the Children's Center statement.

the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have sound...instincts, and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance."

(Citations omitted.) 511 U.S. 270, 114 S.Ct. 1499.

WHEREFORE, the appeal is granted, the Final Notice of Program Reimbursement, dated March 3, 1995, is set aside, and the case is remanded to the Department of Health for further action consistent with this decision.

Date: April 5, 2001



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Fritz R. Kahn  
Legal Member

Horace Kreitzman  
Public Member

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW**

In the Matter of:  
XIN X. ZHU

)  
)  
) BAR Docket No: 99-5394-LR  
)

**FINDINGS OF FACT, CONCLUSIONS OF LAW**

On March 31, 1999, the Business Regulation Administration of the Department of Consumer and Regulatory Affairs (hereinafter "DCRA") notified appellant, Xin X. Zhu, that his renewal application for a Class B vendor's license (Customer number 39702545) would be denied pursuant to Title 24 District of Columbia Municipal Regulation (hereinafter "DCMR"), Section 509.1 and 4. A hearing on the matter was held May 14, 1999, before a Hearing Committee of the Board of Appeals and Review (hereinafter "BAR") consisting of Patricia Randolph Williams, Legal Member, Mary Ann Miller, District Member and Irvin E. Daniels, Public Member. Doris A. Wooldridge, Department of Consumer and Regulatory Affairs, Enforcement Division represented the Government; also present for the Government were Ted Green, DCRA, Vending Coordinator; Meredith Scott, DCRA, License Renewal Supervisor; Sgt. Zachary Scott, District of Columbia Metropolitan (MPDC); Sgt. Neal Gasser, MPDC, Ofcs. Curtis Williams, Virgil Smot and James Steinbach and Jack Smalley, Chief of Operations for the Tontine Group. Appellant Xin X. Zhu was present with his son, Owen Zhu acting as translator.

**FINDINGS OF FACT**

1. Appellant Xin X. Zhu had operated a vending stand in several city locations including the 200 and 300 block of 12 Street, NW and the 1200 block of Pennsylvania Ave., NW, selling merchandise under a Class B Vending License "that authorizes persons to vend merchandise ... from public space". (Notice of Application Denying Vendor's License, March 31, 1999).
2. The following are some of the offenses that were attributed to appellant which constituted violations under 24 DCMR, Chapter 5. These violations resulted in DCRA's denial of appellant's vending license renewal and were the issues adjudicated before the BAR:
  - (a) Selling fifteen Oakley counterfeit mark products in appellant's possession for "intent to sell" or being "offered for sale" on or about April 18, 1998.
  - (b) Selling seventeen Oakley counterfeit mark products in appellant's possession for "intent to sell" or being "offered for sale" on or about December 9, 1998.

(c) Seizure by agents representing Oakley, Nike and Rolex corporations of one hundred sixty-four Oakley, eleven Nike and ten Rolex counterfeit products in appellant's possession for "intent to sell" or were being "offered for sale" on or about June 17, 1998.

3. The Hearing Committee considered the testimony of Sergeant Zachary Scott who testified that appellant had been given several tickets citing the above-mentioned violations. (Tr. p.19-22).

4. Appellant admits to receiving tickets for vending counterfeit products but states that he never received a warning as to the consequences of such action. (Tr. p. 17-18).

5. This testimony was later rebutted by Sgt. Scott who testified that he had warned appellant about his illegal vending practices. (Tr. p. 19-20).

6. Appellant contends that he was unaware of the regulations regarding the illegality of selling counterfeit products because 24 DCMR is not in Chinese. (Tr. p.26-27).

7. Based on the evidence presented, the BAR found it unpersuasive that Appellant Xin X. Zhu was unaware that the vending of counterfeit goods was illegal. Moreover, it is the responsibility of the vendor to know the vending regulations cited in 24 DCMR which clearly cite appellant's action as illegal and subject him to revocation or denial of his/her vending license. Moreover, appellant's application and acceptance of a vending license by DCRA gives him notice that he must adhere to the rules and regulations which constitute acceptance of that vending license under 24 DCMR, Chapter 5.

8. Appellant alleges that the Metropolitan Police Department selectively enforces the vending regulations and harasses him. No such evidence was given by appellant to support this allegation.

9. Appellant has been the subject of numerous citations for violating vending regulations. Appellant's ongoing accrual of violations demonstrates a disregard for current vending regulations whether through actual ignorance or blatant disregard of the law.

### CONCLUSIONS OF LAW

1. Merchandise vendors in the District of Columbia are licensed and regulated under the provisions of 24 DCMR, Chapter 5. Those rules set forth the standards that must be met to obtain and retain a license, and the conditions under which a license may be suspended or revoked.

2. Specifically, 24 DCMR § 509.1 provides that:

Any license pursuant to this chapter may be suspended or revoked by the Mayor, after notice, for any of the following causes: ...

(b) Fraud, misrepresentation, or false statement made in connection with the selling of any article, merchandise....

(d) Conduct of the business licensed under the provisions of this chapter in an unlawful manner,...

3. Further the D.C. Unconsol. Law 11-362(a) (1996) states " a person commits the offense of counterfeiting if such person willfully manufactures, advertises, distributes, offers for sale, sells or possesses with intent to sell or distribute any items , or services bearing or identified by a counterfeit mark."

4. At issue in this matter is whether the appellant has violated the applicable rules or conducted his business in an unlawful manner. It is the government's burden to show that DCRA did not act arbitrarily or capriciously in denying the renewal of appellant's vending license.

5. The government has carried its burden of proof by showing that appellant incurred numerous violations pursuant to 24 DCMR § 509.1; § 509.1(b); § 509.1(d); and the specifications there under. Therefore, appellant's vending renewal application could be denied by DCRA.

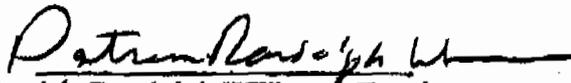
6. Appellant did not deny that he was vending counterfeit products. Instead, his testimony consisted of accusations impugning the motive and character of the officials who had issued him citations; assertions that he was not aware of the parameters cited in the 24 DCMR, Chapter 5 and that he was not warned about the illegality of his actions. The appellant provided neither evidence of his accusations nor rendered a persuasive argument as to why he should be exempt from the rules and regulations of 24 DCMR, Chapter 5. In issuing tickets for the above-mentioned violations, it is irrelevant whether the officer "warned" appellant that the vending of counterfeit goods violated the law and could result a denial of the renewal of his vending license. In fact, it is not the officer's duty or responsibility to familiarize or educate appellant about vending regulations which appellant should know. As to the fact that appellant had no notice, each ticket cites the type (or category) of violation. (Government's Exhibits 1, Appending Tr.).

7. The BAR noted that appellant had received repeated tickets for the same violations. The BAR finds that a reasonable person would determine that ongoing violations for the same offenses constitute that the actions are unlawful even if the person does not know the exact regulations being violated. However, as before stated, the BAR finds appellant's claim of ignorance of the vendors and solicitors regulations under 24 DCMR, Chapter 5, unpersuasive.

8. Appellant offers no evidence to support his allegation that he was unfairly "picked-on" to receive citations citing his for selling counterfeit goods. Moreover, selective enforcement is not a defense to the selling of counterfeit goods when the offense is proven and supported by evidence.

**ORDER**

**THEREFORE**, it is **ORDERED**, this fourteenth day of May 1999, that the decision of the Department of Consumer and Regulatory Affairs be and is hereby upheld.

  
Patricia Randolph Williams, Esquire  
Hearing Committee Chairperson,

July 8, 1999

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Willie Reeves  
Appellant

v.

Metropolitan Police Department  
Appellee

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BAR Docket No. 01-5704-LR

OPINION AND ORDER

This case came before the Board on June 8, 2001 on an appeal filed on April 17, 2001 by Willie Reeves challenging the denial of his application for a license as a security guard and special officer by the Metropolitan Police Department (MPD). Board members David H. Marlin, Phyllis D. Thompson and Gary L. Ivens heard the appeal. Mr. Reeves appeared *pro se*. The MPD was represented by investigators Tracy Duncan and Maria Vazquez, and security examiner Stephanie Anthony. The appellant and the MPD representatives were sworn.

The application was submitted on February 14, 2001. It was denied on April 5, 2001 on the basis that Mr. Reeves failed to list any arrests on his application form and affidavit, in violation of 17 DCMR Sec. 2120.1(a), which authorizes denial of a security license if there is a "material misstatement in the license application."

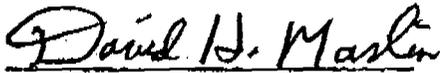
The FBI record of Mr. Reeves, which was introduced into evidence, lists two arrests, both in Pascagoula, Mississippi, in 1964 for breach of the peace and in 1965 for failure to obey an officer in the line of duty. Mr. Reeves, an African-American, testified that both arrests (he was fined \$200 for the second) occurred during civil rights protests in order to secure equal access to lunch counters and stores in racially segregated Mississippi. He testified he informed the MPD officials processing his application the reasons for the arrests. The MPD representatives testified that failure to list these arrests, which occurred more than 35 years ago, would not be considered "material misstatements" and asserted that if the application form had been amended to list the arrests, Mr. Reeves' application would have been approved.

We reverse and remand with instructions that the licenses be issued. To deny a license to an applicant with an unblemished record for nearly four decades is an abuse of discretion.

More importantly, MPD discloses a rigidity in its process that urgently needs attention. On the basis of having reviewed more than 150 licensing appeals during the last several months, we believe that MPD licensing procedures should be changed. When an applicant would be eligible for a license but for technical or ministerial reasons, MPD regulations should require police personnel to work cooperatively with applicants, and the security agencies that usually represent the applicants, to perfect applications and correct errors that are unintentional or arise from misunderstandings of eligibility.

It required courage for Mr. Reeves and others to confront Mississippi police in the 1960s when seeking to exercise their constitutional rights. We all recognize that it is incongruous for District police today to apply to our citizens the effects of unlawful discriminatory treatment practiced by Mississippi law enforcement long ago.

THEREFORE, it is Ordered this 13<sup>th</sup> day of June 2000 that the decision of MPD denying Mr. Reeves' application is REVERSED and the case is REMANDED for action in accord with this decision.



David H. Marlin  
Phyllis D. Thompson  
Gary L. Ivens

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW**

Walter S. Leach )  
Appellant )

v. )

Metropolitan Police Department )  
Appellee )

BAR Docket No. 00-5556-LR

**OPINION AND ORDER**

This case came before the Board on November 17, 2000 on an appeal filed on June 7, 2000 by Walter S. Leach challenging the denial of his applications for licenses as a security guard and special officer by the Metropolitan Police Department (MPD). Board members David H. Marlin, Fritz R. Kahn and James L. Thorne heard the appeal. Mr. Leach appeared *pro se*; the MPD was represented by Investigator Tracy Duncan, both of whom were sworn.

The application was submitted on May 29, 2000 and denied the following day on the basis that Mr. Leach failed to list all of his arrests on his application form in violation of 17 DCMR Sec. 2120.1(a), which authorizes denial of an application to be licensed as a security officer if there is a "material misstatement in the license application." Mr. Leach's application was denied also on the basis that he lacked the requisite "moral character" as defined by 17 DCMR 2102.1 and 2102.2, which state:

- 2102.1 Except as otherwise provided in this chapter, no person shall be employed as a security officer unless that person has first been certified by the Mayor as being of good moral character.
- 2102.2 In making a determination of moral character, the Mayor shall consider information received from the applicant's employers of the past five (5) years, character references, convictions for misdemeanors, military record, and any other relevant information that the Mayor's investigation reveals.

Investigator Duncan stated that the FBI record of Mr. Leach listed three arrests, all in the District of Columbia, as follows: (1) housebreaking on August 31, 1967; (2) armed robbery on January 12, 1972, resulting in a conviction; and (3) armed robbery, assault with a deadly weapon and carrying a deadly weapon on April 28, 1972, also resulting in a conviction. She stated that Mr. Leach only listed the January 1972 armed robbery arrest, omitting the 1967 housebreaking arrest and the charges in April 1972. She also stated that MPD policy at the time of Mr. Leach's application was to automatically disqualify applicants with multiple arrests, irrespective of when they occurred or whether convictions followed, as not possessing the requisite "moral character."

Mr. Leach testified that he did not list the 1967 arrest because it occurred when he was a 16-year old juvenile and he thought it was no longer in his record. He testified, without contradiction by MPD, the 1972 arrests emanated from the same incident, the January charge reflecting his arrest and the April charges representing his court appearance and sentencing to 10 years under the Youth Correction Act, a portion of which was served in a halfway house. He stated that it had been 28 years since his last arrest and that he had worked at various jobs, married and hoped his criminal record would not forever deny him employment possibilities.

Investigator Duncan stated that MPD had adopted a new standard that on its effective date in early 2001 would no longer automatically disqualify persons whose arrests had occurred many years previously. This new policy will also eliminate the need for applicants to document their arrest records and the disposition of any charges because applications will be received from security guard companies online by computers. MPD then will conduct full criminal background checks before applications are considered.

The Board believes that MPD is entitled to substantial discretion in issuing licenses. Security officers usually wear uniforms; some are armed; they are invested with quasi-police authority to prevent thefts, damage to real and personal property, assaults and gate-crashing; are charged with keeping order at public and private gatherings; and are expected to perform other activities to deter or prevent illegal acts. MPD regulations seek to screen out persons whose backgrounds suggest they would be undependable for security functions and to qualify those persons whose personal and work histories indicate their reliability. Security guards must know and exhibit the difference between right and wrong; otherwise, they can be a danger to the public instead of a protector.

MPD must, however, in exercising its discretion, follow its own rules. MPD not only offered no evidence that the standards in Sec. 2102.2 were followed in determining whether Mr. Leach should be licensed, but also it stated that the three character references and the list of employers listed in Mr. Leach's application had not been contacted. Failure to follow the investigations mandated in Sec. 2102.2 may be considered as grounds for the Board to reverse MPD's license denial. See our decision in Kevin Graham, BAR Docket No. 00-5535-LR issued on December 17, 2000. The Board also disapproves of MPD policy that automatically excludes applicants whose arrests occurred years before, particularly without convictions, and who subsequently maintained a clean record for a substantial period of time. We believe in second chances. In light of all the facts and circumstances, we believe the denial of the licenses must be reversed.

THEREFORE, it is Ordered this 27<sup>th</sup> day of December 2000 that the Board REVERSES the decision of the Metropolitan Police Department and REMANDS the license application for disposition in accordance with this Opinion and Order.

*David H. Marlin*

David H. Marlin, Legal Member  
Fritz R. Kahn, Legal Member  
James L. Thorne, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Deangela Batie,	)	
Appellant	)	
	)	
v.	)	Docket No. 01-5741-LR
	)	
Metropolitan Police Department,	)	
Appellee	)	

## OPINION AND ORDER

This case came before the Board on August 3, 2001, on an appeal filed on June 18, 2001 by Deangela Batie, challenging the denial by the Metropolitan Police Department (MPD) of her application for a license as a security guard and special police officer. Board members Phyllis D. Thompson, Joan Schaffner, and Nancy McCall heard the appeal. Ms. Batie appeared pro se. The MPD was represented by Officer David Etheridge. The appellant and the MPD representative were sworn.

Ms. Batie submitted her application on April 30, 2001. It was denied on June 18, 2001, on the basis that Ms. Batie failed to list an arrest on her application form and affidavit, in violation of 17 DCMR § 2120.1(a), which authorizes denial of a security officer license if there is a "material misstatement in the license application;" and on the ground that Ms. Batie has an "excessive arrest history."

In fact, Ms. Batie failed to list two arrests that are shown on her FBI record. One arrest was on June 6, 1991, for carrying a pistol without a license. The charge was dismissed. The second arrest that Ms. Batie failed to list was a February 21, 1991 arrest for theft and related credit card, conspiracy, forgery, and uttering charges.

Ms. Batie testified that she did not list these arrests because she believed they had been expunged from her record. She explained that she had previously been licensed as a security guard in the District of Columbia on the basis of an application on which she also did not list

these arrests that she believed had been expunged. The Board notes that Ms. Batie's April 30, 2001 application lists her previous employment for three security companies.

The Board notes that Ms. Batie's application reflects her careful effort to copy precisely from her Superior Court PDID form the charges associated with her only other arrest, which was on May 15, 1999. That arrest was in connection with a domestic dispute, and included charges of simple assault, assault with a dangerous weapon, threats, and PPW, all of which were not papered or otherwise not prosecuted. The Board also notes that the Superior Court print-out does not show Ms. Batie's 1991 arrest for carrying a pistol without a license, even though that arrest was in the District of Columbia and could be expected to appear on Ms. Batie's Superior Court PDID form. The Board finds that the omission of this arrest from Ms. Batie's Superior Court PDID form provided a basis for Ms. Batie reasonably to believe that the arrest had been expunged from her record and need not be reported. The Board also finds credible Ms. Batie's testimony that she believed her 1991 arrests had been expunged from her record.

Further, the dates of the arrests that Ms. Batie omitted from her application (both were more than ten years ago) lead the Board to conclude that the omission does not warrant denial of her application. The test of materiality of a misstatement is whether the information that is withheld is information that could reasonably be expected to influence the action or decision of the person from whom the information is withheld. See *Jones v. Prudential Insurance Co.*, 388 A. 2d 476, 481 (D.C. 1978). The MPD has advised the Board in other hearings that any arrest that was ten or more years ago is not a factor in the MPD's decision to grant or deny a license. Thus, if listed by Ms. Batie on her application, the 1991 arrests presumably would not have factored into the MPD's decision on Ms. Batie's application. The Board concludes therefore that Ms. Batie's failure to list her 1991 arrests did not amount to a material misstatement. (The Board also notes that under 17 DCMR 2104.4(c), pertaining to certain arrests resulting in conviction and incarceration, the Board is specifically required to take into account the time elapsed since an applicant's conviction.)

The Board disagrees with the MPD's finding that Ms. Batie's record shows excessive arrests. While each of Ms. Batie's arrests entailed a number of separate charges, the total number of arrests is three and, as discussed above, two of these are more than ten years old.

The Board generally has affirmed the MPD's denial of an application for security guard licensure if an applicant fails to list arrests on the forms provided, absent special or extenuating circumstances, or unless a reversal is indicated in order to prevent an injustice. For the reasons discussed above, the Board finds that this is a case with extenuating circumstances.

THEREFORE, it is Ordered this 3rd day of August 2001 that the decision of MPD denying Ms. Batie's application is REVERSED, and the matter is remanded to the MPD with instructions that it afford Ms. Batie an immediate opportunity to re-apply for a license; and with the further instruction that if Ms. Batie's new application and record check reveal only the arrests discussed in this decision, the application may not be denied for excessive arrests.



Phyllis D. Thompson, Legal Member, Presiding  
Joan Schaffner, Public Member  
Nancy McCall, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Travis Wood,	)	
Appellant	)	
	)	
v.	)	Docket No. 01-5765-LR
	)	
Metropolitan Police Department,	)	
Appellee	)	

OPINION AND ORDER

This case came before the Board on October 26, 2001, on an appeal filed on October 4, 2001 by Travis Wood, challenging the denial by the Metropolitan Police Department (MPD) of his application for licensure as a security guard. Board members Phyllis D. Thompson, Joan E. Schaffner, and Eduardo A. Balarezo heard the appeal. Mr. Wood appeared pro se. The MPD was represented by Mr. Milton Agurs and Sergeant Yvonne Shelton. The parties were sworn.

Mr. Wood completed his application and accompanying affidavit on June 28, 2001. His application was denied on October 4, 2001, on the basis that he failed to disclose charges of reckless and negligent driving and a conviction for manslaughter by auto, all related to a traffic accident that occurred on August 28, 1980. On the portion of the application and affidavit asking the applicant to list arrests and convictions, Mr. Wood wrote "none." 17 DCMR § 2120.1(a) authorizes denial of a security officer license if there is a "material misstatement in the license application."

Mr. Wood explained that he had obtained from the police department a print-out showing that the department had no record of any charges against him, and that he therefore believed that the 1980 charges and conviction need not be reported.

Mr. Agurs explained that the police report would not show charges dating more than ten years ago and did not indicate

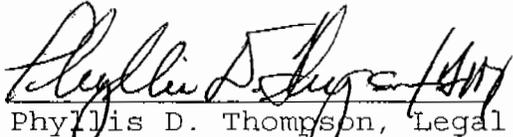
that Mr. Wood's 1980 charges had been expunged from his record. In response to questioning by a Board member, Mr. Agurs also stated definitively that the MPD would not have denied Mr. Wood's application on the basis of the 1980 charges and conviction if Mr. Wood had disclosed them on his application.

The Board concludes that Mr. Wood's failure to list his 1980 charges and conviction does not warrant denial of his application. The test of materiality that this Board has employed is whether the information that was withheld is information that could reasonably have been expected to influence the action or decision of the person from whom the information is withheld, *see Jones v. Prudential Insurance Co.*, 388 A. 2d 476, 481 (D.C. 1978); or, stated differently, whether the misrepresented fact would have been relevant or important to the MPD's decision about whether a license should be granted. As noted above, Mr. Agurs testified that Mr. Wood's 1980 charges and conviction would not have influenced the MPD's decision on his application or caused the MPD to deny his application for licensure. The Board also notes that, consistent with Mr. Agurs' testimony, MPD representatives have advised the Board in other hearings that any arrest that was ten or more years ago is not a factor in the MPD's decision to grant or deny a license. (The Board also notes that under 17 DCMR 2104.4(c), pertaining to certain arrests resulting in conviction and incarceration, the Board is specifically required to take into account the time elapsed since an applicant's conviction.)

Thus, if listed by Mr. Wood on his application, the 1980 charges and conviction presumably would not have factored into the MPD's decision on Mr. Wood's application. The Board concludes, therefore, that under the test stated above, Mr. Wood's failure to list his 1980 charges and conviction did not amount to a material misstatement.

A misstatement could also be material if it casts a shadow on an applicant's honesty or integrity. The Board finds in this case that Mr. Wood's misstatements do not call his integrity or honesty into question. Although Mr. Wood was mistaken about the significance of the clean police report he obtained, the Board found credible his explanation that he believed that the report indicated that the 1980 charges and conviction had been expunged from his record and need not be reported.

THEREFORE, it is Ordered this 26th day of October 2001 that the decision of MPD denying Mr. Wood's application is REVERSED, and the matter is remanded to the MPD with instructions to issue Mr. Wood a license as a security guard.



Phyllis D. Thompson, Legal Member, Presiding  
Joan E. Schaffner, Public Member  
Eduardo A. Balarezo, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Kimberly N. Shuford,	)	
Appellant	)	
	)	
v.	)	BAR Docket No. 02-5766-LR
	)	
Metropolitan Police Department	)	
Appellee	)	

OPINION AND ORDER

This case came before the Board on December 14, 2001 on an appeal filed on October 15, 2001 by Kimberly N. Shuford, challenging the denial by the Metropolitan Police Department (MPD) of her application for a license as a security guard. Board members Phyllis D. Thompson, Joan Schaffner, and James L. Thorne heard the appeal. Ms. Shuford appeared pro se. Officer Elizabeth Lowery represented the MPD. The appellant and the MPD representative were sworn.

Ms. Shuford submitted her application on October 11, 2001. MPD denied the application on October 15, 2001, on the basis that Ms. Shuford was convicted and received probation for simple assault, citing 17 DCMR § 2120.1(e), which authorizes denial of a security officer license if there is a "conviction of a misdemeanor involving theft, fraudulent conduct, assault, or false arrest or imprisonment." The denial notice also states that Ms. Shuford "failed to notify the Security Officers Management of arrest."

When questioned about the arrest for which she received probation, Ms. Shuford explained that it related to an altercation with a woman who had previously dated and had a child with Ms. Shuford's current boyfriend. Ms. Shuford explained that when this woman came to her home and threatened her, she sprayed mace at her. She stated that she pled guilty to the assault charge because she did not want to lose the time from her work and children that would be required to defend against the charge. Ms. Shuford explained that she was told that after she had completed her probation successfully and submitted a letter from her supervision officer confirming her successful completion, which she did, she would be granted her license. She explained that she did not list the arrest on her application because she had documentation that it would be expunged from her record. In fact, the arrest was not listed on the report Ms. Shuford received from the District of Columbia Criminal Information System, and she explained that, when filling out her application and affidavit, she copied the arrests indicated on that listing assuming that it was complete.

As for other arrests on her record, Ms. Shuford explained that all were a result of altercations with other women in her old neighborhood. She explained that she has since moved from that neighborhood and has worked hard to turn her life around and set a good example for her two children, for whom she is the sole support.

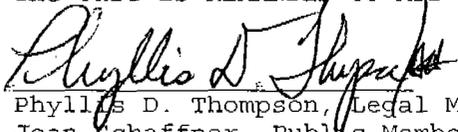
Ms. Shuford has been working as a security guard since at least August 1999. The record indicates that she has been granted a security guard's license at four additional times when she transferred employment from

one security guard agency to another. On each occasion, Ms. Shuford listed her various arrests on her application and nevertheless was granted a license. Accordingly, the Board sees no reason to deny Ms. Shuford a license based upon her past arrest history. We note that her most recent position ended on October 1, 2001, after she had worked for the company for eighteen months. It appears that she would still be working as a licensed security guard if she had not been released from that position.

As for Ms. Shuford's recent arrest and probation, the record contains documentation indicating that the matter would be expunged from Ms. Shuford's record. Given the fact that the offense was not listed in Ms. Shuford's criminal summary report from the District and given what appears to have been Ms. Shuford's careful attempt to copy onto her application the offenses listed on that report, we find her failure to list the arrest does not warrant denial of her license. Finally, while the relevant regulations do state that conviction of a misdemeanor assault is grounds for denial of a license, the Board finds it is not an absolute bar. The regulations permit a person who has been released from incarceration for a *felony* conviction (as distinguished from a misdemeanor conviction, which is in issue here) within two years prior to the date of application to obtain a security guard license if that person demonstrates that he/she is not a significant safety risk to the community. See 17 DCMR § 2104.1(a). We conclude, therefore, that 17 DCMR § 2120.1(e) cannot logically be read to bar licensure of a person who has been convicted of misdemeanor assault if that person is not a significant safety risk to the community. The Board does not believe that Ms. Shuford is a safety risk to the community. Accordingly, having paid her debt to society, she should be allowed the opportunity to continue with her work.

The Board further notes that while Ms. Shuford has been arrested on several occasions over the past six years, almost all of the arrests were no papered or dismissed. She testified, credibly, that she has removed herself from the environment which created her past difficulties and is trying to straighten out her life for her own sake as well as for her sons' well-being. Given these facts, and the additional considerations stated above, the Board believes it amounts to an abuse of discretion for the MPD to deny Ms. Shuford's application.

THEREFORE, it is Ordered this 19th day of December 2001 that the decision of the MPD denying Ms. Shuford's application is REVERSED and the case is REMANDED to MRD for action in accordance with this decision.



Phyllis D. Thompson, Legal Member, Presiding  
Joan Schaffner, Public Member  
James L. Thorne, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Daren Antonio Dorsey,	)	
Appellant	)	
	)	
v.	)	BAR Docket No. 02-5770-LR
	)	
Metropolitan Police Department)	)	
Appellee	)	

OPINION AND ORDER

This case came before the Board on December 14, 2001 on an appeal filed on October 24, 2001 by Daren Antonio Dorsey, challenging the denial by the Metropolitan Police Department (MPD) of his application for a license as a security guard.

Board members Phyllis D. Thompson, Joan Schaffner, and James L. Thorne heard the appeal. Mr. Dorsey appeared pro se. Officer Elizabeth Lowery represented the MPD. The appellant and the MPD representative were sworn.

Mr. Dorsey submitted his application on October 11, 2001. MPD denied the application on October 24, 2001, on the basis that Mr. Dorsey failed to list a March 9, 2001 arrest for domestic simple assault on his application and accompanying affidavit. MPD relied on 17 DCMR § 2120.1(e), which authorizes denial of a security officer license if there is a "material misstatement in the license application."

Mr. Dorsey testified that he has been steadily employed for six years as a metal finisher and that he submitted the application in question in connection with his attempt to find part-time work as a security guard. He explained that he did not list the domestic simple assault arrest on his application because the charges had been "thrown out of court." He admitted during questioning, however, that he understood that the application and affidavit required him to list all arrests, including those involving charges that subsequently were dismissed or "no papered."

The MPD file relating to Mr. Dorsey's application includes NCIC printouts describing arrests and arrest warrants pertaining to Raynard Marquette Dorsey and Curtis Dorsey. During her statement at the hearing, Officer Lowery cited these matters as additional grounds for denial of Mr.

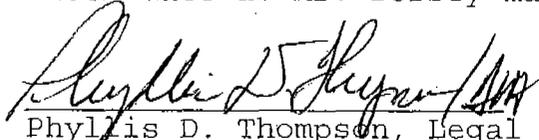
Dorsey's application. Appellant Dorsey denied that these names are his aliases and testified that, instead, the individuals named on the NCIC report are his brothers. He denied any involvement in the offenses described on the NCIC report. Appellant Dorsey also testified that law enforcement officials repeatedly have acted on the mistaken assumption that his brother Raynard's extensive arrest record is appellant Dorsey's record.

The Board found credible appellant Dorsey's testimony about the NCIC report material pertaining to Raynard Marquette Dorsey and Curtis Dorsey. The Board notes that the physical description Raynard Dorsey included on the NCIC report does not appear to correspond to appellant Dorsey's physical characteristics. Accordingly, the Board rules that, on the present record, the MPD may not deny appellant Dorsey's application on the basis of the various arrests and charges described on the NCIC report relating to Raynard Dorsey and Curtis Dorsey.

In light of appellant Dorsey's repeated problems with arrest-record searches that have identified his brother's arrest record as his own record, the Board finds understandable appellant's reluctance to reveal his one arrest for domestic simple assault. While this does not excuse appellant's failure to tell the truth on his application, the Board finds that it is a mitigating factor that should be taken into account.

In cases where an applicant for a security guard license has failed to list a charge or arrest on his application, MPD's practice is to deny the application but to permit the applicant to reapply six months after the denial. The Board believes it is appropriate to uphold the denial of appellant Dorsey's application on the basis of his failure to list his arrest for domestic simple assault. Because dishonesty in the application process is a serious matter and should be discouraged, a waiting period before appellant may reapply also is appropriate. However, because of the mitigating factor described above, the fact that appellant has no record of conviction of any crime, and appellant's stable work history, the Board believes that appellant Dorsey should not be required to wait for a prolonged period before being permitted to reapply.

THEREFORE, it is Ordered this 20th day of December 2001 that the decision of the MPD denying Mr. Dorsey's application is AFFIRMED, and MPD is directed to permit Mr. Dorsey to make a new application for licensure as of January 23, 2002 or such later date as Mr. Dorsey may choose.



Phyllis D. Thompson, Legal Member, Presiding  
Joan Schaffner, Public Member  
James L. Thorne, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Keith Davis,	)	
Appellant	)	
	)	
v.	)	BAR Docket No. 02-5771-LR
	)	
Metropolitan Police Department)	)	
Appellee	)	

OPINION AND ORDER

This case came before the Board on December 14, 2001 on an appeal filed on October 25, 2001 by Keith A. Davis, challenging the denial by the Metropolitan Police Department (MPD) of his application for a license as a security guard and commission as a special police officer. Board members Phyllis D. Thompson, Joan Schaffner, and James L. Thorne heard the appeal. Mr. Davis appeared pro se. Officer Elizabeth Lowery represented the MPD. The appellant and the MPD representative were sworn.

Mr. Davis submitted his application on October 11, 2001. With it he furnished documentation from the District Court for Charles County Maryland, evidencing his guilty plea to a charge of possession of drug paraphernalia and the court's order requiring him to pay a fine and sentencing him to three years of unsupervised probation commencing April 24, 2001. MPD denied the application on October 16, 2001, citing 17 DCMR § 2104.1(b).

17 DCMR § 2104.1(b) states that a person "who has been released from incarceration for a misdemeanor conviction in any jurisdiction in the United States involving larceny or involving the illegal use, carrying, or concealment of a dangerous weapon within one (1) year prior to the date of filing an application for certification" shall "not be eligible for certification as a security officer unless he or she meets the burden of proving to the Board of Appeals and Review that he or she is not a significant safety risk to the community and meets all other requirements for certification."

The Board panel noted at the hearing that by its terms section 2104.1(b) is not applicable to Mr. Davis's application since the offense for which he received probation did not involve larceny or possession of a dangerous weapon and since no period of incarceration was involved. In response, Officer Lowery explained that denial of the application is also mandated by provisions of the MPD Security Officers Management Branch ("SOMB") Policy Manual stating that an applicant for a special police officer commission or security guard license "will be declared ineligible" if the applicant is "presently on parole, probation or any other type of conditional release." As noted above, Mr. Davis's probation continues until April 24, 2004.

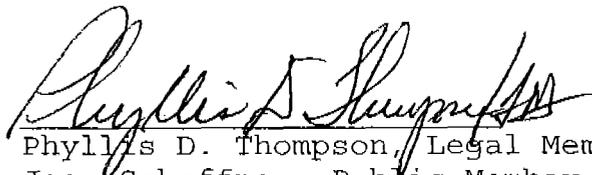
The Board declines to uphold the denial of Mr. Davis's application for a security guard license on the basis of the SOMB Policy Manual provisions. As far as the Board can discern, the Policy Manual is an internal MPD operating manual that has never been promulgated as a formal rule or regulation. Such internal government manuals do not have the force of law and are not binding. See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981); *Pearce v. United States*, 261 F.3d 643, 649 (6th Cir. 2001); *United States v. Alameda Gateway*, 213 F.3d 1161, 1168 (9th Cir. 2000); *Reich v. Manganas*, 70 F.3d 434, 437 (6th Cir. 1995); *DFDS Seacruises (Bahamas) v. United States*, 676 F. Supp. 1193, 1205 (S.D. Fla. 1987). If MPD wishes to impose the policies described in the Policy Manual as rules of general applicability, it should take steps to accomplish their promulgation as regulations.

Although appellant's admission that he possessed illegal drug paraphernalia at least arguably calls into question his moral character, in the Board's view the evidence in the record (including evidence of only one arrest) will not support a finding that appellant lacks the moral character for certification as a security guard. The Board therefore concludes that MPD's denial of his application for licensure as a security guard cannot stand.

As to the appeal relating to MPD's denial of Mr. Davis's application for commission as a special police officer, the Board has determined that it should not decide such appeals in cases where the record does not establish that the appellant has exhausted available administrative remedies within MPD. Appellant confirmed at the hearing that he has not availed himself of the opportunity (afforded under the MPD Special Police Officer's Manual) to appeal the denial to

the Chief of Police. Accordingly, the Board declines to rule on the special-police-officer-commission issue.

THEREFORE, it is Ordered this 20th day of December 2001 that the decision of the MPD denying Mr. Davis's application for licensure as a security guard is REVERSED and the case is REMANDED to MPD for action in accordance with this decision. Mr. Davis's appeal from denial of his application for commission as a special police officer is DISMISSED.



Phyllis D. Thompson, Legal Member, Presiding  
Joan Schaffner, Public Member  
James L. Thorne, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Macdonald Parsons,	)	
Appellant	)	
	)	
v.	)	BAR Docket No. 02-5768-LR
	)	
Metropolitan Police Department)	)	
Appellee	)	

OPINION AND ORDER

This case came before the Board on December 14, 2001 on an appeal filed on October 17, 2001 by Macdonald Parsons, challenging the denial by the Metropolitan Police Department (MPD) of his application for licensure as a security guard. Board members Phyllis D. Thompson, Joan Schaffner, and James L. Thorne heard the appeal. Mr. Parsons appeared pro se. Officer Elizabeth Lowery represented the MPD. The appellant and the MPD representative were sworn.

Mr. Parsons submitted his application on June 27, 2001. MPD denied the application on September 26, 2001, on the ground that Mr. Parsons failed to list an arrest on his application and affidavit. MPD cited 17 DCMR § 2120.1, which states that an application for certification as a security officer shall be subject to denial if there is "a material misstatement in the license application." The arrest in question, which is shown on an FBI printout obtained by MPD, occurred on May 21, 2000 at Dulles Airport and was for immigration law violations including fraud or misrepresentation.

Mr. Parsons testified that he was arrested by Immigration and Naturalization Service (INS) officials for attempting entry into the United States using a passport belonging to someone else. He testified that he found the passport in a taxicab in Sierra Leone. He further testified that he entered the United States with an intent to seek asylum from persecution in his country and to apply for refugee status. He provided the Board with copies of a document that appeared to be an order of the Board of Immigrant Appeals (BIA) granting Mr. Parsons' request for asylum in the United States. Mr. Parsons also submitted to the Board an INS

employment authorization card authorizing him to work in the United States.

Mr. Parsons explained that he did not list the INS arrest on his application form or affidavit because he believed that the forms were inquiring about his record once he was legally admitted into the United States. He asserted that, when seeking asylum, he was candid and forthright about his use of someone else's passport.

The Board accepts Mr. Parsons' explanation for his failure to list his arrest. The Board finds in the record no evidence that Mr. Parsons lacks the good moral character required for licensure as a security guard. Although BIA confidentiality policy has precluded the Board staff from verifying the BIA grant of asylum to Mr. Parsons, the documents that Mr. Parsons presented at the hearing appear to the Board and Board staff to be authentic. On the assumption that the BIA did not regard Mr. Parsons' arrest and use of another's passport as factors disqualifying him from remaining and working in the United States, the Board does not believe that his arrest and misrepresentation in connection with seeking asylum should disqualify him for licensure as a security guard.

WHEREFORE, it is Ordered this 20th day of December 2001 that the decision of the MPD denying Mr. Parsons' application is REVERSED and the case is REMANDED to MPD for action consistent with this decision.



Phyllis D. Thompson, Legal Member, Presiding  
Joan Schaffner, Public Member  
James L. Thorne, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Omar A. Omar,	)	
Appellant	)	
	)	
v.	)	BAR Docket No. 02-5789-LR
	)	
Metropolitan Police Department)	)	
Appellee	)	

OPINION AND ORDER

This case came before the Board on February 22, 2002 on an appeal filed on December 13, 2001 by Omar A. Omar, challenging the denial by the Metropolitan Police Department (MPD) of his application for licensure as a security guard. Board members Fritz R. Kahn, Eduardo A. Balarezo, and Phyllis D. Thompson heard the appeal. Mr. Omar appeared pro se. Mr. Milton Agurs represented the MPD. The appellant and the MPD representative were sworn.

Mr. Omar submitted his application on September 17, 2001. MPD denied the application on December 13, 2001, on the ground that Mr. Omar failed to list charges on his application and accompanying affidavit. MPD cited 17 DCMR § 2120.1, which states that an application for certification as a security officer shall be subject to denial if there is "a material misstatement in the license application." The charges in question, which are shown on an FBI printout obtained by MPD, relate to Mr. Omar's detention by the Immigration and Naturalization Service (INS) on February 8, 2001, after he entered the country at Dulles International Airport. The charges listed on the printout are violation of the immigration laws, fraud or misrepresentation in violation of 8 U.S.C. § 118 212(A)(6)(C)(I), and immigrant without documents, in violation of 8 U.S.C. § 118 212(A)(7)(A)(I)(I).

Mr. Omar testified that he used a false passport to exit his country (Sudan) but did not present any false documents to U.S. immigration officials. Instead, he testified, he asked for asylum in the United States upon his arrival at Dulles. He submitted to the Board a copy of a May 15, 2001 Order by Immigration Court Judge Joan V. Churchill indicating that,

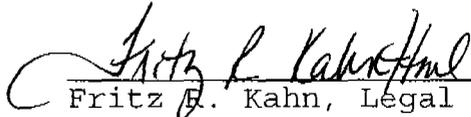
by oral decision on the same date, the court granted Mr. Omar's request for asylum "per agreement of INS."

Mr. Omar explained that he did not list the INS detention on his application form or affidavit, and believes that he should not be required to do so, because he does not regard his detention as an "arrest" or an "arrest for a criminal offense," which are what the application and affidavit required him to disclose. He explained that he is unwilling to identify himself as an individual with an arrest or criminal offense record, and he urged that he should not be required to do so as the price of obtaining licensure as a security guard after having sought (and having made what the Immigration Court and the INS apparently agreed was a well-founded case for) asylum.

The Board accepts Mr. Omar's explanation for his failure to list his INS detention and does not view it as evidence of dishonesty or lack of good moral character. Whether or not the charges listed on Mr. Omar's FBI printout are criminal offenses (and it appears to the Board that they may not be, but instead are civil offenses), it is doubtful that a lay person would understand the INS's detention and citation of an immigrant seeking asylum to constitute an "arrest" for a "criminal offense" that must be listed in response to the questions on the security guard license application and affidavit. Furthermore, the Immigration Court Order indicates that the INS agreed that Mr. Omar was entitled to asylum and (apparently) concluded that the charges against him were not warranted. Thus, it appears that even if Mr. Omar had listed the charges on his application and affidavit, they would not have been grounds for denying his application.

On this record, the Board finds that even if Mr. Omar made a misstatement on his application and affidavit, it was not a material misstatement that justifies denial of his application. The Board finds, moreover, that there is no valid policy reason why the MPD should require Mr. Omar to list his INS detention and the related charges as an "arrest" or "arrest for a criminal offense" as a prerequisite to processing his application and issuing his license. If the MPD believes that information about Mr. Omar's INS detention and charges must be part of his application record or must be shared with his employer, the Board believes these purposes can be accomplished by other means.

WHEREFORE, it is Ordered this 25th day of February 2002 that the decision of the MPD denying Mr. Omar's application is REVERSED and the case is REMANDED to MPD for action consistent with this decision.



Fritz R. Kahn, Legal Member, Presiding  
Phyllis D. Thompson, Legal Member  
Eduardo A. Balarezo, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

James D. Hunt, )  
Appellant )  
 )  
v. ) Docket No. 02-5832-LR  
 )  
Metropolitan Police Department, )  
Appellee )

## OPINION AND ORDER

This case came before the Board on May 17, 2002 on an appeal filed on April 30, 2002 by James D. Hunt, challenging the denial by the Metropolitan Police Department (MPD) of his application for licensure as a security guard. Board members Phyllis D. Thompson, Joan Schaffner, and Brian Flowers heard the appeal. Mr. Hunt appeared pro se. Officers Edward Harper, Maria Vasquez, and Yolanda Lampkin represented the MPD. The appellant and the MPD representatives were sworn.

Mr. Hunt submitted his application for licensure as a security guard on January 29, 2002. The application was denied on April 30, 2002, on the ground that Mr. Hunt "failed to list charges that took place in 2001." 17 DCMR § 2120.1(a) authorizes denial of a security officer license if there is a "material misstatement in the license application."

The charges from the year 2001 to which the MPD referred in its denial notice were "assault-sec degree" charges from May 7, 2001 shown on an FBI printout obtained by MPD. In his Notice of Appeal and during the hearing, Mr. Hunt explained that the charges related to a domestic dispute, as a result of which both he and his roommate were arrested. He also explained that he wrote "none" in the sections of his application and affidavit asking him to list arrests because he thought he was required to list only convictions. Mr. Hunt acknowledged, however, that he read the instructions on the forms, which clearly ask for a list of arrests.

Mr. Hunt's explanation that he believed he was required to list convictions only does not excuse his failure to list his charges, because of the explicit instructions on the application form and affidavit. The Board concludes that Mr. Hunt's failure to list the charges constituted a material misstatement that justified MPD's decision to deny the license application.

Nevertheless, the Board takes note of Mr. Hunt's explanation that his only charges relate to a domestic dispute, the type of charges that may not have been a relevant factor in MPD's decision-making process about whether a license should be granted.<sup>1</sup> The Board also noted at the hearing MPD's willingness in other cases to waive the waiting period for re-application, and to permit the applicant to re-apply immediately, where the only charge that an applicant failed to list was a domestic dispute charge. The MPD representatives agreed to a waiver of the waiting period in Mr. Hunt's case.

WHEREFORE, this 29th day of May 2002, the Board confirms its order, issued at the conclusion of the hearing, that the decision of the MPD denying Mr. Hunt's application is AFFIRMED; and further ORDERED that MPD shall permit Mr. Hunt to re-apply for a license without further delay.



Phyllis D. Thompson, Legal Member, Presiding  
Joan Schaffner, Public Member  
Brian Flowers, Government Member

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<sup>1</sup>One test of the materiality of a misstatement that the Board has employed is whether the information that is withheld is information that could reasonably be expected to influence the action or decision of the person from whom the information is withheld. See *Jones v. Prudential Insurance Co.*, 388 A. 2d 476, 481 (D.C. 1978). Therefore, in determining whether the failure to list a charge amounts to a material misstatement, the Board generally considers whether a charge that an applicant failed to list would have been a factor in the MPD's decision to grant or deny a license. A misstatement could also be material if it casts a shadow on an applicant's honesty or integrity.

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

William Barnes,	)	
Appellant	)	
	)	
v.	)	Docket No. 03-6008-LR
	)	
Metropolitan Police Department,	)	
Appellee	)	

OPINION AND ORDER

This case came before the Board on May 2, 2003, on an appeal filed on January 6, 2003 by William Barnes, challenging the denial by the Metropolitan Police Department (MPD) of his application for licensure as a security guard. Board members Phyllis D. Thompson and Brian K. Flowers heard the appeal. Mr. Barnes appeared pro se. The MPD was represented by Investigator Maria Vasquez and Officer Gilbert Sanchez.

Appellant completed his application on March 28, 2003, and his accompanying affidavit was notarized on April 1, 2003. The MPD denied his application on April 2, 2003, on the ground that he failed to list all of his arrests and convictions on his application forms. D.C. Mun. Regs. title 17, section 2120.1(a) authorizes denial of a security officer license if there is a "material misstatement in the license application."

Appellant listed the following on the portion of his application and affidavit asking him to list arrests and convictions: "1989 Violation [sp] probation possession of drugs charge and dirty urine." On his affidavit, he listed a 1993 conviction for attempted cocaine distribution. A police printout contained in the record shows, however, that appellant had a number of other arrests and convictions during the years from 1983 to 1993.

Appellant explained at the hearing that he had obtained from the District of Columbia police department a print-out

showing the arrest and conviction that he listed on his affidavit. He further testified that he was not aware at the time he completed his application that he would need information from Virginia, but nevertheless listed what he could recall of his arrest and convictions in that state.

Investigator Vasquez expressed disbelief that appellant could have forgotten some of his arrests and convictions. She also pointed to the information that appellant provided on his application, about a violation of probation, as evidence that appellant realized that he had additional charges that he had not listed.

There is no dispute in this case that appellant gave incomplete information, and thus made misstatements, on his application forms. The issue this case presents is whether appellant made a "material" misstatement on his application materials.

One test of materiality that this Board has employed is whether the information that was withheld is information that could reasonably have been expected to influence the action or decision of the MPD; or, stated differently, whether the misrepresented fact would have been relevant or important to the MPD's decision about whether a license should be granted. On a number of occasions, MPD representatives have advised the Board that arrests or convictions that occurred approximately ten or more years before an applicant's application is submitted is not a factor in the MPD's decision to grant or deny a security guard license. Also, D.C. Mun. Regs. title 17 DCMR, section 2104.4(c), pertaining to certain arrests resulting in conviction and incarceration, specifically requires the MPD to take into account the time elapsed since an applicant's conviction.

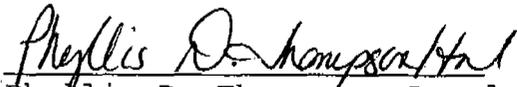
It appears that, if appellant had listed them on his application, the 1983-93 arrests and convictions would not have factored into the MPD's decision on appellant's application or caused the MPD to deny the application. The Board concludes, therefore, that appellant's failure to list a number of his arrests and convictions on his application materials did not amount to a material misstatement. (The Board also notes that the MPD did not cite moral character as a basis for denying appellant's application, and finds that the appellant testified

credibly that he has changed his life since the decade when he was regularly in trouble with the law.)

A misstatement can also be material if it casts a shadow on an applicant's honesty or integrity. The Board finds in this case that appellant's omission of information does not call into question his integrity or honesty. Like Inspector Vasquez, we place weight on appellant's acknowledgment in his application materials of his violation of a probation order. Appellant's reference to that order amounted to an acknowledgment that he had additional unlisted charge(s). It appears to the Board that appellant was not attempting to hide his arrest or conviction history. We also find credible appellant's testimony that he could not remember all of his charges.

For the foregoing reasons, the Board concludes that while appellant made misstatements in his license application, he did not make a material misstatement that warranted denial of his license application.

WHEREFORE, it is Ordered this 6th day of May, 2003 that the decision of MPD denying appellant's application is REVERSED, and the matter is remanded to the MPD for action consistent with this order. The MPD may require from appellant a complete listing of his charges (and shall make available to him for copying onto an application form a list of those charges), but shall not deny his application on the basis of his failure to list the charges on his earlier submissions, and shall not require him to begin the entire application process anew.



Phyllis D. Thompson, Legal Member, Presiding  
Brian K. Flowers, Government Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

REGINALD JACKSON )  
Appellant )  
v. )  
METROPOLITAN POLICE )  
DEPARTMENT )  
Appellee )

BAR Docket No.: 03-5854-LR

OPINION AND ORDER

This case came before the Board on January 24, 2003, on an appeal filed by Mr. Jackson on December 13, 2002. Mr. Jackson challenges the Metropolitan Police Department (MPD) decision denying his application to for a private detective agency license. Board members Phyllis Thompson, Terry Thomas, and Richard Johns heard the appeal. Mr. Jackson appeared pro se; Detective Dorothy "Dottie" Walltower represented the MPD; and both were duly sworn.

Mr. Jackson submitted his application to the MPD during July, 2002. The MPD denied Mr. Jackson's application on November 26, 2002, through a letter from Lt. Jon Shelton, Manager of the MPD's Security Officers Management Branch. Lt. Shelton stated in his letter that Mr. Jackson's record "includes serious acts of violence to include but not limited to Armed Robbery, Bank Robbery, Murder II While Armed and several charges for narcotics violations." The letter advised Mr. Jackson that "After careful review...it was determined that your involvement in such acts of violence against the community reflects negatively on your moral character. Therefore you are ineligible to receive a license in the District of Columbia for a private detective/security business" (underscoring in the original).

At the hearing before the Board, Detective Hightower stated that the MPD's interpretation is that the eligibility requirements for licensure as a security officer, found in 17 DCMR § 2102, apply as well to applicants seeking private detective licenses. 17 DCMR § 2102.1 states that "Except as otherwise provided in this chapter, no person shall be employed as a security officer unless that person has first been certified by the Mayor as being of good moral character."

Assuming (without deciding) that the provisions of 17 DCMR § 2102 did apply to Mr. Jackson's application, the applicable provisions include section 2102.2, which provides that: "In making a determination of moral character, the Mayor *shall consider* information received from the applicant's employers of the past five (5) years, character references, convictions for misdemeanors, military record, and any other relevant information that the Mayor's investigation reveals" (italics added). Despite that requirement of section 2102.2, the record indicates that the

MPD made its decision on Mr. Jackson's application primarily on the basis of Mr. Jackson's criminal record, without obtaining and considering character references or information about Mr. Jackson's most recent employment history.

Mr. Jackson testified at the hearing that he has undergone drug treatment at Lazarus House and has been clean and sober for eleven years. He further offered that he now works with a lawyer and would like to do "P.I. work" for the lawyer's personal injury practice. He stated that he could get references from his lawyer, people at Lazarus House and others. That and other testimony presented at the hearing, as well as Mr. Jackson's demeanor at the hearing, all suggest that insights that the MPD might derive from character references, information about Mr. Jackson's most recent employment history, and facts about Mr. Jackson's recent life choices possibly could have a material affect on the MPD's decision on Mr. Jackson's application. Thus, it appears to the Board that no one can say with assurance in this case that the MPD's failure to make the inquiries contemplated by section 2102.2 was harmless error. In light of the MPD's stated policy, the Board finds that Mr. Jackson is entitled to have the MPD consider such additional information of the type described in section 2102.2 as he is able to furnish within a reasonable time.

THEREFORE, it is ordered this 19th day of February 2003 that the decision of the MPD denying Mr. Jackson's application is REVERSED; and it is further ORDERED that the MPD shall afford Mr. Jackson a reasonable period of time within which to submit character references and other information relevant to his moral character, and shall consider any such additional information that is submitted, prior to making a decision on Mr. Jackson's application.

  
Phyllis D. Thompson, Legal Member  
Terry Thomas, Government Member  
Richard Johns, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Gary L. Alston,	)	
Appellant	)	
	)	
v.	)	BAR Docket No. 03-6054-LR
	)	
Metropolitan Police Department)	)	
Appellee	)	

OPINION AND ORDER

This case came before the Board on August 1, 2003, on an appeal filed on June 10, 2003, by Gary L. Alston, challenging the denial by the Metropolitan Police Department (MPD) of his application for licensure as a security guard. Board members Phyllis D. Thompson, Terri Thompson-Mallett, and Glenn S. Greene heard the appeal. Mr. Alston appeared pro se, accompanied by his son, Mr. Garrett Alston, who testified that he has been a police officer for 14 years. Officer Alicia Thomas represented the MPD. The appellant and the MPD representative were sworn.

Mr. Alston submitted his application on or about February 26, 2003. MPD denied the application on May 9, 2003, stating in the "COMMENTS" section that "Applicant failed to list 11 of his 13 arrests. He is being denied for his extensive arrest history, moral character and material misstatement. He has a felony conviction for armed robbery."

The FBI Identification Record prepared by the U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, shows eleven entries, the first one being "CHARGE 1-INV ROB" dating from 1960, and the most recent one being "CHARGE 1-UNLAW MANUFAC ETC CHARGE 2-DEADLY WEAPON CONCEALED" dating from 1983.

In the Affidavit submitted with application where the applicant "certifies that he/she has never been arrested for a criminal offense in the United States in the past, except for the following," Mr. Alston entered a 1971 "armed robbery" charge to which he plead "guilty," as well as a "disorderly conduct" charge dating from 1990 with the disposition "collateral re." This alleged 1990 charge does not appear in the FBI Identification Record in the file.

The applicable regulatory sections that may prevent Mr. Alston from obtaining the license are 17 DCMR § 2120.1 [moral character], 2120.1(a) [material misstatement], and 2120.1(e) [conviction of misdemeanor involving theft].

Mr. Alston appealed to the Board of Appeals and Review on June 10, 2003. With his appeal, Mr. Alston submitted a written, explanatory statement. There, he stated that "I would like to point out that the last time I was charged, arrested or convicted of anything was over thirty (30) years ago. I believe that since that time I have turned my life around and that I have demonstrated that I am now of good moral character." He also submitted to the Board a letter of support from his employer. Mr. Alston's son testified as a character witness for his father.

In answer to a question from the Board, Officer Thomas testified that, as a matter of policy, charges that are more than 10 years old are usually not considered.

In response to a question from the Board, Officer Thomas also stated that the MPD had not checked any references for Mr. Alston.

Based on the record and the testimony, the Board is satisfied that Mr. Alston has succeeded in turning his life around, and the charges and convictions are too old to be the basis for denial of the application. Also, there is satisfactory evidence that Mr. Alston tried to obtain a complete record of his criminal history and did not attempt to hide any charges. This is supported by the fact that he listed the 1990 disorderly conduct charge even though it did not appear in the criminal history. From Mr. Alston's description of the circumstances of that 1990 charge, the Board is satisfied that it does not disqualify Mr. Alston for licensure.

THEREFORE, it is ordered this 1st day of August 2003 that the decision of the MPD denying Mr. Alston's application is REVERSED and the case is REMANDED to MPD for action consistent with this decision.

  
Phyllis D. Thompson, Legal Member, Presiding  
Terri Thompson-Mallett, Government Member  
Glenn S. Greene, Legal Member

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW**

<b>Yolanda Clark,</b>	:	
<b>Appellant,</b>	:	
	:	
v.	:	<b>Docket No.: 03-6071-LR</b>
	:	
<b>Metropolitan Police Department,</b>	:	
<b>Appellee.</b>	:	
	:	

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**OPINION AND ORDER**

This case first came before the Board on August 22, 2003, on an appeal filed on July 16, 2003 by Yolanda Clark challenging the denial by the Metropolitan Police Department ("MPD") of her application for a license as a security guard. Board members Phyllis D. Thompson, Richard F. Johns, and Terry B. Thomas heard the appeal. Ms. Clark appeared pro se. The MPD was represented by Officer Maria Vazquez and Chanita Ransom of the Security Officers Management Branch. The parties were sworn.

Ms. Clark completed her application and accompanying affidavit on April 21, 2003. MPD denied the application on July 15, 2003, based upon Ms. Clark's criminal history record and her failure to list all of her previous charges. The MPD cited 17 DCMR § 2120.1(a), which authorizes denial of a security officer license if there is a "material misstatement in the license application;" and D.C. Mun. Reg. tit. 17, §2120.1(a).

On her application, Ms. Clark did list, in the section that asked her to list "all arrests and/or convictions, including all cases dismissed or no papered," charges from 1987 through 1991. Ms. Clark explained at the hearing that she was instructed by her employer Jenkins Security to go "downtown" and get information relating to her charges from Superior Court for the District of Columbia. Ms. Clark went to the Superior Court and received a printout which listed certain charges. Ms. Clark copied the information from the printout onto her application. Based upon information received from her employer and the information listed on the printout, it was Ms. Clark's understanding that the information provided on the application was sufficient. The Board found Ms. Clark's testimony credible on this point. The Board further finds that the omission on Ms. Clark's application relating to her criminal history record is not evidence of dishonesty and that Ms. Clark did not intend to mislead or deceive the MPD.

As to the denial of appellant's license application on the basis of her criminal record, the Board finds as follows. D.C. Mun. Reg. tit. 17, § 2102.1 states that no person shall be employed as a security officer unless she has good moral character. D.C. Mun. Reg. tit. 17, § 2102.2 states, however, that the MPD "shall consider" character references in making a determination of moral character. Although section 2102.2 indicates clearly that the MPD must consider any information received from an applicant's references, it does not state that the MPD must contact an applicant's references

to solicit information not submitted with the application. Nonetheless, the application for licensure as a security guard does ask applicants to list the names, addresses and telephone numbers of references. The Board believes that this may mislead applicants into thinking that they need not submit information from their references with their applications and that the MPD will contact the listed references to conduct its own investigation, just as it does in checking applicants' criminal records. The Board concludes that if the MPD does not intend to take that step, it must at least advise applicants who have criminal records of the need to submit letters of reference and/or similar information to support their applications.

The MPD did not offer evidence that it checked with or sought information concerning appellant's character from the references she listed on her application. The Board finds that appellant should be permitted to supplement her application with a letter or letters of reference and that the MPD should consider any such submitted references before determining whether to grant appellant a license.

WHEREFORE, the Board VACATES the MPD decision denying the license application and REMANDS this matter to MPD with instructions that it must permit appellant to complete the license application process by submitting, within a reasonable time, a corrected affidavit listing her full criminal history record and a letter or letters of reference as to whether she has the necessary moral character for licensure, and that the MPD must consider any reference(s) that appellant submits before making its decision on her application.

SO ORDERED this 28th day of October, 2003, nunc pro tunc.

  
\_\_\_\_\_  
Phyllis D. Thompson, Legal Member, Presiding  
Richard F. Johns, Public Member  
Terry B. Thomas, Government Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

LATASHA M. DIGGS )

Appellant. )

vs. )

BAR Docket No. 04-6136-LR

METROPOLITAN POLICE )  
DEPARTMENT )

Appellee. )

ORDER

This matter came before the Board at a duly scheduled hearing set for 10:00 a.m., Friday, February 6, 2004.

Appellant, Latasha M. Diggs, appeared pro se.

Appellee, Metropolitan Police Department, Security Officers Management Branch (MPD), was represented by Officer Gilbert V. Sanchez.

The witnesses were sworn.

**Findings of Fact**

The Appellant filed this appeal on December 10, 2004. The appeal results from a denial by the Appellee of her application to become licensed as a security guard.

During the licensing process, the Appellant submitted an Application dated September 4, 2003 and an Affidavit dated August 28, 2003. In both, the Appellant listed a September 1995 theft charge. On September 8, 2003 the Appellant completed a six-question MPD Questionnaire entitled Notice and answered "yes" to the following questions: Have you ever been arrested and/or convicted? Have you ever been arrested and/or convicted outside of the Washington, DC area? Have you ever been on probation or parole? On December 10, 2003 the Appellant was denied her license. The comment section of the denial notice stated, "applicant is being denied for a theft (conviction) on 9/24/95." The regulation cited for the denial was "17 DCMR § 2120.1(e) [conviction of a misdemeanor involving theft, fraudulent conduct, assault or false arrest or imprisonment]."

LATASHA M. DIGGS  
PAGE 2

At the hearing, the Appellant admitted to committing the 1995 theft offense. She offered being young and having made a mistake as her excuses for committing the offense. The Appellant stated that she has changed her life and is now attempting to grow as a person. The Appellant also stated that she has performed security for four years and has worked at such places as the Defense Information Service. Further, the Appellant stated that she has possessed both District of Columbia (DC) and Virginia licenses and that she has held temporary DC licenses three times. Finally, the Appellant stated that upon her most recent attempt to renew her temporary DC license that she was denied. Officer Sanchez stated that MPD's records reflect that the Appellant was authorized to perform security under a series of temporary licenses but that there is no record of a permanent license. Finally, Officer Sanchez stated the theft conviction was sufficient grounds to deny the license in accordance with regulation.

#### Conclusions of Law

The Board finds that the District Court of Maryland record of the September 24, 1995 theft charge holds an official disposition of Probation Before Judgment, which ended satisfactorily on February 11, 1996. Therefore, MPD's denial that "applicant is being denied for a theft (conviction) on 9/24/95" and citing of "17 DCMR § 2120.1(e) [conviction of a misdemeanor involving theft, fraudulent conduct, assault or false arrest or imprisonment]" is NOT APPLICABLE. In fact, the record shows that the Appellant entered a guilty plea under the legal fiction of what is termed 'probation before judgment' [this allows a Defendant to essentially enter a temporary guilty plea and serve a probationary period (without further violation) in order to have the temporary plea withdrawn. Should the Defendant violate probation at any point (and there is no record that the Appellant did), the guilty plea is then automatically entered and the Defendant would then proceed directly to the sentencing phase without trial.] This is not considered a conviction because the guilty plea is not accepted unless/until the Defendant violates one/more conditions of the probation. Having this information, the Board concludes that the September 24, 1995 theft did not result in a conviction; and therefore, no record of conviction exists for this arrest.

**WHEREFORE**, it is ordered on this 6<sup>th</sup> day of February 2004 that the decision by the Appellee to deny the application is REVERSED and the case is REMANDED to the Appellee for issuance of license.

  
Fritz Kahn, Legal Member  
Michael O. Patterson, Public Member  
Terry B. Thomas, Government Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF APPEALS AND REVIEW

Bio Medical Applications of D.C. )  
d/b/a Fresenius Medical Care, N.A. )

Appellant, )

BAR Docket No. 01-5619-CON

v. )

Appeal of Issuance of CON  
No. 99-0-5

State Health Planning and Development )  
Agency of D.C., )

Appellee )

Capitol Dialysis, L.L.C., )

Intervenor )

DECISION AND ORDER

This appeal is a challenge by appellant Bio Medical Applications of the District of Columbia, d/b/a Fresenius Medical Care (“Fresenius”) to the decision of the D.C. State Health Planning and Development Agency (“SHPDA”) granting a certificate of need (“CON”) to Capitol Dialysis, L.L.C. (“Capitol”), permitting Capitol to establish a 15-station outpatient hemodialysis facility at 140 Q Street, N.E. Fresenius contends that SHPDA’s determination that there was a need for additional adult in-facility dialysis stations in the District was contrary to the need projections contained in the District’s Comprehensive Health Systems Plan (“the Comprehensive Health Plan” or “the Plan”); that issuance of the CON violated the legal requirement that projects receiving CON approval be consistent with the Comprehensive Health Plan; and that SHPDA therefore exceeded its authority in issuing the CON.

Board members David H. Marlin, Fritz R. Kahn, and Phyllis D. Thompson heard oral argument in this matter on October 23, 2001. Lisa A. Estrada, Esq., argued the case for appellants. Leslie H. Nelson, Esq., of the Office of Corporation Counsel, argued the case for appellee. John T. Brennan, Jr., Esq., argued for the intervenor.

The Board has reviewed the record and considered the arguments presented in the parties' briefs and at oral argument. On the record before us, and for the reasons discussed below, we find no basis to disturb SHPDA's decision.

### Statutory and Regulatory Background

Under District law, SHPDA, with the advice and recommendation of the State Health Coordinating Council ("SHCC"), is charged with developing and promulgating a Comprehensive Health Plan for the District. D.C. Code Ann. § 32-354(a) and (d).<sup>1</sup> The Comprehensive Health Plan is to "identify the health needs of District residents" and is to "serve as the basis for allocating public and private health resources in the District of Columbia." *Id.* §§ 32-354(a)(3) and (b). There is to be public involvement in the development of the Plan, including a public hearing, and SHPDA is required to conduct informational and educational activities concerning it. *Id.* §§ 32-354(c)(1) and (3). SHPDA must publish in the D.C. Register a notice of the completion and issuance of the Plan and forward a copy of it to the D.C. Public Library. *Id.* § 32-354(d). The Comprehensive Health Plan is to be reviewed annually and a new plan "shall be issued every 5 years." *Id.* § 32-354(e). In addition, SHPDA is to develop an Annual Implementation Plan for implementation of the Comprehensive Health Plan. *Id.*, § 32-354(c)(2).

SHPDA also is responsible for administering the certificate of need ("CON") program in the District. D.C. Code Ann. § 32-352(b)(3). Any person proposing to offer a new institutional health service in the District, which term includes the services of a freestanding hemodialysis facility, must obtain from SHPDA a CON that demonstrates a public need for the new service. D.C. Code Ann. § 32-356(a). The SHCC makes recommendations to SHPDA on applications for a certificate of need. *Id.* § 32-353(b)(3).

To grant a certificate of need, SHPDA must find that the proposed health service meets applicable requirements established by regulation. D.C. Code Ann. § 32-360(a). SHPDA regulations governing the CON application and review process are found at 22 CDCR Chapter 40. 22 CDCR § 4050.1 states that

The Certificate of Need general criteria and standards set forth in this section, in addition to specific criteria for particular health services as specified in the D.C. State Health Plan . . . shall be applied by the SHPDA during the conduct of Certificate of Need reviews, as applicable.

22 CDCR §§ 4050.3 through 4050.32 establish a number of criteria and standards that apply to CON applications (other than specified types of applications not relevant here). See 22 CDCR § 4050.2. Section 4050.3 provides as follows:

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<sup>1</sup> All references in this decision to the D.C. Code are to the Code as it existed at the time of the SHPDA decision in issue, prior to the 2001 recodification.

4050.3

Criterion: Consistency of the project with defined priorities, goals, objectives, and criteria and standards of the State Health Plan (SHP) and the Annual Implementation Plan (AIP) for the development of health facilities and/or services, if applicable.

Standard: The project shall be in conformance with the general provisions priorities, goals, objectives, recommended actions, and criteria and standards contained in the SHP and AIP, if applicable.

In addition, 22 CDCR Part 4309 sets out a number of criteria and general considerations that SHPDA and SHCC must use in conducting CON reviews. Section 4309.4 states that:

A review shall consider the relationship of the health services being reviewed to the applicable Annual Implementation Plan and State Health Plan. Each decision of the SHPDA, or the appropriate judicial or administrative review body, to issue a Certificate of Need shall be consistent with the State Health Plan, except in emergency circumstances that pose an imminent threat to public health.

#### **The Proceedings and Decision Below**

In February, 2000, Capitol submitted to SHPDA a CON application seeking approval to establish a 20-station freestanding outpatient hemodialysis facility. In June 2000, after a public hearing and comment period, SHPDA staff presented to the SHCC a recommendation that Capitol's CON application be denied. SHPDA staff took note of Capitol's argument that many dialysis patients residing in Wards 4 and 5 of the District, a significant number of whom are elderly and frail, had no option but to travel long distances to dialysis centers located in other parts of the District and to accept treatment during evening hours (the third daily shift of dialysis sessions) that are inconvenient for the patients and their families. SHPDA Staff Report at 4. SHPDA staff also acknowledged Capitol's submission of dialysis-station need projections that were prepared using statistical data that were more current than the data reflected in a 1999 draft End-Stage Renal Disease Services Chapter VI-B (the "Draft ESRD Chapter" or the "Draft Chapter") of the District's Comprehensive Health Plan, and that showed a need for additional dialysis stations in the District. *Id.* The SHPDA staff concluded, however, that Capitol had "not demonstrated the need for the project." SHPDA Staff Report at 15. The Staff Report reasoned that

The draft End-Stage Renal Disease Services Chapter of the Comprehensive Health Plan, on the other hand, projects that by the year 2002 there will be 1,743 dialysis patients and that they will need 291 stations to serve them. Based on the recognition that there were 326 stations in 1999, . . . the Plan concludes that there is no need for additional adult chronic in-facility stations until the year 2002. Since then the SHPDA has approved nine (9) additional stations to be located in nursing homes . . . . This means that currently there are 335 stations.

SHPDA Staff Report at 5-6. The SHPDA Staff concluded in its Preliminary Recommendation to the SHPDA Director that “[a]s the draft Comprehensive Health Plan projects that there is no need for additional dialysis stations until 2002 and given the number of vacant slots available in exiting facilities, there is no need for additional stations at this time.” *Id.*

At a hearing in June 2000, SHPDA staff explained to the SHCC Project Review Committee that “there is no need for . . . additional stations until the year 2002, is what the plan says, basically, and the staff has to live by that, and the recommendation is based on that.” Transcript of June 8, 2000 Project Review Committee Hearing, at 82-83. Notwithstanding the SHPDA staff’s recommendation, both the SHCC Project Review Committee and the full SHCC voted to recommend approval of the CON. As Fresenius notes in its brief, at least some SHCC members appeared to believe that their recommendation to approve Capitol’s CON application entailed acting in a manner inconsistent with the District’s Comprehensive Plan. See Minutes of July 13, 2000 SHCC Meeting at 5 (remarks of Chairman Tate that she “felt comfortable taking the Comprehensive Plan into consideration but setting it aside to a certain extent”).

On July 20, 2000, SHPDA Director Regina Knox Woods issued SHPDA’s decision awarding a CON for a 15-station dialysis facility. Director Woods acknowledged the SHPDA staff’s observation that the District’s Comprehensive Plan indicated no need for new adult hemodialysis facility stations. SHPDA Notice of Grant of CON at 6. Director Woods concluded, however, that

While I understand staff’s concerns, I have determined that the introduction of a new provider into the system will help enhance competition and improve quality and accessibility of services. I have, therefore, determined that the Applicant has justified the need for some additional stations.

SHPDA Notice of Grant of CON at 7. Director Woods further explained:

The new facility will help enable patients to receive care at the time and location that is convenient to them. Given the

medical condition of dialysis patients, and given that they have to receive care three times a week, it is important to reduce the circumstances that will force patients to travel long distances or to receive care in the evenings.

SHPDA Notice of Grant of Con at 18.

By letter dated September 13, 2000, SHPDA denied appellant's motion to reconsider the award of a CON to Capitol. Director Woods explained that her decision to grant the CON "was fundamentally based on the recognition that dialysis patients are often in poor medical condition and need to receive care at a time and location that helps reduce their burden of obtaining services three days a week." SHPDA Denial of Request for Reconsideration at 1. Director Woods explained that "a sufficient factual showing was made to warrant approval of 15 additional stations to hopefully relieve the burden and inconvenience on the public." *Id.* at 1.

Director Woods acknowledged that Fresenius had "correctly note[d] that the draft plan determined that there are enough stations for now and through 2002." *Id.* at 2. She also stated that SHPDA recognized "the thrust of the argument that there are enough dialysis stations compared with the need identified in the draft chapter of the Comprehensive Health Plan." *Id.* She explained, however, that the decision to approve Capitol's CON application "was based on the need for patients to receive care to the extent possible at the time and location that is convenient for them," to "help improve their quality of life." *Id.*

### Standard of Review

The standard of review that the Board must apply in this case is narrow. We may disturb SHPDA's decision only if we find that it was arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or unsupported by substantial evidence in the record. 1 CDCR §§ 510.14(a)-(e). In conducting our review, we must "take due account of the presumption of official regularity, the experience, and specialized competence of the SHPDA, and the purposes of" District law relating to health services planning. D.C. Code Ann. § 32-363(a) (1981).

### Analysis

Fresenius argues that SHPDA acted outside the scope of its authority and that its award of a CON to Capitol was contrary to District law governing the CON process because the assessment of need set forth in the draft Comprehensive Health Plan Chapter on End-Stage Renal Disease Services precluded approval of a new dialysis facility in the District. Fresenius points out that the Draft ESRD Chapter identified a need for 291 dialysis stations in the District by the year 2002, while the inventory of dialysis stations in the District at the time of Capitol's application already exceeded that number. SHPDA and Capitol counter that the Draft ESRD Chapter did not bar the CON approval because the draft chapter, a revision of the 1989 District of Columbia Comprehensive Health Plan,

Chapter on End-Stage Renal Disease Services, was just that: a mere *draft* chapter that has never been formally adopted in accordance with the procedural steps outlined in D.C. Code. Ann. §§ 32-354(c) and (d).

The appellee's and intervenor's argument -- that the need determinations and projections contained in the Draft ESRD Chapter did not constrain SHPDA's decision-making because the chapter is an unpromulgated draft -- has considerable merit. In conducting CON reviews, SHPDA is mandated to "utilize all appropriate criteria adopted by rules." D.C. Code Ann. § 44-410(c). Because the Draft ESRD Chapter has never been issued in accordance with the procedures spelled out in D.C. Code Ann. § 32-354 and has not been incorporated in any rule, it is questionable whether SHPDA is legally obligated to utilize the criteria and standards set out in the draft. We hesitate to rule broadly on the status of the Draft Chapter, however, because, as appellant points out, there is some indication from the record that SHPDA "treated the Draft Chapter as the applicable Comprehensive Plan for all purposes." Appellant's Brief at 2 n. 1. There is some authority to the effect that if SHPDA intended to be bound by the criteria and standards set out in that draft, it is bound to follow those standards to avoid prejudice to affected parties. *See Wilkinson v. Legal Services Corporation*, 27 F. Supp. 2d 32, 60-61 (D.D.C. 1998) (citing authority that even internal, unpublished rules can be binding on an agency; that with regard to rules that have not been formally promulgated, the "law" to which an agency will be bound are those rules to which it intended to be bound; and that those rules implicit in an agency's course of conduct can give rise to a "common law" administrative rule).

We conclude that we do not need to decide the broader issue of whether SHPDA was bound to review Capitol's CON applications for consistency with the Draft ESRD Chapter, because we find that even if SHPDA was required to act in conformity with the criteria and standards contained in Draft Chapter, SHPDA's decision to award the CON was not inconsistent with those criteria and standards.

Our reasoning is as follows. First, we do not read the relevant language of the Draft ESRD Chapter to have the same mandatory effect that appellants infer. In setting out health systems availability/need criteria and standards, the Draft Chapter specifies that "Dialysis capacity in the District of Columbia and the surrounding health service areas *should* be sufficient to meet the needs of all District and Metropolitan area residents, and nonresident visitors" and that "[c]hronic maintenance hemodialysis stations *should* be available in the numbers specified in the need methodology in this chapter" (emphasis supplied). By contrast, the Draft Chapter also specifies that "[n]o expansion of a dialysis facility shall be approved until the facility's utilization rate is 85 percent (3.0 shifts a day, six days a week) and it can be demonstrated that other facilities with unused capacity cannot appropriately meet the needs of potential patients."

The contrasting usage of the terms "should" and "shall" in these standards suggests to us that the standards leave SHPDA with differing degrees of discretion. As courts in other jurisdictions have observed, use of the word "should" in a State Health Plan denotes discretion. *Roanoke Memorial Hospitals v. Kenley*, 352 S.E. 2d 525, 529

(Va. Ct. App. 1987) (reasoning that “should” is used to express what is expected or what ought to be in the future,” and that “use of the word ‘should’ in the context of the State Health Plan was intended to confer an appropriate amount of discretionary authority in the administrative body”); *Starks v. Kentucky Health Facilities*, 684 S.W.2d 5, 7 (Ky. Ct. App. 1984); see also *Bio-Medical Applications of Lewiston, Inc. v. United States*, 17 Cl. Ct. 84, 90 (1989) (term “should” suggests a precatory, not mandatory, use). The term “shall,” by contrast, denotes a mandate or requirement to be observed without discretion. See *Strass v. Kaiser Foundation Health Plan*, 744 A. 2d 1000, 1013 (D.C. 2000) (“shall” is a mandatory term); *Martin v. United States*, 283 A. 2d 448, 450 (D.C. 1971) (same).

We think this distinction makes sense of the Draft ESRD Chapter statements that “dialysis capacity in the District of Columbia and the surrounding health service areas should be sufficient to meet the needs of all” District residents (an expectation or goal, not a mandate) and that “[n]o expansion of a dialysis facility shall be approved until the facility’s utilization rate is 85 percent” (a non-discretionary limit). In a similar vein, we think the statement, “[c]hronic maintenance hemodialysis stations should be available in the numbers specified in the need methodology in this chapter” -- *i.e.*, 291 stations by 2002 -- is to be read as an expectation, or perhaps a guideline or rule of thumb, not a mandatory limitation or requirement that strips SHPDA of administrative discretion to determine whether a need exists for new dialysis stations proposed in a CON application.

We reject appellant’s suggestion that the regulatory standard that a CON-approved project “shall be in conformance with” the standards contained in the Comprehensive Health Plan (22 CDCR § 4050.3) or “shall be consistent with” the Plan (22 CDCR § 4309.4) denotes that SHPDA’s award of a CON must result in a total number of dialysis stations not exceeding the number identified in the Draft Chapter’s discussion of projected need. Like the Virginia Court of Appeals, we think the term “consistent with” does not mean “the same in every detail,” but instead means “in harmony with” or “compatible with” or “holding to the same principles as” or “in general agreement with.” *Roanoke Memorial Hospitals, supra*, 352 S.E. 2d at 529.

Determination of whether Capitol’s proposed project was in harmony with the Draft ESRD Chapter’s standard of “dialysis capacity . . . sufficient to meet the needs of all” District residents and visitors, and whether the proposal would result in a service level holding to the same principles as the need projections contained in the Draft Chapter, required SHPDA to apply its expertise and to exercise some discretion. We think it reasonable that SHPDA, in exercising discretion and applying its expertise, considered the types of factors mentioned in its CON Notice of Approval, such as the distances that dialysis patients must travel to receive treatment at existing dialysis facilities, the convenience of available treatment times, and the impact of the existing service level on patients’ quality of life. As to each of these factors, the record contained ample testimony and other evidence to substantiate SHPDA’s conclusion that a need existed for additional dialysis stations to enable more dialysis patients to receive care at a convenient time and location.

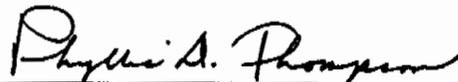
We note that while the SHPDA staff and at least one member of the SHCC apparently believed that approval of the CON would be inconsistent with the Draft ESRD Chapter or the Comprehensive Health Plan, the SHPDA Director, in her decision awarding the CON and her denial of Fresenius' motion for reconsideration, did not state such a belief. Director Woods stated that she "understood" staff concerns and recognized the thrust of Fresenius' argument that approval of the CON did not square with the dialysis station need projections quantified in the Draft Chapter. But Director Woods did not state (and we think her statements do not imply) that her decision was out of harmony with the goals, objectives, criteria or mandatory standards of the Comprehensive Health Plan. Thus we are not asked to evaluate a CON decision that the Director herself acknowledged was inconsistent with the Plan as she interpreted it. We, of course, owe some deference to the Director's interpretation of what the Comprehensive Health Plan required. See D.C. Code Ann. § 32-363(a) (presumption of regularity applies); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984) (weight should be accorded to agency director's interpretation of scheme he administers); *United States v. Mead Corporation*, 533 U.S. 218 (2001) (whatever its form, agency interpretation merits some measure of deference, even if not *Chevron* deference).

For all these reasons, we conclude that SHPDA's decision awarding a CON to Capitol was not inconsistent with the criteria and standards contained in the Draft ESRD Chapter. It is conceivable that (as Fresenius hints) SHPDA's decision might nonetheless have been contrary to law if the 1989 version of the District's Comprehensive Health Plan remained in effect and Capitol's proposal was inconsistent with it. Fresenius argues that "[h]ad SHPDA accepted Capitol's argument that the Draft Chapter should not be accorded weight, the agency would be required by CON statutes and regulations to rely instead on the 1989 version of the plan, which would likely be more adverse to Capitol's application than the Draft Chapter." Appellant's Brief at 2-3 n.1. However, the parties and intervenor have not supplied the Board with a copy of the 1989 version of the Plan. On the record before us, we find no basis to conclude that the SHPDA's decision was unlawful.

Finally, we reject appellant's suggestion that this is a case in which the State Health Planning agency has effectively -- and perhaps inappropriately -- permitted a CON applicant to use the CON process to update the State Health Plan, in lieu of revising the Plan in accordance with the procedures specified in law (here, D.C. Code Ann. § 32-354). Cf. *Adventist HealthCare MidAtlantic, Inc. v. Suburban Hospital*, 711 A. 2d 158, 167-68 (Ct. App. Md. 1998) (noting that CON applicant's application of State Health Plan methodology using updated statistics may be inappropriate since it begs the question of whether the State Health Plan methodology itself needs updating through the established public process). Although Director Woods noted that Capitol had submitted a need analysis based on updating the dialysis-utilization statistics and trend factors used in the need methodology described in the Draft ESRD Chapter, the SHPDA Director did not premise her decision on acceptance of Capitol's efforts to update the Draft Chapter's need analysis. Rather, she premised the CON award on her finding that a need existed for additional dialysis stations that would be more convenient for dialysis patients.

ORDER

Now therefore, it is **ORDERED** this 30th day of November, 2001, that the decision of the SHPDA issuing CON No. 99-0-5 is hereby **AFFIRMED**.



Phyllis D. Thompson, Legal Member  
David H. Marlin, Legal Member  
Fritz R. Kahn, Legal Member