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DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, Petitioner, v. DRANE FLANNERY RESTAURANT LLC/BIG BOARD (THE), Respondent.	Case No.: 2022-DOH-C21046 NOI No.: C21046

ORDER ON SUMMARY ADJUDICATION

I. Introduction and Procedural History

This case arises under the Civil Infractions Act of 1985, as amended (D.C. Official Code §§ 2-1801.01 - 2.1802.05) and Title 16, Chapter 36 of the District of Columbia Municipal Regulations (DCMR). The Department of Health (DOH) charged Respondent Drane Flannery Restaurant LLC/The Big Board for violating D.C. Official Code § 7-2307 in violation of Mayor's Order 2021-148 § II(1) for permitting persons to enter an indoor premises without displaying proof of vaccination against Covid-19 and Mayor's Order 2021-147 § IV(1) for not requiring all persons to wear masks indoors when not actively eating or drinking. DOH alleged that the violations existed on January 21, 2022, at 421 H St NE, and sought a $1,000 fine for each violation, for a total of $2,000.

Respondent filed an answer to the Notice of Infraction (the NOI) stating that DOH lacked the authority to enforce the Mayor's Orders because the orders violated the Home Rule Act and

thwarted Congress's reserved constitutional power under D.C. Code §1–206.02(c)(1). Respondent also maintained that DOH exceeded its regulatory authority by suspending the Big Board's license. In its response Respondent requested a hearing before OAH to contest the alleged violations. Respondent submitted that they are raising a legal, rather than a factual challenge to DOH's enforcement action, and did not intend to call witnesses or present any documentary evidence at the evidentiary hearing.

This administrative court scheduled a hearing for May 18, 2022. On the day of the hearing the parties agreed to set a briefing schedule to address Respondent's answer to the NOI. The following motions are currently pending before this court. On May 11, 2022, Respondent filed Drane Flannery Restaurant LLC's Response to Notice of Infraction. On June 3, 2022, DOH filed Petitioner's Response to Respondent's Drane Flannery Restaurant LLC's Response to DC Health's Notice of Infraction. On June 16, 2022, Respondent filed Respondent Drane Flannery Restaurant LLC's Reply to Petitioner DC Health's Response. On July 7, 2022, Petitioner filed Petitioner's Reply to Respondent's Reply to DC Health's Response.

The hearing was rescheduled for June 29, 2022, and converted to a status hearing. On that day, the parties represented that they had fully presented their arguments in their filings and did not require an evidentiary hearing for the adjudication of this matter. Another status conference was scheduled for August 17, 2022, and rescheduled by this tribunal to October 12, 2022. On September 12, 2022, this administrative court issued an Order Requiring Clarification of Plea for the Respondent. On September 15, 2022, Respondent filed a plea of Deny and stated they were not requesting an in-person evidentiary hearing and agreed with adjudicating this matter without the need for an evidentiary hearing.

II. Factual Background

On January 21, 2022, the DOH Food Safety Division received an anonymous complaint concerning Respondent. On that day DOH inspected Respondent's establishment and observed Respondent allowing customers to enter the establishment without wearing face masks or face coverings and entering without displaying proof of vaccination against Covid-19. During the inspection the Respondent, server and bartender were also observed not wearing face masks or face coverings. Another inspection took place on February 1, 2022, where Respondent was again observed committing the same violations.

DOH issued a Notice of Infraction to Respondent for violating D.C. Official Code § 7-2307 in violation of Mayor's Order 2021-148 § II(1) for permitting persons to enter an indoor premises without displaying proof of vaccination against Covid-19 and Mayor's Order 2021-147 § IV(1) for not requiring all persons to wear masks indoors when not actively eating or drinking. DOH sought a $1,000 fine for each violation, for a total of $2,000.

Respondent entered a plea of Deny but did not challenge the facts of this case and represented that they did not want to present any witnesses or documentary evidence in defense of the allegations. Instead Respondent raised a legal argument challenging DOH's legal authority to issue the NOI, the lawfulness of the Mayor's Orders upon which it relied, and denial of due process by suspending Respondent's license.

The parties in this matter have requested this administrative court to rule on the pending motions to adjudicate this matter without the need for a hearing. OAH Rule 2819.1 states a party may request that an Administrative Law Judge decide a case summarily, without an evidentiary

hearing. This court interprets the Parties' motions as a request for summary adjudication and will conduct an analysis based on the legal standard for summary adjudication.

III. Summary of Parties Arguments

A. Respondent's Argument

Respondent contends that DOH lacked the legal authority to issue the NOI because the underlying Mayor's Orders upon which it relied were unlawful. DOH cited Respondent for violating two "emergency" executive orders issued by the Mayor: Mayor's Order 2021-147 §IV(1)[1] and Mayor's Order 2021-148 §II(1)[2]. Respondent contends that the Mayor violated the Home Rule Act[3] when the orders were issued using "emergency" power, without a review by the United States Congress, during a two-year "emergency" period in response to the COVID-19 pandemic. Respondent maintains the Home Rule Act requires legislation enacted by the D.C. Council to be submitted to Congress for review during a 30-day period, during which Congress may take action to disapprove and invalidate legislation and the emergency legislation. *See* D.C. Code §1–206.02(c)(1). The only exception to this requirement is for emergency legislation, but in such case the legislation "shall be effective for a period not to exceed 90 days." D.C. Code

[1] Mayor's Order 2021-147 §IV(1)
Section II of Mayor's Order, dated July 29, 2021, is reinstated, to the extent that it requires all persons to wear masks indoors. This provision shall remain in effect until January 31, 2022 at 6:00 a.m.

[2] Mayor's Order 2021-148 §II(1)
Establishments Subject to Vaccination Entry Requirements
Starting on January 15, 2022, the following establishments and facilities (the "covered establishments and facilities") shall not permit a guest, visitor or customer over twelve (12) years old to enter their indoor premises without displaying proof of vaccination against Covid-19:

> (a) Restaurants, bars and nightclub establishments, including restaurants and taverns, coffee shops and fast-food establishments that have seating if guests choose to sit down; breweries, wineries and distillery tasting rooms; mixed-use facilities; food courts…

[3] Pursuant to Article I of the US Constitution, the Congress of the United States (Congress) granted the Council of the District of Columbia (Council) the authority to self-govern under the District of Columbia Self-Government and Government Organizational Act (the Home Rule Act).

§1–204.12(a)[4]. Respondent contends that the Mayor's "emergency" orders authorized by the D.C. Council's successive emergency amendments abrogates the 90-day constitutional limit. Thus, Respondent states the Mayor's Orders upon which DOH relied are invalid, and DOH's actions against the Respondent are invalid.

Respondent also contends DOH exceeded its regulatory authority by suspending The Big Board's license for the alleged violations of the Mayor's Orders. DOH issued a summary suspension of Respondent's license and closed the restaurant in February 2022 until after the Big Board paid a $100 restoration fee. Respondent maintains DOH lacks the regulatory authority to close a business for COVID-19 violations and the suspension of the D.C. Administrative Procedure Act for the pendency of the emergency period violates due process. Respondent also submits that they were barred by D.C. law from challenging DOH's enforcement action in court during the pendency of the emergency period.

B. DOH's Argument

DOH maintains that the Home Rule Act uses the term "act" interchangeably with "legislation" which does not include "administrative issuances." Administrative issuances outline the authority of the Mayor and Mayor's Orders 2021-147 and 2021-148 are within the executive power of the Mayor. DOH submits Respondent's argument ignores the Council's legislative powers to enact emergency legislation. The Council's adoption of the "Public

[4] DC Code 1-204.12 Acts, resolutions, and requirements for quorum.
(a) The Council, to discharge the powers and duties imposed herein, shall pass acts and adopt resolutions, upon a vote of a majority of the members of the Council present and voting, unless otherwise provided in this chapter or by the Council. Except as provided in the last sentence of this subsection, the Council shall use acts for all legislative purposes. Each proposed act shall be read twice in substantially the same form, with at least 13 days intervening between each reading. Upon final adoption by the Council each act shall be made immediately available to the public in a manner which the Council shall determine. If the Council determines, by a vote of two-thirds of the members, that emergency circumstances make it necessary that an act be passed after a single reading, or that it take effect immediately upon enactment, **such act shall be effective for a period of not to exceed 90 days**.

Emergency Extension Emergency Declaration Resolution of 2021" and the "Public Emergency Extension Emergency Amendment Act of 2022" met the procedural requirements of the Home Rule Act. Accordingly, DOH argues the enactment of Mayor's Order 2021-147 and 2021-148 were proper exercises of the Mayor's executive powers under the Home Rule Act. DOH submits that the Home Rule Act states the Congress reserves the right, at any time, to exercise its constitutional authority as legislature for the District by enacting legislation … to amend or repeal any law in force in the District prior to or after enactment of this chapter and any act passed by the Council. D.C. Code 1-206.01[5].

DOH also maintains that the issuance of a summary suspension was a valid enforcement action because DOH and the Food Safety Division inspected Respondent's establishment on two separate occasions and observed Respondent violating Mayor's Order 2022-007[6] and Mayor's Order 2022-043[7]. The Mayor's legitimate exercise of her executive powers validates DOH's enforcement actions.

Based on the entire record in the case, including the arguments presented by the parties in court and through pleadings, I make the following findings.

[5] D.C. Code 1-206.01 Retention of Constitutional Authority
Notwithstanding any other provision of this chapter, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this chapter, including legislation to amend or repeal any law in force in the District prior to or after enactment of this chapter and any act passed by the Council.
[6] Mayor's Order 2022-007
Administrative Issuance extending the Covid-19 public emergency and continuation of emergency measures and requirements to March 17, 2022.
[7] Mayor's Order 2022-043
Administrative Issuance extending the Covid-19 public emergency to April 16, 2022.

IV. Legal Standard for Summary Judgment

The rules of this administrative court provide that a party may request that an Administrative Law Judge decide a case summarily, without an evidentiary hearing, so long as the motion includes sufficient evidence of undisputed facts and controlling legal authority. See OAH Rule 2819.1. The OAH Rules, however, do not otherwise specify the legal criteria for granting such motions.

When the OAH Rules do not address a procedural issue, "an Administrative Law Judge may be guided by the District of Columbia Superior Court Rules of Civil Procedure." OAH Rule 2801.1. The Court's rule provides for entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Super Ct. Civ. R. 56(c). Under Superior Court Rule 56, the burden is on the moving party to show: (1) that there are no issues of material fact; and (2) that the moving party is entitled to judgment as a matter of law. A genuine issue of material fact is one where there is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial. *Dodek v. CF* 16 Corp., 537 A.2d 1086, 1092 (D.C. 1988).

The Court must view all evidence in the light most favorable to the non-moving party. *Truitt v. Miller*, 407 A.2d 1073 (D.C. 1979). The court may grant the motion only if a reasonable finder of fact, having drawn all reasonable inferences in favor of the non-moving party, could not find for that party based on the evidence in the record. *Burch v. Amsterdam Corp*., 366 A.2d 1039 (1976). Although the court must view the record in the light most

favorable to the non-moving party, conclusory allegations alone are insufficient to avoid a summary judgment. *See LaPrade v. Rosinsky*, 882 A.2d 192, 196 (D.C. 2005). The non-moving party must do more than assert "(t)he mere existence of a scintilla of evidence . . . ; there must be evidence on which the . . . (trier of fact) could reasonably find for the [non-moving party]." Id. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

After review of the motions and arguments, this administrative court makes the following findings and conclusions.

V. Undisputed Material Facts

There are some material facts that are not in dispute based on representations from all Parties and they include the following:

1. The Property at 421 H St NE is a commercial business and restaurant.

2. Respondent, Drane Flannery, LLC (The Big Board) is the owner.

3. On January 21, 2022, the DOH Food Safety Division received an anonymous complaint concerning Respondent. On that day DOH inspected Respondent's establishment and observed Respondent allowing customers to enter the establishment without wearing face masks or face coverings and entering without displaying proof of vaccination against Covid-19. During the inspection the Respondent, server and bartender were also observed not wearing face masks or face coverings.

4. Mayor's Order 2021-147 §IV(1) required all persons to wear masks indoors. The provision remained in effect until January 31, 2022 and applied to restaurants and taverns when persons are not actively eating and drinking.

5. Mayor's Order 2021-148 §II(1) required establishments including restaurants, bars, nightclubs, taverns, coffee shops and fast-food establishments with seating not to permit a guest, visitor or customer over twelve (12) years old to enter their indoor premises without displaying proof of vaccination against Covid-19.

6. On February 1, 2022, DOH conducted another inspection at Respondent's establishment and Respondent was again observed violating Mayor's Orders 2021-147 and 2021-148.

7. On February 7, 2022, DOH issued a Notice of Infraction to Respondent for violating D.C. Official Code § 7-2307. DOH sought a total fine of $2,000.

8. Respondent entered a plea of Deny but did not challenge the facts of this case or presented a defense to the alleged violations. Respondent instead challenged the legal authority of DOH to issue the NOI.

9. Respondent does not want an in-person evidentiary hearing and does not intend to call witnesses or present any documentary evidence in their defense.

10. The Parties requested adjudication of this matter on the pleadings filed and without the need for an evidentiary hearing.

VI. Discussion

A. OAH's Jurisdiction

Before a party may invoke the jurisdiction of OAH, a basis for that jurisdiction must be found. An administrative tribunal may exercise jurisdiction in a case only when the legislature has conferred jurisdiction on the tribunal to adjudicate the claim at issue. Accordingly, the District of Columbia Court of Appeals has held, "[w]hether OAH [has] jurisdiction…depends entirely on whether or not its exercise of jurisdiction was authorized by statute or regulation." *D.C. Off. of Tax & Revenue v. Shuman*, 82 A.3d 58, 66 (D.C. 2013).

The Office of Administrative Hearings (OAH) has only limited authority to review DOH decisions.[8] This authority comes from D.C. Code § 2-1831.03(a)(1) , which provides that OAH has jurisdiction over adjudicated cases of DOH . An administrative agency may not act in excess of its statutory authority. *D.C. Office of Tax & Revenue v. Shuman*, 82 A.3d 58, 69 (D.C. 2013). DOH issued NOI - C21046 to Respondent alleging violation of D.C. Code § 7-2307 for failure to comply with Mayor's Orders 2021-148 § II(1) and 2021-147 § IV(1). This tribunal is granted the authority to conduct an "administrative adjudicative proceeding arising from a charge by an

[8] D.C. Code § 2-1831.03(a)(1).

agency that a person committed an offense or infraction that is civil in nature". Id. OAH is not delegated authority to grant Petitioner's request to invalidate the Mayor's Orders and declare them invalid and in violation of the Home Rule Act. This administrative court is not authorized to grant Petitioner the relief it seeks and is limited to deciding on whether there was a violation of the statute as alleged.

This administrative court does not have the authority to declare an act of the D.C. Council unconstitutional. *Archer v. D.C. Dept of Human Resources* 375 A.2d 523, 526 "an administrative agency has no authority to declare invalid legislation enacted by the parent legislature." Mayor's Orders 2021-147 and 2021-148 were implemented after the D.C. Council's enactment of legislation extending the Covid-19 public emergency. The United States Supreme Court has held that judicial courts must give substantial deference to an executive agency's reasonable interpretations of the statutes and regulations the agency is charged with administering. *Chevron U.S.A., Inc. v. N.R.D.C., Inc.,* 467 U.S. 837, 844 (1984); *Auer v. Robbins*, 519 U.S. 452, 461-463 (1997). Furthermore, the District of Columbia Court of Appeals has held that OAH, although it is an executive agency, must also afford deference to the reasoned interpretations of the agencies within its jurisdiction. *DDOE v. East Capitol Exxon*, 64 A.3d 878 (D.C. 2013); *Brown v. Watts*, 993 A.2d 529, 533 (D.C. 2010). The Court of Appeals itself affords deference "to an agency's interpretation of the statute[s] and regulations it is charged by the legislature to administer, unless its interpretation is unreasonable or is inconsistent with the statutory language or purpose." *East Capitol Exxon*, 64 A.3d at 880-1. OAH, because it hears cases from a "substantial number of different agencies . . . lacks the subject matter expertise justifying the deference to agency interpretations of statutes or regulations." *East Capitol Exxon*, 64 A.3d at 881; see also *D.C. Office of Tax and Rev. v. Shuman*, 82 A.3d 58, 67 (D.C. 2013).

Accordingly, this administrative court does not have the legal authority to declare the legislation and Mayoral Orders underlying this NOI unconstitutional and must defer to DOH's interpretation. DOH's interpretation of the statutes in this matter appear reasonable and consistent with statutory language and purpose. Consequently, this administrative court cannot address Respondent's contention that Mayor Orders 2021-148 and 2021-147 are unconstitutional and violate the Home Rule Act.

Respondent stated in its pleadings that the legal considerations they raised may be beyond the review of this tribunal. Respondent was correct, and the legal question is beyond the review of this administrative court. It is clear that Respondent understands the scope of review in this forum is limited, and that this tribunal cannot offer the full relief that Respondent seeks. This administrative court simply does not have the authority or a basis to invalidate the D.C. Council's legislation or the Mayoral Orders extending the Covid-19 public emergency, emergency measures and requirements.

B. NOI Violation and Fine

The District of Columbia Court of Appeals has held that an Administrative Law Judge may only impose a fine for a violation if a fine for the violation is listed in a properly promulgated fine schedule.[9] In this matter Respondent was charged with violating DC Code § 7-2307. Respondent did not challenge the facts of this case and represented that they did not want to present any witnesses or documentary evidence in defense of the allegations. However, there is not a fine specified in a statute for a violation of DC Code § 7-2307.

[9] *Woolworth v. D.C. Board of Appeals and Review,* 579 A. 2d 713 (D.C. 1990).

The statute Respondent is charged with violating states that a Mayor's emergency order "may provide for a fine of not more than $1,000 for each violation."[10] But the cited Mayor's Orders do not set a fine. They provide that an individual who knowingly violates the order may be subject to penalties authorized by law, but do not state the amount of the penalty.

A search of the civil fine schedule applicable to Department of Health violations found no fines specified for violations of DC Code § 7-2307 or the Mayor's Orders. See generally, 16 DCMR 3600 et seq. Consequently, due to this legal omission, the NOI must be dismissed without prejudice pursuant to OAH Rule 2805.5[11] because a fine cannot be assessed to the violation charged.

VII. Conclusion

Based on the foregoing considerations, and the entire record in this matter, it is this _11th___ day of __October___ 2022:

ORDERED, that Respondent Drane Flannery Restaurant LLC's Motion for Summary Adjudication is **GRANTED**; and it is further

[10] DC Official Code § 7-2307 states:
An emergency executive order issued by the Mayor may provide for a fine of not more than $1,000 for each violation. The Corporation Counsel of the District of Columbia or any Assistant Corporation Counsel may bring an action in the name of the District of Columbia against anyone who has violated the provisions of an emergency executive order issued pursuant to this chapter.

[11] OAH Rule 2805.5 states:
In a Civil Infractions Act case filed on or after October 1, 2010, and in a Litter Control Administration Act case, if a Respondent fails to answer within the time allowed by law, an Administrative Law Judge shall determine whether:
(a) The Government has submitted evidence of proper service; and
(b) The Notice of Infraction or Notice of Violation meets all legal requirements on its face.
If so, the Administrative Law Judge shall find the Respondent in default and shall impose the legally authorized fine and penalty. If not, the Administrative Law Judge shall dismiss the Notice of Infraction or Notice of Violation without prejudice.

ORDERED, that the NOI and this case are **DISMISSED** without prejudice**,** and this case is **CLOSED**; and it is further

ORDERED, that the status conference scheduled for October 12, 2022, is, **CANCELED**; and it is further

ORDERED, that the appeal rights of any party aggrieved by this Order are stated below.

___/s/ *Cory M. Chandler*_____
Cory M. Chandler
Administrative Law Judge

APPEAL RIGHTS

After an administrative law judge has issued a Final Order, a party may ask the judge to change the Final Order and may ask the District of Columbia Court of Appeals to change the Final Order. There are important time limitations described below for doing so.

COVID-19 NOTICE: The deadlines described below may be temporarily suspended or extended due to the COVID-19 pandemic. For up-to-date information about any changes to these deadlines, please visit the Office of Administrative Hearings website at https://oah.dc.gov and the D.C. Court of Appeals website at https://www.dccourts.gov/court-of-appeals.

HOW TO REQUEST THE ADMINISTRATIVE LAW JUDGE TO CHANGE THE FINAL ORDER[12]

Under certain limited circumstances and within certain time limits, a party may file a written request with the Office of Administrative Hearings (OAH) asking the administrative law judge to change a final order. OAH Rule 2828 explains the circumstances under which such a request may be made. Rule 2828 and other OAH rules are available at https://oah.dc.gov and at OAH's office. Rule 2828 states that a request to change a final order "shall state whether an appeal [to the District of Columbia Court of Appeals] has been filed. If an appeal has been filed, OAH has no jurisdiction to decide" the request unless the Court of Appeals has remanded the case to OAH for that purpose.

A request to change a final order does not affect the party's obligation to comply with the final order and to pay any fine or penalty. If a request to change a final order is received at OAH **within 10 calendar days** of the date the Final Order was filed (**15 calendar days** if OAH mailed the final order to you), the period for filing an appeal with the District of Columbia Court of Appeals does not begin to run until the Administrative Law Judge rules on the request. **A request for a change in a final order will not be considered if it is received at OAH more than 120 calendar days of the date the Final Order was filed** (**125 calendar days** if OAH mailed the Final Order to you). **HOW TO APPEAL THE FINAL ORDER TO THE DISTRICT OF COLUMBIA COURT OF APPEALS**

Pursuant to D.C. Official Code § 2-1831.16(c)-(e), any party suffering a legal wrong or adversely affected or aggrieved by this Order may seek judicial review by filing a Petition for Review and six copies with the District of Columbia Court of Appeals at the following address:

Clerk
District of Columbia Court of Appeals
430 E Street, NW, Room 115
Washington, DC 20001

The Petition for Review (and required copies) may be mailed or delivered to the Court of Appeals, and must be received there within 30 calendar days of the mailing date of this Order, pursuant to D.C. App. R. 15(a)(2). There is a $100 fee for filing a Petition for Review. Persons who are unable to pay the filing fee may file a motion and affidavit to proceed without the payment of the fee when they file the Petition for Review. Information on petitions for review can be found in Title III of the Court of Appeals' Rules, which are available from the Clerk of the Court of Appeals, or at https://www.dccourts.gov/court-of-appeals.

[12] All parties must file all documents by either email: oah.filing@dc.gov, fax: (202) 442-4789; or mail: OAH, 441 Fourth Street, NW, Suite 450 North, Washington, DC 20001-2714. The filing must state when and how copies were served on the other party.

IMPORTANT NOTICES:

- **By law, the amount of a lawfully imposed fine cannot be modified or reduced on appeal. D.C. Official Code § 2-1831.16(g).**

- **Filing of a petition for review does not stay (stop) the requirement to comply with a Final Order, including any requirement to pay a fine, penalty or other monetary sanction imposed by a Final Order. If you wish to request a stay, you must first file a written motion for a stay with the Office of Administrative Hearings. If the presiding Administrative Law Judge denies a stay, you then may seek a stay from the D.C. Court of Appeals.**

Certificate of Service:

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I hereby certify that on October 11, 2022 this document was served upon the parties named on this page at the address(es) and by the means stated.

/s/ M. Lankford

_____
Clerk / Deputy Clerk

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