

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Inspector General

Inspector General



June 10, 2009

The Honorable Adrian M. Fenty
Mayor
District of Columbia
Mayor's Correspondence Unit, Suite 316
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mayor Fenty:

Enclosed please find a copy of a Management Alert Report (MAR 09-I-007) issued on May 15, 2009, to the Alcoholic Beverage Regulation Administration (ABRA) and the D.C. Metropolitan Police Department (MPD). The MAR addresses our finding that Alcohol Beverage Control (ABC) license applicants do not undergo national criminal background checks. As a result, ABRA cannot determine whether an applicant committed a crime elsewhere in the country that would disqualify him/her from receiving a license. ABRA's response to the MAR, dated June 4, 2009, also is enclosed. ABRA stated that its response was coordinated with MPD.

Although the OIG is conducting an ongoing special evaluation of ABRA for which a report will be completed later this year, we are providing this information to you now so that you are aware of the importance of the issues addressed in the MAR and the corrective actions proposed by ABRA.

If you have questions, please contact Alvin Wright, Jr., Assistant Inspector General for Inspections and Evaluations, at (202) 727-2540.

Sincerely,


Charles J. Willoughby
Inspector General

CJW/klb

Enclosures

cc: See distribution list

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DISTRICT OF COLUMBIA
OFFICE OF THE INSPECTOR GENERAL

CHARLES J. WILLOUGHBY
INSPECTOR GENERAL

INSPECTIONS AND EVALUATIONS DIVISION
MANAGEMENT ALERT REPORT

**ALCOHOLIC BEVERAGE REGULATION
ADMINISTRATION
AND
D.C. METROPOLITAN POLICE
DEPARTMENT**

**NATIONAL CRIMINAL BACKGROUND CHECKS NOT
REQUIRED FOR LICENSE APPLICANTS**

Inspections and Evaluations Division
Mission Statement

The Inspections and Evaluations (I&E) Division of the Office of the Inspector General is dedicated to providing District of Columbia (D.C.) government decision makers with objective, thorough, and timely evaluations and recommendations that will assist them in achieving efficiency, effectiveness, and economy in operations and programs. I&E goals are to help ensure compliance with applicable laws, regulations, and policies, to identify accountability, recognize excellence, and promote continuous improvement in the delivery of services to D.C. residents and others who have a vested interest in the success of the city.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Inspector General

Inspector General



May 15, 2009

Fred Moosally
Interim Director
Alcoholic Beverage Regulation Administration
941 North Capitol Street, N.E.
Washington, D.C. 20002

Cathy L. Lanier
Chief of Police
D.C. Metropolitan Police Department
300 Indiana Avenue N.W., Room 5080
Washington, D.C. 20001

Dear Mr. Moosally and Chief Lanier:

This is a Management Alert Report (MAR 09-I-007) to inform you that during our special evaluation of the Alcoholic Beverage Regulation Administration (ABRA), the Office of the Inspector General (OIG) determined that ABRA does not require Alcoholic Beverage Control (ABC) license applicants to undergo national criminal background checks. This deficiency prevents ABRA from determining whether an applicant committed a crime elsewhere in the country that would disqualify him/her from receiving a license. Currently, ABRA only reviews information from the D.C. Metropolitan Police Department (MPD), and an applicant's state of residence if s/he is not a District of Columbia (District) resident. The OIG provides these reports when it believes a matter requires the immediate attention of District government officials.

Background

As an independent District government agency, ABRA operates under the authority of the ABC Board (Board) and issues licenses to qualified applicants to serve or sell alcoholic beverages. D.C. Code § 25-301(a) (Supp. 2008) states that before the Board may issue a license, it shall determine that “[t]he applicant has not been convicted of any felony in the 10 years before filing the application [and] has not been convicted of any misdemeanor bearing on fitness for licensure in the 5 years before filing the application.” Title 23 DCMR §§ 502.1 and 502.5 require an applicant to “obtain a police clearance from the Metropolitan Police Department” as well as from his/her state of residence if he/she is not a District resident. Title 23 DCMR § 502.3

also requires business partners and corporation officers to obtain police clearances from the MPD and their state of residence. In comparison, jurisdictions such as Virginia and Montgomery County, Maryland, require alcohol license applicants to undergo national criminal background checks. This issue of background checks takes on additional significance because, according to the Virginia Department of Alcoholic Beverage Control 2008 Annual Report, “Homeland Security officials advise that many of those on terrorist watch lists are involved in alcohol-related businesses.”¹

The National Crime Information Center (NCIC), which is controlled and administered by the Federal Bureau of Investigation (FBI), is a national depository of local jurisdictions’ criminal records. Only law enforcement agencies have access to the NCIC system and may use it to obtain information about individuals’ criminal histories. However, the FBI also participates in the National Crime Prevention and Privacy Compact (Compact), which “organizes an electronic information sharing system among the Federal Government and the States to exchange criminal history records for noncriminal justice purposes authorized by Federal or State law, such as background checks for governmental licensing and employment.” (42 U.S.C.S. § 14616(a) (LEXIS through P. Law 111-10)).

In addition, the use of fingerprint-based criminal background checks is used beyond traditional law enforcement applications. For example, state and local jurisdictions use it as part of their professional/occupational licensing processes; social service organizations rely upon them to screen their volunteers. One of the primary advantages of a fingerprint-based check is that it can definitively identify and link a person to his/her criminal record, if one exists. As a result, fingerprint-based checks can help to minimize problems caused when (1) a background check is conducted using only an individual’s name, date of birth, and other data that are similar or even identical for multiple individuals, and (2) an individual has deliberately used multiple names, dates of birth, and social security numbers in an effort to deceive. Although fingerprint-based criminal background checks are useful tools, different jurisdictions vary in the types of information reported to these databases, which are subject to errors as are other databases.

Observations

ABRA does not require license applicants to undergo national criminal background checks or fingerprinting.

Interviewees stated that ABRA requires local police clearances from the District’s MPD and an applicant’s home jurisdiction, but does not require national criminal background checks.

An ABRA official informed the team that the agency is drafting a memorandum of understanding (MOU) under which MPD would conduct national criminal background checks on license applicants using the NCIC system. MPD would likely charge a fee for conducting these checks, a cost that would then be passed along to the applicant. The official added, however, that before the MOU can be completed, MPD must confirm that ABRA has the statutory authority to instruct MPD to run NCIC checks on its behalf. The ABRA official said that ABRA

¹ *Id.* at 19.

appears to have the statutory authority to implement national criminal background checks, but that changes to District regulations (DCMR) are necessary before the practice could be implemented and to recoup fees charged by MPD.² According to this official, the Board supports the idea of proposing such rulemaking and entering into an MOU with MPD.

Our research and analysis concluded, however, that the DCMR currently does not prohibit ABRA from performing national criminal background checks; even though the NCIC system cannot be used for a non-law enforcement purpose (i.e., as part of the ABRA licensure process), the Compact system could be used for national criminal background checks, the results of which could be considered during ABRA's application review process.

An ABRA official stated that ABRA does not currently require applicants to undergo fingerprinting, but fingerprinting will be part of ABRA's planned national criminal background checks. This official indicated that ABRA plans to cease requiring local police clearances once national criminal background checks are implemented, but that ABRA will explore whether the currently required police clearances should continue.

A former senior ABRA official emphasized the importance of ensuring that ABC licenses are not issued to those with criminal histories by citing the case of a license issued unknowingly to an applicant with a drug conviction. According to a *Washington Times* article, this individual was charged with operating a drug network out of an ABC-licensed nightclub although he had spent the past decade in prison for dealing cocaine. His criminal history was undetected in part because police clearances are only required from the District and applicants' states of residence.³

Recommendations

The conditions cited above interfere significantly with ABRA's responsibility to ensure that ABC licenses are not granted to applicants whose criminal histories make them ineligible for licensure. Accordingly, the OIG recommends placing a high priority on the following actions:

1. That the Interim Director of ABRA determine what steps are necessary to conduct national criminal background checks in addition to, not in lieu of, the checks currently required by ABRA for license applicants, and work expeditiously to implement them.
2. That the Interim Director of ABRA require license applicants to submit fingerprints as part of the criminal background check process.

² The ABRA official said that due to the D.C. Administrative Procedures Act, a transition to national criminal background checks would require changing DCMR provisions through the rulemaking process, which includes a public comment period and final approval by the Council of the District of Columbia.

³ In addition, the applicant had a prior conviction in the District that was sealed and would not appear in criminal background checks. Jim McElhatton, "Man with drug convictions given liquor license; Northeast club called front for multimillion-dollar cocaine business," *The Washington Times* (Mar. 12, 2007) B01.

MAR 09-I-007

May 15, 2009

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Please provide your comments on this MAR by June 3, 2009. Your response should include actions taken or planned, dates for completion of planned actions, and reasons for any disagreements with the concerns and recommendations presented. Please distribute this MAR only to those who will be directly involved in preparing your response.

Should you have any questions prior to preparing your response, please contact [REDACTED] Director of Planning and Inspections, at [REDACTED]

Sincerely,



Charles J. Willoughby
Inspector General

CJW/klb

cc: Mr. Daniel M. Tangherlini, City Administrator and Deputy Mayor
The Honorable Vincent C. Gray, Chairman, Council of the District of Columbia
The Honorable Mary M. Cheh, Chairperson, Committee on Government Operations and the Environment
The Honorable Phil Mendelson, Chairperson, Committee on Public Safety and the Judiciary
The Honorable Jim Graham, Chairperson, Committee on Public Works and Transportation
Mr. Peter B. Feather, Chairperson, Alcoholic Beverage Control Board



**Government of the
District of Columbia**

Office of the Inspector General

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Washington, D.C. 20005**

Web Page: www.oig.dc.gov

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION



June 4, 2009

Charles Willoughby
Inspector General
Office of the Inspector General for the District of Columbia
717 14th Street, N.W.
Washington, D.C. 20005

RE: Management Alert Report: Alcoholic Beverage Regulation Administration and D.C. Metropolitan Police Department, National Criminal Background Checks Not Required for License Applicants – MAR 09-I-007

Dear Mr. Willoughby,

This is in response to your Management Alert Report (MAR) dated May 15, 2009, wherein the Office of the Inspector General (OIG) determined that the Alcoholic Beverage Regulation Administration's (ABRA) current background check procedure for license applicants is deficient. Specifically, the MAR raises concerns that ABRA does not require license applicants to undergo national criminal background checks to determine whether an applicant has committed a crime in a jurisdiction other than the District of Columbia or where the applicant resides.

1. ABRA is working jointly with the Metropolitan Police Department to take the steps necessary to implement the recommendations of the Office of the Inspector General

ABRA appreciates the recommendations contained in the OIG's May 15, 2009 MAR. ABRA is committed to implementing national criminal background checks for license applicants, including requiring the submission of fingerprints as part of this process. As referenced in the May 15, 2009 MAR, ABRA has been working with the Metropolitan Police Department (MPD) on a Memorandum of Understanding (MOU) in an effort to implement a system where applicants would be subject to a national criminal background check.

The first recommendation asks ABRA to determine the steps necessary to conduct these national criminal background checks, which the MOU with MPD will achieve, and also that these national criminal background checks take place in addition to the local checks currently required. ABRA met with MPD on Friday, May 29, 2009 to discuss the OIG's recommendations. ABRA and MPD have reached agreement that the written MOU will

incorporate both the national criminal background checks, as well as the local background checks, which are already part of the license application process. ABRA and MPD's objective as part of this new process is to incorporate MPD's national and local criminal background checks into one visit by the Applicant.

ABRA has previously been investigating methods, prior to receiving the MAR, of achieving more comprehensive background checks for its license applicants and, in so doing, has been working with MPD to draft a MOU for MPD to assist ABRA in performing national background checks for license applicants through the Federal Bureau of Investigation (FBI). This task is expected to be accomplished by a submission of the applicant's fingerprints to MPD, who will then forward such to the FBI, whereupon the FBI will run the fingerprints against the national database, return the results to MPD, and MPD will compile them for ABRA. The MOU will detail this process, contain the applicable fees, and the specific requirements of each agency to achieve the primary goal of ensuring that only qualified applicants obtain alcoholic beverage licenses.

The second recommendation contained in the May 15, 2009 MAR is that license applicants be required to submit fingerprints as part of the criminal background check process. ABRA intends to adopt this recommendation as part of its MOU with MPD. Specifically, ABRA has an oral agreement with MPD to process fingerprints submitted by license applicants as part of its MOU with ABRA. The MOU will be implemented by August 21, 2009 to coordinate with ABRA's emergency rulemaking as referenced below. This start date is needed to work out details at MPD and to provide ABRA with sufficient time to obtain input and provide notice to the public of the additional requirements. ABRA will notify you in the event that we are able to get these changes implemented by an earlier date.

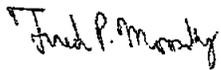
2. ABRA Disagrees that National Criminal Background Checks can be conducted without going through the Rulemaking Process required by the District of Columbia Administrative Procedures Act

ABRA agrees with the OIG's May 15, 2009 recommendations but disagrees on some of the steps that are needed to implement these changes. ABRA believes that the implementation of more comprehensive background checks would require the Agency to amend its existing regulations in order to impose new criminal background check requirements on applicants. Specifically, ABRA submitted to the Legal Counsel Division of the Office of the Attorney General on May 21, 2009, a request for a legal opinion on this issue. The Legal Counsel Division advised ABRA on May 28, 2009 that a rulemaking would be required if ABRA seeks to expand upon the existing criminal background check process. *See attached Legal Advice Memorandum AL-09-370.* As such, ABRA disagrees that it can conduct criminal background checks without going through the rulemaking process. ABRA has reviewed the OIG suggestion that it utilize the National Crime Prevention and Privacy Compact (Compact), however, the District of Columbia is not currently a signatory state to the Compact according to the FBI website at <http://www.fbi.gov/hq/cjisd/web%20page/pdf/faq.pdf>. ABRA does not appear to have the ability to join the Compact on its own initiative. Notwithstanding the statements

above, ABRA is committed to implementing the recommendations set forth in the May 15, 2009 MAR. To resolve this issue, ABRA intends to publish a draft rulemaking in the D.C. Register by August 21, 2009. ABRA will be implementing the rulemaking on an emergency basis in light of the importance of this issue. An emergency rulemaking will allow for these additional criminal background procedures to be put in place while the rulemaking is reviewed by the Council of the District of Columbia, pursuant to D.C. Official Code § 25-211(b).

I hope that the aforementioned approach to this matter is responsive to the concerns raised in the MAR. If there are any questions, concerns, or requirements for additional information on this matter, please contact me at (202) 442-4355.

Sincerely,



Fred P. Moosally
Interim Director
Alcoholic Beverage Regulation Administration

Attachment

cc: Mr. Daniel M. Tangherlini, City Administrator and Deputy Mayor, District of Columbia
The Honorable Vincent C. Gray, Chairman, Council of the District of Columbia
The Honorable Mary M. Cheh, Chairperson, Committee on Government Operations and the Environment
The Honorable Phil Mendelson, Chairperson, Committee on Public Safety and the Judiciary
The Honorable Jim Graham, Chairperson, Committee on Public Works and Transportation
Mr. Peter Nickles, Attorney General, Office of the Attorney General
Mr. G. Bradley Weinsheimer, Chief, Superior Court Division, United States Attorney's Office for the District of Columbia

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

MEMORANDUM

TO: Fred P. Moosally
Interim Director
Alcoholic Beverage Regulation Administration

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

DATE: May 28, 2009

SUBJECT: Legal Advice Regarding Rulemaking for Additional Background
Check Requirements for License Applicants
(AL-09-370) (MID 256832)

This responds to your May 21, 2009 memorandum concerning background check requirements for Alcoholic Beverage Control (ABC) licensee applicants.

You state, in your memorandum, that, among other things, D.C. Official Code § 25-301 (3) and (4) (2008 Supp.) provides that prior to issuing an ABC license, the Alcoholic Beverage Control Board (Board) must determine that the applicant meets several requirements including that:

- * * *
- (3) The applicant has not been convicted of any felony in the 10 years before filing the application.
 - (4) The applicant has not been convicted of any misdemeanor bearing on fitness for licensure in the 5 years before filing the application.
- * * *

You further state that under the Alcoholic Beverage Regulation Administration's (ABRA) existing rules, codified at 23 DCMR § 502, an ABC licensee applicant is only required to secure a police clearance form from the Metropolitan Police Department (MPD) and from the jurisdiction where the applicant resides to satisfy the requirements in D.C. Official Code § 25-301 (3) and (4). However, ABRA is considering making its background checks more comprehensive by requiring ABC licensee applicants to submit fingerprints to the MPD and by requiring MPD to secure a report from the National

Crime Information Center and provide that report to ABRA pursuant to an inter-agency MOU. You ask whether ABRA must amend its existing regulations in order to impose these new requirements.

The short answer to your question is "yes". You suggest, in your memorandum, that ABRA may not be required to engage in rulemaking because D.C. Official Code § 25-301 (3) and (4) give ABRA the statutory authority to conduct criminal background checks without engaging in rulemaking. However, ABRA's statutory authority simply states the information that ABRA must obtain in order to make the determination that an applicant meets the minimum statutory requirements. The statute provides no guidance on the specifics of what is required in order to satisfy the minimum statutory requirements or the process for meeting those requirements. In addition, the current rulemaking, cited above, is too general to encompass the more detailed information that ABRA now proposes to secure from ABC applicants.

In the absence of revised rulemaking, applicants would not have the required public notice of a change from the current requirements, as required by the District of Columbia Administrative Procedures Act (DCAPA), effective October 21, 1968, 82 Stat. 1206, D.C. Official Code § 2-505 (2006 Repl. and 2008 Supp.). Under the DCAPA a "rule" is defined as:

the whole or any part of any Mayor's or agency's statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or to describe the organization, procedure, or practice requirements of the Mayor or of any agency.

D.C. Official Code § 2-502 (6) (A) (2008 Supp.). The D.C. Court of Appeals has consistently held that policies implementing an agency's programs are subject to rulemaking procedures. *See Webb v. DHS*, 618 A.2d 148 (D.C. 1992) (eligibility guidelines for homemaker services subject to DCAPA rulemaking requirements); *Rortie v. District of Columbia Department of Human Resources*, 403 A.2d 1148 (D.C. 1979) (criteria governing emergency assistance are rules within the meaning of the DCAPA); *Junghans v. Department of Human Resources*, 289 A.2d 17 (D.C. 1972) (formula for calculating public assistance payments subject to DCAPA). Further, requiring a rulemaking process to establish new criteria for participation in a public program allows agencies to "fully inform themselves of the public's viewpoint before making difficult and fundamental policy determinations concerning the allocation of scarce resources." *Id.* at 22.

The proposed new requirements being contemplated by ABRA to expand the type of information required of ABC license applicants would certainly constitute a directive with future legal effect. Therefore, rulemaking is required if ABRA seeks to expand the type of criminal background information required of its applicants.¹

If you have questions regarding this memorandum, please contact either [REDACTED] Senior Assistant Attorney General, Legal Counsel Division, at [REDACTED], or me at 724-5524.

WCW/phg

¹ While not the subject of your inquiry or this memorandum, a related question is whether the ABRA statute provides sufficient authority for the more expanded criminal background check that ABRA is considering. If ABRA is able to verify the requirements set forth in D.C. Official Code § 25-301 (3) and (4) under its current regulations, a reasonable argument can be made that ABRA has no statutory authority for, and does not need, the more expanded criminal investigation. If ABRA is not able to fulfill its statutory responsibility under its current regulations, ABRA may need to consider first securing more expanded statutory authority such as that in Title II of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (Child Safety Act), effective April 13, 2005, D.C. Law 15-353, 52 DCR 5418. Furthermore, if ABRA proceeds with the proposed expanded criminal investigation and promulgates rulemaking to that effect, ABRA will need to devise a method to secure the written permission of affected applicants to participate in the expanded process. Title II of the Child Safety Act is also instructive in that regard.