THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
Mortons of Chicago/Washington Square, Inc. t/a Mortons of Chicago	)	License Number: 24326 Case Number: 09-CMP-00157 Order Number: 2010-377
Holder of a Retailer's Class CR License at premises 1050 Connecticut Avenue, N.W. Washington, D.C. 20036	)	

BEFORE: Charles Brodsky, Chairperson
Mital Gandhi, Member
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member
Mike Silverstein, Member

ALSO PRESENT: Mortons of Chicago/Washington Square, Inc., t/a Mortons of Chicago, Respondent

Andrew J. Kline, on behalf of the Respondent

Amy Schmidt, Assistant Attorney General, on behalf of the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

Jonathan Berman, Assistant Attorney General
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 11, 2010, the Alcoholic Beverage Control Board (Board) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated March 10, 2010, on Mortons of Chicago/Washington Square, Inc., t/a Mortons of Chicago (Respondent), at premises 1050 Connecticut Avenue, N.W., Washington, D.C., charging the Respondent with the following violation:

Charge I: The Respondent permitted the consumption of an alcoholic beverage by patrons after the establishment's permitted hours of operation on February 3, 2009, in violation of 23 DCMR §§ 705.9-705.10 (2008), for which the Board may take action pursuant to D.C. Official Code § 25-823(1) (2009).

The matter proceeded to a Show Cause Hearing where the Government and the Respondent presented evidence through the testimony of witnesses and the submission of documentary evidence. The Board, having considered the evidence, the testimony of witnesses, the arguments of counsel, and the documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. The Board issued a Notice of Status Hearing and Show Cause Hearing, dated February 10, 2010. (*See* Alcoholic Beverage Regulation Administration (ABRA) Show Cause File Number 09-CMP-00157). The Respondent holds a Retailer's Class CR License and is located at 1050 Connecticut Avenue, N.W., Washington, D.C. (*See* ABRA Licensing File No. 24326).

2. The Show Cause Hearing in this matter was held on May 12, 2010. The Notice to Show Cause, dated February 11, 2010, charges the Respondent with the violation enumerated above. (*See* ABRA Show Cause File Number 09-CMP-00157).

3. The Respondent, through counsel, stipulated that the establishment allowed patrons to consume alcoholic beverages after 11:00 p.m. *Transcript* (*Tr.*), 5/12/10 at 9-10. Furthermore, the Respondent stipulated that it had a policy of allowing customers who had entered the establishment before 11:00 p.m. to stay in the establishment after 11:00 p.m. in order to finish eating and drinking. *Tr.*, 5/12/10 at 10. The Respondent also added that after being visited by an ABRA investigator it requested that the Board allow the establishment to stay open after 11:00 p.m. *Tr.*, 5/12/10 at 10. The Respondent's February 17, 2009, request to extend their hours of operation to 1:00 a.m. was granted by the Board on February 25, 2009. (*See* ABRA Licensing File No. 24326).

4. The Government called Investigator Shakoor to testify. *Tr.*, 5/12/10 at 39. Investigator Shakoor testified that he was at the Respondent's establishment on Tuesday, February, 3, 2009, at approximately 11:00 p.m. *Tr.*, 5/12/10 at 39-40. Investigator Shakoor testified that he spoke with the establishment's ABC Manager during his investigation. *Tr.*, 5/12/10 at 40. According to Investigator Shakoor the ABC Manager admitted that "last call" was at 11:15 p.m. *Tr.*, 5/12/10 at 40.

5. The Board takes administrative notice that the Respondent's Application for ABC License, approved on October 30, 1996, in Question 16, states: "Lunch: Monday through Friday 11:00 a.m. to 2:00 p.m. Dinner Monday through Saturday 5:30 p.m. to 11:00 pm. . . .[*sic*]" (*See* ABRA Show Cause File Number 09-CMP-00157). Furthermore, the Board notes that the Respondent's License on February 3, 2009, indicated that its hours of operation terminated at 11:00 p.m. (*See* ABRA Licensing File No. 24326).

CONCLUSIONS OF LAW

6. The Board has the authority to suspend or revoke the license of a licensee who violates any provision(s) of Title 25 of the D.C. Official Code pursuant to D.C. Official Code § 25-823(1) (2009). Additionally, pursuant to the specific statutes under which the Respondent was charged, the Board is authorized to levy fines. D.C. Code § 25-830 (2009) and 23 DCMR. § 800, *et seq.* (2008)

7. As a preliminary matter, the Board dismisses the Government's charge that the Respondent violated 23 DCMR § 705.9. Section 705.9 forbids ABC establishments from selling alcohol or permitting the consumption of alcoholic beverages on their premises between 2:00 a.m. and 8:00 a.m., Monday through Friday. 23 DCMR § 705.9 (2008). Here, the establishment is accused of selling alcohol and permitting the consumption of alcoholic beverages on its premises after 11:00 p.m. but before 2:00 a.m. on Tuesday, February 3, 2009. Based on these facts, the Respondent clearly did not violate § 705.9 because that section only forbids the sale of alcohol between 2:00 a.m. and 8:00 a.m. on Tuesdays. Therefore, the Board dismisses the Government's claim that the Respondent violated 23 DCMR § 705.9.

8. The Board finds that the Government has proven that the Respondent violated 23 DCMR § 705.10 by selling alcohol and permitting the consumption of alcoholic beverages on its premises after 11:00 p.m. because this violated the Respondent's license, which stated the Applicant had to cease operations at 11:00 p.m.

9. The issue presented to the Board is whether Respondent violated 23 DCMR § 705.10 where the Respondent's license indicates that its hours of operation and sale ended at 11:00 p.m. on Tuesdays and the establishment's last call was regularly held at 11:15 p.m. Under 23 DCMR § 705.10, "[t]he hours of operation set forth in § 705.9 for an ABC establishment may be further reduced by hour restrictions that have been approved as conditions of the establishment's ABC license by the Board" 23 DCMR § 705.10 (2009).

10. The Board notes that everyone applying for a liquor license must file an application form which contains the information required by Title 25 of the District of Columbia Official Code and "any additional information that the Board may require." D.C. Code § 25-401 (2001). As part of the application process, applicants must give the Board "[a] detailed description of the nature of the proposed operation, including. . . . The hours during which the establishment plans to sell alcoholic beverages; D.C. Code § 25-402(D) (2001).

11. The Board further notes that 23 DCMR § 705.10 cannot violate D.C. Code § 25-724 under the District of Columbia's hierarchy of statutory authority. Section 25-724 states that "[a]t the time of initial application. . . the Board may further limit the hours of sale and delivery for a particular applicant (1) based on the Board's findings of fact, conclusions of law, and order following a protest hearing, or (2) under the terms of a voluntary agreement." D.C. Code § 25-724 (2001).

12. The Board agrees with the Respondent that the Board's authority to affirmatively limit the hours of operation and sale at the time of initial application is not unlimited. For example, the Board may only reduce a licensee's hours of operation and sale under D.C. Code § 25-724, in response to a voluntary agreement or protest hearing or under D.C. Code § 25-104(e) if the Board determines that a reduction of hours is "in the best interest of the [District]." D.C. Code § 25-104(e) (2004).

13. Nevertheless, this case does not involve a situation where the Board affirmatively reduced the Respondent's hours of operation and sale. Here, the Respondent in its Application for ABC License in response to Question 16 stated that its hours of operation would be "Lunch: Monday through Friday 11:00 a.m. to 2:00 p.m. Dinner Monday through Saturday 5:30 p.m. to 11:00 pm. . . . [*sic*]." Based on its application, the Respondent was then issued a Retailer's Class CR License stating that the hours of operation and sale were from 11:00 a.m. to 11:00 p.m. on Tuesdays. (*See* ABRA Licensing File No. 24326). Nowhere during this process did the Board affirmatively limit the Respondent's hours of operation and sale. *Instead, the Board merely gave the Respondent a license with the hours of operation and sale that it requested voluntarily, when it filled out its application in compliance with D.C. Code § 25-402(D).*

14. Nothing in the law prevents licensees from voluntarily applying for and receiving fewer hours than the law allows. Neither 23 DCMR § 705.09 or 23 DCMR § 705.10 indicate that ABC establishments must be allowed to operate until 2:00 a.m., Monday through Friday, if the Board does not affirmatively limit their hours. Indeed, when § 705.09 states that an Applicant "*may* sell. . . or permit the consumption of alcoholic beverages and § 705.10 states that the hours of operation. . . *may be further* reduced," this indicates that § 705.09 and § 705.10 are not the sole means of limiting an applicant's hours of operation and sale and do not prevent the Respondent from requesting fewer hours than the law allows. 23 DCMR §§ 705.9-705.10 (emphasis added).

15. The Board interprets D.C. Code § 25-724 to mean that the Board may not further reduce the hours of operation and sale requested by the Respondent unless there is a protest hearing or voluntary agreement. The Board emphasizes that D.C. Code § 25-724 allows the Respondent to request fewer hours than the District of Columbia's liquor laws allow. Section 25-724 states that "the Board may further limit," which indicates that § 25-724 is not the exclusive means through which an applicant's operating hours may be limited. D.C. Code § 25-724. Furthermore, the Board notes that if it grants the Respondent's request for fewer hours than the law allows, the Board is not independently reducing the Respondent's hours. Rather, instead of making an independent judgment of what the Respondent's hours should be, the Board was merely

performing a ministerial function. As such, the Respondent's license that indicated it had to cease operations and stop selling alcoholic beverages after 11:00 p.m. was valid because Respondent requested that its operations end at 11:00 p.m. and the Board did not further reduce the hours because there was no protest hearing or voluntary agreement.

16. As a result, 23 DCMR §§ 705.09-705.10 and D.C. Code § 25-724 do not preclude the Respondent from voluntarily limiting its own operating hours, as it did in its Application for ABC License in October 1996. As such, the Respondent's license, which ordered it to cease its operations and stop selling alcohol at 11:00 p.m. was valid and did not authorize the Respondent to sell alcohol until 2:00 a.m.

17. Based on the Board's legal determination, the Board concludes that the Respondent violated 23 DCMR § 705.10. The Board credits the testimony of Investigator Shakoor that the Respondent sold and permitted the consumption of alcohol past 11:00 p.m. in violation of the provisions of its Retailer's Class CR License. Indeed, the Respondent admitted that "last call" was at 11:15 p.m., which indicates that the Respondent was not just allowing its customers to finish eating and drinking but also selling alcohol past 11:00 p.m.

18. Finally, the Board will quickly addresses the Respondent's arguments that it did not engage in a substantial change, that its license was appropriate under 23 DCMR § 1505.1, and that the Board could not reduce the Respondent's hours under D.C. Code § 104(e). First, the Respondent's argument that staying open past 11:00 p.m. is not a substantial change is irrelevant to whether the Respondent violated 23 DCMR §§ 705.09-705.10. Second, the Board agrees with Respondent's arguments that the application was presumed to be appropriate under 23 DCMR § 1505.1 because there was no objection but finds that the argument is irrelevant in the present case. Section 1505.1 merely states that "[t]here shall be a presumption that a license is appropriate for an establishment if, after public notice is given under this chapter, no objection to the license is filed with the Board." 23 DCMR § 1505.1 (2008). In this case, the Board issued a license that required the Applicant to cease operations and stop selling alcoholic beverages at 11:00 p.m. Therefore, under 23 DCMR § 1505.1, the presumption was that the Respondent's license, which ceased operations at 11:00 p.m., was appropriate, not a license that ended at 2:00 a.m. as the Respondent seeks to argue. Finally, the Respondent's D.C. Code § 104(e) arguments are irrelevant because the Board did not impose any conditions on the Respondent but rather the Respondent requested that its operations cease at 11:00 p.m. in its application for a liquor license. Therefore, there was no need for the Board to produce a written rationale for its decision because the limitation in hours was self-imposed by the Respondent. As a result, these arguments do not change the fact that the Respondent was obligated to cease operations and stop selling alcohol at 11:00 p.m., as indicated in its ABC license.

19. On a final note, the Board notes that 23 DCMR § 705.10 is not listed in the schedule of penalties found in 23 DCMR. § 800, *et seq.* Therefore, a violation of § 705.10 is a primary tier violation. D.C. Code § 25-830(f) (2009).

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board, on this 7th day of July, 2010, finds that the Respondent, Mortons of Chicago/Washington Square, Inc., t/a Mortons of Chicago at premises 1050 Connecticut Avenue, N.W., Washington, D.C., holder of a Retailer's Class CR License, violated 23 DCMR § 705.10.

The Board hereby **ORDERS** that:

1. The Respondent shall pay a fine in the amount of $1500.00, by no later than thirty (30) days from the date of this Order.

District of Columbia
Alcoholic Beverage Control Board

Charles Brodsky, Chairperson

Mital Gandhi, Member

Nick Alberti, Member

Donald Brooks, Member

Herman Jones, Member

Calvin Nophlin, Member

Mike Silverstein, Member

Pursuant to Section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code §2-510 (2001) and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of the service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington D.C. 20001.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).