

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:)		
)		
Solomon Enterprises, Inc.)	Case No.:	12-CMP-00228
t/a Climax Restaurant & Hookah Bar)	License No:	088290
)	Order No:	2014-373
)		
Holder of a)		
Retailer's Class CT License)		
)		
at premises)		
900 Florida Avenue, N.W.)		
Washington, D.C. 20005)		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Solomon Enterprises, Inc., t/a Climax, Respondent

Andrew Kline, Counsel on behalf of the Respondent

Christine Gephardt, Assistant Attorney General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

INTRODUCTION

The Alcoholic Beverage Control Board (Board) Solomon Enterprises, Inc., t/a Climax, (hereinafter "Respondent" or "Climax") in violation of one count of violating D.C. Official Code § 25-823(6) for violating Board Order No. 2013-370 by failing to make a timely fine payment. The Board fines the Respondent \$4,000 and suspends the license for two days.

Procedural Background

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on January 8, 2014. *ABRA Show Cause File No., 12-CMP-00228*, Notice of Status Hearing and Show Cause Hearing, 1-2 (Jan. 8, 2014). The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 900 Florida Avenue, N.W., Washington, D.C., on January 17, 2014. *ABRA Show Cause File No., 12-CMP-00228*, Service Form. The Notice charges the Respondent with one violation, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

Specifically, the Notice, charges the Respondent with the following violation

Charge I: The Respondent failed to “. . . comply with the terms of a Board Order [issued on September 18, 2012, in Case Number 12-CMP-00228] . . . in violation of “. . . D.C. Official Code § 25-823(6).

Notice of Status Hearing and Show Cause Hearing, 2.

Only the Government appeared at the Show Cause Status Hearing on January 30, 2013. The parties proceeded to a Show Cause Hearing and argued their respective cases on May 14, 2014.

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

I. Background

1. Climax holds a Retailer's Class CT License at 900 Florida Avenue, N.W., Washington, D.C. *ABRA License No. 088290*.

II. Board Order No. 2013-370

2. On September 18, 2013, in Case No. 12-CMP-00228, the Board issued Board Order No. 2013-370, which ordered the Respondent to pay a \$2,000 fine for violating D.C. Official Code § 25-762(a). *In re Solomon Enterprises, LLC, t/a Climax Restaurant & Hookah Bar*, Case No. 12-CMP-00228, Board Order No. 2013-370, 4 (D.C.A.B.C.B Sept. 18, 2013). The Order gave the Respondent thirty days to pay the fine. *Id.*

3. The last sentence on page 4 of Board Order No. 2013-370 reads: “The Alcoholic Beverage Regulation Administration shall distribute copies of this Order to the Government and to the Respondent.” *Id.* at 4.

4. The Board takes administrative notice of its records related to the delivery of Board Order No. 2013-370. According to ABRA's records, the agency mailed the Order on September 19, 2013. *Board Exhibit No. 1* (Attached).

5. ABRA also sent the Respondent a "Notice of Delinquency," dated October 25, 2013, which contained a copy of Board Order No. 2013-370. *Letter from Tesha Anderson, Office of Adjudication to Solomon Enterprises, LLC*, 1 (Oct. 25, 2013) ("Enclosure: Copy of the Board Order") (Attached); *Transcript*, May 14, 2014 at 18.

6. On March 10, 2014, ABRA issued a receipt for a \$2,000 payment related to Case Number 12-CMP-00228. *ABRA Show Cause File No. 14-CMP-XXXX*, Receipt (Mar. 10, 2014) (Exhibit 2).

CONCLUSIONS OF LAW

7. The Board has the authority to fine, suspend, or revoke the license of a licensee who violates any provision of Title 25 of the District of Columbia Official Code pursuant to District of Columbia Official Code § 25-823(1). D.C. Official Code § 25-830; 23 DCMR § 800, *et seq.* (West Supp. 2014).

8. In a show cause action, the burden rests with the Government to substantiate the charges by presenting "substantial evidence" that the licensee committed the alleged offenses. D.C. Official Code § 2-509(b); 23 DCMR § 1718.3 (West Supp. 2014).

I. THE RESPONDENT VIOLATED A BOARD ORDER BY FAILING TO TIMELY PAY THE FINE IMPOSED BY THE BOARD.

9. The Board finds that the Respondent failed to timely pay the \$2,000 fine levied in Board Order No. 2013-370. Under § 25-823(6), a licensee is obligated to comply with a Board order. D.C. Official Code § 25-823(6). Here, the Board issued Board Order No. 2013-370 on September 18, 2013. *Supra*, at ¶ 2. The Order gave the Respondent thirty days to pay the fine. *Id.* ABRA's records show that the Order was mailed on September 19, 2013. *Supra*, at ¶ 4. The Respondent did not pay the fine until March 10, 2014; consequently, there is no dispute that the fine payment was late, which violated the terms of Board Order No. 2013-370. *Id.*

II. THE SUBSTANTIAL EVIDENCE IN THE RECORD SHOWS THAT THE RESPONDENT RECEIVED A COPY OF BOARD ORDER NO. 2013-370 MONTHS BEFORE HE PAID THE FINE.

10. The Respondent argues that the Government failed to prove that ABRA served Climax with Board Order No. 2013-370. *Tr.*, 5/14/14 at 25. This is incorrect.

11. The record shows that the Respondent was mailed a copy of Board Order No. 2013-370 on September 19, 2014. *Supra*, at ¶ 4. Even without this evidence, the Government provided substantial evidence that a copy of the Order was delivered to the Respondent months before the March payment occurred. *Supra*, at ¶¶ 3, 5-6. First, Board Order No. 2013-370 ordered ABRA

to distribute a copy of the Order to the parties; therefore, it is fair to presume that ABRA, in the course of its regular duties, complied with the Board's command. *Supra*, at ¶ 3. Second, the agency sent a second copy of the Order to the Respondent on October 25, 2013 with the Notice of Delinquency—a number of months before the Respondent paid the fine in March 2014. *Supra*, at ¶¶ 5-6. Consequently, the Government made a prima facie showing that the Respondent received the Order months before the fine payment occurred.

12. In light of the above, the burden shifted to the Respondent to show through substantial evidence that it did not receive Board Order No. 2013-370. *Nader v. de Toledano*, 408 A.2d 31, 48 (D.C. 1979) (“The establishment of a prima facie case by the party bearing the burden of persuasion as to an issue shifts the burden of producing contradictory evidence to the adverse party”). Nevertheless, the Respondent provided no evidence on this point; therefore, the Board finds no reasonable basis to rule against the Government. *Tr.*, 5/14/14 at 43.

a. Section 1717.1 authorizes the Board to take administrative notice of ABRA's records related to the service of Board Order No. 2013-370 on the Respondent.

13. The Board further affirms its right to take administrative notice of ABRA's records related to the delivery of Board Order No. 2013-370 to the Respondent after the close of the hearing.

14. Under § 1717.1, the Board may permit new information into the record when (1) “. . . all parties are afforded due notice and an opportunity to rebut the information; or” (2) in accordance with D.C. Official Code § 2-509(b), 23 DCMR 1717.1 (West Supp. 2014). In reopening the record during deliberations, the United States Court of Appeals for the Second Circuit has stated that it will

consider (1) the timeliness of the evidence and specifically whether there is a reasonable explanation for the government's failure to present the evidence during the case-in-chief, (2) the character of the supplemental evidence before reopening the case, and (3) the overall effect of the evidence and whether its belated introduction imbues the evidence with distorted importance, prejudices the defendant's case, or precludes an adversary from having an adequate opportunity to meet the additional evidence offered.

U.S. v. Crawford, 533 F.3d 133, 138 (2d Cir. 2008).

15. The Board is persuaded by this reasoning that it is fair and reasonable to enter ABRA's records related to the delivery of Board Order No. 2013-370 to the Respondent into the record. First, the government's failure to present specific evidence on the service issue is reasonable, because the Respondent did not formally raise the issue until after the close of the Government's case. *Tr.*, 5/14/14 at 13, 21.¹ Second, the new information inserted into the record form part of ABRA's normal business records, which require no outside investigation on the part of ABRA or

¹ The issue of taking administrative notice of ABRA's records was discussed during the hearing. *Tr.*, 5/14/14 at 26, 37, 44.

the Board. Third, the Board does not provide these records a “distorted importance,” as the record supports the same conclusion, even if this specific evidence were excluded. *Supra*, at ¶ 11. Fourth, the Respondent retains the ability to contest this evidence during post-trial motions, which avoids any risk of prejudice. D.C. Official Code § 2-509(b); 23 DCMR § 1719.4 (West Supp. 2013); *see also Davis v. United States*, 735 A.2d 467, 475 (D.C. 1999) (saying that allowing the filing of post-trial motions may avoid the “substantial danger of prejudice” and abuse of discretion by the judge). Therefore, the Board finds it appropriate, fair, and reasonable to look at ABRA’s records related to the delivery of Board Order No. 2013-370.

b. ABRA properly served the Order on the Respondent by mail on September 19, 2014 and October 25, 2014 in accordance with § 1703.5(g).

16. Finally, the Respondent has no basis to argue that it was improperly served. *Tr.*, 5/14/14 at 52. Here, ABRA properly served the Respondent with Board Order No. 2013-370 on September 19, 2014, and October 25, 2014. Under § 1703.5(g), service is completed when a party serves the Order in compliance with an order of the Board. 23 DCMR § 1703.5(g) (West Supp. 2014). Board Order No. 2013-370 ordered ABRA to merely “distribute” copies of the Order to Government and the Respondent. *Supra*, at ¶ 3. Therefore, by mailing the order on September 19, 2014, and October 25, 2014, to the Respondent, the agency completed service in accordance with § 1703.5(g).²

17. Therefore, the Respondent’s service objections are entirely without merit.

III. Penalty

18. The failure to comply with a Board Order in accordance with D.C. Official Code § 25-823(6) constitutes a primary tier violation. 23 DCMR § 800 (West Supp. 2014). As Climax’s third primary tier offense in a three year period, the fine range falls between \$4,000 and \$6,000. 23 DCMR § 801.1(b) (West Supp. 2014); *ABRA Licensing File No. 088290* Investigative History (See #6, #9). The Board imposes the minimum fine penalty based on the Respondent’s lack of history of late fine payments.

ORDER

Therefore, the Board, on this 15th day of October 2014, finds that Solomon Enterprises, Inc., t/a Climax guilty of violating § 25-823(6). The Board imposes the following penalty on Climax:

- (1) For the violation described in Charge I, Climax shall pay a \$4,000 fine.

² The Board could also find that ABRA satisfied service vis-à-vis § 1703.4(e) by mailing the order to the Respondent, because this reasonable method of distribution is authorized by D.C. Official Code § 2-509(e). D.C. Official Code § 2-509(e) (“A copy of the decision and order and accompanying findings and conclusions shall be given by the Mayor or the agency, as the case may be, to each party or to his attorney of record”); 23 DCMR § 1703.4(e) (“Service upon a party may be made in the following manner: . . . [a]s otherwise authorized by law”).

IT IS FURTHER ORDERED that the Respondent must pay all fines imposed by the Board within thirty (30) days from the date of this Order, or its license shall be immediately suspended until all amounts owed are paid.

IT IS FURTHER ORDERED that the stayed suspension days imposed in Board Order No. 2013-370 have been triggered by the Board's findings above. The two (2) day suspension of the Respondent's license shall start on Friday, December 5, 2014, and end at 3:00 a.m. on Sunday, December 7, 2014.

IT IS FURTHER ORDERED, in accordance with 23 DCMR § 800.1, that the violation found by the Board in this Order shall be deemed a primary tier violation.

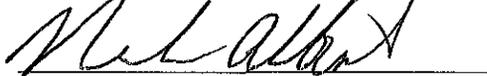
IT IS FURTHER ORDERED that the Respondent's Motion to Dismiss is **DENIED**. *Tr.*, 5/14/14 at 21.

The ABRA shall deliver copies of this Order to the Government and the Respondent.

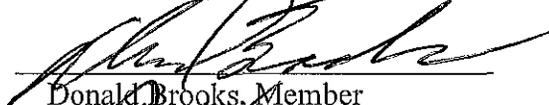
District of Columbia
Alcoholic Beverage Control Board



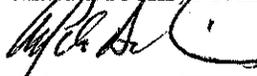
Ruthanne Miller, Chairperson



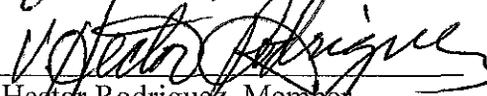
Nick Alberti, Member



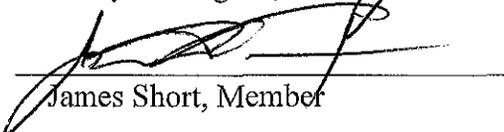
Donald Brooks, Member



Mike Silverstein, Member



Hector Rodriguez, Member



James Short, Member

Pursuant to 23 DCMR § 1719.1, any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

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 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) (2004).

Establishment	Year	Order #	Date Issued	Date Sent	Email	Mail
Climax Restaurant & Hookah	2013	395	9/11/2013	9/12/2013	x	x
Climax Restaurant & Hookah	2013	370	9/18/2013	9/19/2013	x	x
Climax Restaurant & Hookah	2013	450	10/16/2013	10/18/2013	x	x

Board Exhibit
1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION



Board
Exhibit
2

October 25, 2013

Solomon Enterprise, LLC
T/a Climax Restaurant & Hookah Bar
900 Florida Avenue NW
Washington, DC 20001

RE: Soloman Enterprise, LLC t/a Climax Restaurant and Hookah Bar,
ABRA-88290
Case No. 12-CMP-00228

Notice of Delinquency

Dear Licensee,

Our records indicate that on **September 18, 2013**, the Alcoholic Beverage Control Board (Board) by Board Order No. 2013-350 fined your establishment for violations of the laws and regulations of the District of Columbia pursuant to Title 25 of the D.C. Official Code (2001) and Chapter 8 of Title 23 of the District of Columbia Municipal Regulations. Payment of **\$2,000.00** was required within **thirty (30) days of the issuance of the Order**. Your payment is now overdue and this letter serves as a **Notice of Delinquency** on the payment of your fine.

Be advised that if you do not pay this fine **within five (5) business days** of receipt of the Notice of Delinquency, this matter will be referred to the Office of the Attorney General for the District of Columbia for prosecution. You are on notice that should this matter proceed to prosecution, you may incur additional penalties to include a doubling of the original fine amount.

A copy of the Order is enclosed. Please contact me at (202) 442-6924 to make arrangements for the payment of your fine.

Sincerely,

A handwritten signature in black ink, appearing to read "Techar Anderson", is written over a circular stamp or seal.

Techar Anderson
Office of Adjudication

Enclosure: Copy of the Board Order