

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

In the Matter of:

Nispero, LLC
t/a El Nuevo Migueleno

Holder of a
Retailer's Class CR License

at premises
1721 Columbia Road, N.W.
Washington, D.C. 20009

Case No.: 15-CMP-00715
License No.: ABRA-075403
Order No.: 2016-408

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
Ruthanne Miller, Member
James Short, Member

ALSO PRESENT: Fernando Rivero, 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

The Alcoholic Beverage Control Board (Board) finds that Nispero, LLC, t/a El Nuevo Migueleno (Respondent), violated District of Columbia (D.C.) Official Code §§ 25-701 and 25-703 on October 24, 2015. As a result, the Respondent must pay a \$4,000.00 fine. In addition, the Respondent shall have its license suspended for two (2) days with one (1) day to be served, and one (1) day stayed for one (1) year which shall not go into effect unless the Board finds that the Respondent committed a violation within one year from the date of this Order.

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Alcoholic Beverage Control Board executed on March 16, 2016. The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 1721 Columbia Road, N.W., Washington, D.C., on March 22, 2016.

The Notice charged the Respondent with the following violations:

Charge I: [On Sunday, October 24, 2015] [y]ou failed to keep a licensed ABC manager on duty at all times, in violation of D.C. Official Code § 25-701...

Charge II: [On Sunday, October 24, 2015] [y]ou were under the influence of alcohol while personally superintending the establishment, in violation of D.C. Official Code § 25-703...

ABRA Show Cause File No., 15-CMP-00715, Notice of Status Hearing and Show Cause Hearing, 2-3 (March 16, 2016).

The Respondent failed to appear at the Show Cause Status Hearing held on April 27, 2016. A Show Cause Hearing was scheduled for May 25, 2016.

The Respondent also failed to appear at the Show Cause Hearing held on May 25, 2016. The Board proceeded to hearing pursuant to D.C. Official Code § 25-447(e), which allows for an ex parte proceeding.

FINDINGS OF FACT

The Board, having considered the evidence contained in the record, the testimony of witness, and the documents comprising the Board's official file, makes the following findings:

I. Background

1. The Board issued a Notice of Status Hearing and Show Cause Hearing, dated March 16, 2016. *See* ABRA Show Cause File No. 15-CMP-00715. Nispero, LLC, t/a El Nuevo Migueleno, holds a Retailer's Class CR License, ABRA License No. ABRA-075403. *See* ABRA Licensing File No. ABRA-075403. The establishment's premises is located at 1721 Columbia Road, N.W., Washington, D.C. *See* ABRA Licensing File No. ABRA-075403.

2. The Show Cause Hearing was held on May 25, 2016. The Notice charges the Respondent with the violations enumerated above. *See* ABRA Show Cause File No. 15-CMP-00715.

II. Testimony of ABRA Investigator Vernon Leftwich

3. The Government presented its case through the testimony of one witness, ABRA Investigator Vernon Leftwich. *Transcript (Tr.) 5/25/16* at 6.

4. Investigator Leftwich authored the Investigative Report, whose contents and exhibits serve as the basis of the factual nature of the incident. *Tr. 5/25/16* at 16. Government's Exhibit 1.

5. On Sunday, October 24, 2015 at approximately 2:25 a.m., Investigator Leftwich visited the Respondent's establishment to investigate a noise complaint. *Tr.* 5/25/16 at 7. He identified himself to a male security employee. *Tr.* 5/25/16 at 7-8. He informed the security employee about the noise complaint, and asked him to turn down the music's volume. *Tr.* 5/25/16 at 8.

6. Investigator Leftwich then asked to speak to the owner or an ABC-licensed Manager in order to notify that person about the noise complaint. *Tr.* 5/25/16 at 8. The security employee told Investigator Leftwich that the owner had left, and that there was no ABC-licensed manager on the premises. *Tr.* 5/25/16 at 9.

7. The security employee called the owner and informed him that Investigator Leftwich was in the establishment. *Tr.* 5/25/16 at 9. Investigator Leftwich advised the security employee that he was leaving and would return later. *Tr.* 5/25/16 at 9.

8. Later the same morning, at approximately 2:40 a.m., Investigator Leftwich made a second visit to the establishment to talk to the Respondent about the noise complaint. *Tr.* 5/25/16 at 10. The same security employee from the previous visit directed Investigator Leftwich to where the owner was standing. *Tr.* 5/25/16 at 10. Investigator Leftwich identified himself to a male who was pointed out to be the owner. *Tr.* 5/25/16 at 10-11. He asked the owner to provide him with his identification and the owner refused. *Tr.* 5/25/16 at 11.

9. Investigator Leftwich informed the owner about the noise complaint and told him that there was now a violation for not having an ABC-licensed manager or an owner present during his first visit. *Tr.* 5/25/16 at 11. The owner responded by telling Investigator Leftwich that the investigator was not being truthful about the noise complaint, and that the investigator needed more training. *Tr.* 5/25/16 at 12.

10. The security employee also asked the owner to provide Investigator Leftwich with his identification. *Tr.* 5/25/16 at 12. The owner again refused. *Tr.* 5/25/16 at 12.

11. The security employee asked Investigator Leftwich to give the owner a "break" because the owner had had a few drinks. *Tr.* 5/25/16 at 12, 14. The owner was aggressive and yelling at Investigator Leftwich, telling him that he did not know what he was doing. *Tr.* 5/25/16 at 12. The owner also told Investigator Leftwich that other ABRA investigators knew that he was the owner. *Tr.* 5/25/16 at 12-13. Investigator Leftwich told the owner that this was his first time to the establishment and that is why he requested verification of the owner's identity. *Tr.* 5/25/16 at 12-13.

12. Investigator Leftwich testified that during his interaction with the owner, he could smell alcohol on the owner's breath as though he had recently consumed alcohol. *Tr.* 5/25/16 at 13-14. Investigator Leftwich also noticed that the owner's eyes were glossy; that he was not responding to the investigator's requests; that the owner was agitated and aggressive; and that he was not able to stand without support. *Tr.* 5/25/16 at 14. The owner was leaning against the wall during the interaction and was confrontational toward Investigator Leftwich. *Tr.* 5/25/16 at 14.

13. The owner threatened to call the police against Investigator Leftwich. *Tr.* 5/25/16 at 13-14. It was at this point that Investigator Leftwich left the establishment. *Tr.* 5/25/16 at 13. He also informed his supervisor about the incident. *Tr.* 5/25/16 at 13.

14. As noted above, the Respondent failed to appear at the Show Cause Hearing. The Respondent was given adequate notice of the charges brought by the Government, and adequate notice of the Show Cause Hearing before the Board. The Respondent did not file any testimony or exhibits refuting the evidence submitted by the Government. Furthermore, the Respondent did not contact the Government or ABRA to request a continuance of the hearing. As such, the findings of fact are undisputed.

CONCLUSIONS OF LAW

15. 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. 2013). Furthermore, after holding a Show Cause Hearing, the Board is entitled to impose conditions if the Board determines “that the inclusion of the conditions would be in the best interests of the locality, section, or portion of the District in which the establishment is licensed.” D.C. Official Code § 25-447.

I. THE RESPONDENT VIOLATED § 25-701

16. The Board finds the Respondent liable for permitting the licensed establishment to operate on October 24, 2015, without either the licensee or an ABC-licensed Manager supervising during the hours of operation in violation of D.C. Official Code § 25-701.

17. ABRA’s regulations are clear that either the licensee or an ABC-licensed Manager must be present while the establishment is operating. Title 23 of the DCMR § 707.1 provides that in the absence of a licensee, a Board approved manager shall be present at the licensed premises during the hours that alcoholic beverages are permitted to be sold, served, or consumed on the licensed premises.

18. The Board finds that the facts set forth in the Investigative Report and the Investigator’s sworn testimony support the charge and support a finding of liability as to the Respondent. It is unrefuted that on October 24, 2015 at approximately 2:25 a.m., the Respondent’s employee admitted to Investigator Leftwich that there was no ABC-licensed manager or owner on the premises. It was not until Investigator Leftwich’s second visit to the premises fifteen (15) minutes later, that the owner was present.

II. THE RESPONDENT VIOLATED § 25-703

19. The Board finds the Respondent liable for being under the influence of alcohol while personally supervising the establishment on October 24, 2015, in violation of D.C. Official Code § 25-703.

20. The Board credits Investigator Leftwich’s unrefuted testimony regarding the visible signs of the Respondent’s intoxication during his visit to the premises. The investigator

personally observed that the Respondent was not able to stand on his own, smelled of alcohol, his eyes were glossy, and he was agitated, uncooperative and aggressive. One or two signs of intoxication are not necessarily indicative that the Respondent was under the influence of alcohol. However, a combination of several signs, as set forth in the evidentiary record, allows the Board to reasonably infer that the Respondent was under the influence of alcohol while superintending the establishment. Thus the Board finds the Respondent guilty of Charge II.

III. PENALTY

21. The Respondent's Investigative History shows that these are the Respondent's fourth secondary and first unlisted primary tier violations. *Licensing File No. ABRA-075403*, Investigative History. Thus, the Board may fine the Respondent between \$1,000.00 and \$2,000.00 for each charge. *Licensing File No. ABRA-075403*, Investigative History; DCMR §§ 23-801 and 23-802.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board, on this 29th day of June, 2016, finds that the Respondent, Nispero, LLC, t/a El Nuevo Migueleno, located at 1721 Columbia Road, N.W., Washington, D.C., holder of a Retailer's Class CR license, violated D.C. Official Code §§ 25-701 and 25-703.

The Board hereby **ORDERS** that:

- 1) Charge I: Respondent must pay a fine in the amount of \$2,000.00.
- 2) Charge II: Respondent must pay a fine in the amount of \$2,000.00.
- 3) In total, the Respondent must pay a fine in the amount of \$4,000.00 by no later than thirty (30) from the date of this Order or its license shall be suspended until all outstanding fines are paid.
- 4) In addition, the Respondent shall receive a two (2) day suspension of its license, with one (1) day stayed for one (1) year and one (1) day to be served.
- 5) The Respondent's one (1) suspension day will be served on Thursday, July 14, 2016.

Copies of this Order shall be sent to the Respondent and the Government.

District of Columbia
Alcoholic Beverage Control Board

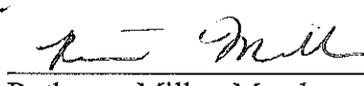
Donovan Anderson, Chairperson



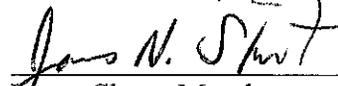
Nick Alberti, Member



Mike Silverstein, Member



Ruthanne Miller, Member



James Short, Member

Pursuant to D.C. Official Code § 25-433(d)(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, 2000 14th Street, N.W., Suite 400S, Washington, DC 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, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR §1719.1 (2008) 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).