

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

In the Matter of:)		
)		
2461 Corporation)	Case No.:	15-251-00157
t/a Madam's Organ)	License No:	25273
)	Order No:	2016-669
Holder of a)		
Retailer's Class CT License)		
)		
at premises)		
2461 18th Street, N.W.)		
Washington, D.C. 20009)		

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

ALSO PRESENT: 2461 Corporation, t/a Madam's Organ, Respondent

Richard Bianco, Counsel, on behalf of the Respondent

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**

INTRODUCTION

Before addressing the main issue raised by this case, the Alcoholic Beverage Control Board first addresses the subsidiary issue raised during the course of the proceedings related to the maximum capacity of 2461 Corporation, t/a Madam's Organ (hereinafter "Respondent" or "Madam's Organ"). *Transcript*, March 9, 2016 at 11-12. During the hearing, the Respondent gave the Board the impression that it has and intends to intentionally violate the capacity limits set by its liquor license based on his own erroneous interpretation of the law and the terms of the Respondent's liquor license. *Id.*; *Tr.*, July 20, 2016 at 142.

Specifically, the Respondent took the position that due to the court's June 2008 ruling in *2461 Corp.* the Respondent is entitled to a capacity of more than 99 patrons, even though this contradicts the capacity number posted on its liquor license. *Tr.*, 3/9/16 at 11-12; *2461 Corp. v. D.C. Alcoholic Beverage Control Bd.*, 950 A.2d 50, 51 (D.C. 2008); *Tr.*, 7/20/16 at 142. While this theory may have been correct in 2008 due to prior language of the regulation describing capacity, by the beginning of 2009 it no longer represented the state of the law.¹ *Infra*, at ¶¶ 42-49. Specifically, the Respondent's legal theory died when the Council of the District of Columbia used its prerogative to overrule the court's decision in *2461 Corp.* by enacting the "Alcoholic Beverage Enforcement Amendment Act of 2008" in February of 2009 and revising the definition of capacity contained in the regulation that was the subject of the court's ruling in *2461 Corp. Id.*

In light of this change in the law, the Board encourages the Respondent to submit an application for a substantial change with the required permits to ensure that its liquor license reflects the desired capacity of the premises. Otherwise, the Respondent risks committing a slew of intentional primary tier violations because of an outdated view of the law. D.C. Official Code §§ 25-762, 25-823(a)(7).

The Main Issue

As to the merits of the show cause action brought by the Government, the Board finds the Respondent in violation of D.C. Official Code § 25-823(a)(5) based on the actions of its doorman on September 5, 2016. On that day, the doorman impeded the entry of ABRA Investigator Craig Stewart by attempting to block his path and by pushing on the supervisory investigator with his body as Supervisory Investigator Stewart tried to enter the establishment. Based on the offense, the Board fines the establishment \$1,000. Below, the Board discusses the procedural background of this case, the Board's factual findings, factual findings rejected by the Board, and the Board's conclusions of law.

Procedural Background

This case arises from an Amended Notice of Status Hearing and Show Cause Hearing (Amended Notice), which the Board executed on December 15, 2015. *ABRA Show Cause File No.*, 15-251-00157, Notice of Status Hearing and Show Cause Hearing, 2 (Dec. 15, 2015). The Amended 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 Amended Notice charges the Respondent with the following violation:

¹ The Board can only speculate that the court decision has added a layer of confusion to the enforcement of this requirement against the Respondent since 2009. Nevertheless, because this confusion has now been dispelled, the Board expects the Respondent to act accordingly.

Charge I: [On September 5, 2015,] [y]our failed to allow an ABRA investigator to enter the licensed premises without delay, . . . in violation of D.C. Official Code § 25-823[a](5)²

Notice of Status Hearing and Show Cause Hearing, 2.

Both the Government and Respondent appeared at the Show Cause Status Hearing on January 27, 2016. The parties proceeded to a Show Cause Hearing and argued their respective cases on March 9, 2016 and July 20, 2016.

FINDINGS OF FACT

In considering the record, the Board is presented with conflicting witness testimony, which is colloquially known as a “credibility contest” or “he says, she says dispute,” as well as a small amount of video evidence that does not capture the entire incident. *Durant v. United States*, 551 A.2d 1318, 1329 (D.C. 1988); *Hoepfner v. Holladay*, 741 N.W.2d 823 (Iowa Ct. App. 2007). As the finder of fact, the Board is tasked with making “the credibility determinations needed to resolve conflicts in witnesses’ testimony.” *Resper v. U.S.*, 793 A.2d 450, 457 (D.C. 2002). While there are some inconsistencies with the testimony of witnesses on both sides, the Board is persuaded that the Government’s version of events related to the charge is accurate and corroborated by the video evidence in the record. Moreover, the Board finds that any inconsistencies in the testimony presented by the Government’s witnesses are immaterial and understandable based on the quick nature of the events in question.

For these reasons, 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. Facts Related to the Respondent’s Establishment.

1. Madam’s Organ holds a Retailer’s Class CT License at 2461 18th Street, N.W., Washington, D.C. *ABRA License No. 25273*. The Respondent’s license, issued on September 30, 2013, indicates that it has a capacity of 99 people. *Government Exhibit No. 1* (Case Report No. 15-251-00157, Exhibit No. 3) (ABRA License). The Respondent’s Certificate of Occupancy, issued on April 14, 2006, indicates that it has an occupancy load of 99 persons and a restaurant seating capacity of 99. *Government Exhibit No. 1* (Case Report No. 15-251-00157, Exhibit No. 4) (Certificate of Occupancy).

II. Facts Related to Prior Investigations Conducted by ABRA Investigator Brashears.

2. Before September 5, 2015, ABRA Investigator Brashears has previously visited Madam’s Organ to conduct investigations. *Transcript (Tr.)*, March 9, 2016 at 96, 98. During prior visits,

² The Board granted the prosecutor’s motion to strike the phrase “or otherwise interfered with an investigation” from the Amended Notice. *Transcript (Tr.)*, March 9, 2016 at 4.

Investigator Brashears has observed Daniel Carr act as a doorman for the establishment. *Id.* at 97-98, 104, 133. Mr. Carr has worked as security for the Madam's Organ for approximately five years. *Id.* at 133, 188. During these interactions, Mr. Carr would "routinely" ask Investigator Brashears to stop and wait so that he could obtain a licensed manager. *Id.* at 98. In response, Investigator Brashears has told Mr. Carr that he cannot "impede" him and that he should have management meet him inside. *Id.* On these occasions, Investigator Brashears would then proceed inside the establishment. *Id.* at 99.

III. Facts Related to the Incident on September 5, 2016.

3. ABRA Investigator Craig Stewart has worked at ABRA for ten years and supervises the agency's line investigators. *Transcript (Tr.)*, 3/9/16 at 19. On September 5, 2015, Investigator Stewart was present in the Adams Morgan neighborhood with Investigator Mark Brashears and ABRA Investigator Torren Fox. *Id.* at 21; *see also id.* at 74. Everyone in the team was wearing civilian clothes, but Supervisory Investigator Stewart had his badge displayed on his chest. *Id.* at 37-38, 67; *see also id.* at 77, 89-90. On the night of the incident, his badge looked similar to a police badge, was contained in a leather case, and was hanging from a chain around his neck. *Front Camera #10*, at 6:30:09.

4. While present in Adams Morgan, Supervisory Investigator Stewart was approached by MPD Sergeant Rooney. *Tr.*, 4/9/16 at 21; *see also id.* at 87. Sgt. Rooney indicated that MPD had received a noise complaint regarding Madam's Organ. *Id.* at 21; *see also id.* at 74. Additionally, Supervisory Investigator Stewart was aware that ABRA investigators and other officials with the District government had indicated that the establishment may have had issues with overcrowding in the past. *Id.* at 49-52. Based on the complaint, Investigator Stewart and his team approached the Respondent's establishment around 1:40 a.m. *Id.* at 21.

5. Outside the establishment, Investigator Brashears heard music coming from the establishment. *Id.* at 75; *see also id.* at 56. He also observed patrons hanging out in front of the establishment and inside the establishment's sidewalk café area. *Id.* He further observed a tall white male with a beard, identified as Daniel Carr, and a black male, identified as Darian Gray, that appeared to be working for the establishment near the front entrance. *Id.* at 21-22, 75, 97-98, 104; *see also id.* at 138. Mr. Gray was checking identifications, while Mr. Carr was working as security and collecting money. *Id.* at 76, 139.

6. As the investigative team reached the establishment, Supervisory Investigator Stewart observed Mr. Carr and Mr. Gray standing in front of the establishment. *Id.* at 21-22. Investigator Stewart and Investigator Brashears heard Mr. Carr say "ABRA's here" into his radio. *Id.* at 22, 70, 76. Mr. Carr further confirmed that he used his radio to notify management that ABRA officials were present. *Id.* at 195, 223.

7. Supervisory Investigator Stewart showed Mr. Carr his badge and indicated that he was going to enter the establishment. *Id.* at 22, 77; *see also id.* at 90. Mr. Carr admits that he heard Supervisory Investigator Stewart tell him that the supervisory investigator was with ABRA. *Id.* at 140. The badge was hanging from a chain on his neck and displayed on his chest. *Id.* at 37-38; *see also id.* at 77, 89-90. Mr. Carr told Supervisory Investigator Stewart to wait for him to

get a manager. *Id.* at 22-23; *see also id.* at 77. Supervisory Investigator Stewart told Mr. Carr that he could not delay or impede the investigation team and that they were going to perform an inspection. *Id.* at 23.

8. Mr. Carr responded “no, I’m going to get the manager for you.” *Id.* Supervisory Investigator Stewart repeated his instruction that Mr. Carr was not permitted to delay or impede the investigatory team. *Id.* at 23.

9. Supervisory Investigator Stewart then stepped to the right, in an attempt to go around Mr. Carr and go through the establishment’s entrance. *Id.* In response, Mr. Carr moved in front of Supervisory Investigator Stewart to block his entrance into the establishment. *Id.* at 24. Supervisory Investigator Stewart went around Mr. Carr by stepping further to the right. *Id.* As this occurred, Mr. Carr began backing up into the door until the two were standing face to face in front of the door, which was being held open by Mr. Carr’s back. *Side Camera #9*, 06:28:14 – 06:28:17. The camera footage then shows Mr. Carr back into the vestibule, while the supervisory investigator holds open the door and follows. *Id.* at 06:28:17 – 06:28:21. Nevertheless, upon entering the establishment’s vestibule, Mr. Carr continued to impede the investigator’s entrance by standing in front of him. 3/9/16 at 24; *see also id.* at 78. Supervisory Investigator Stewart continued to attempt to move around Mr. Carr and told him that he could not impede the investigation. *Id.* at 24. Instead of moving out of the way, Mr. Carr told Supervisory Investigator Stewart that he had to wait for a manager and that he was not going to move. *Id.* at 24, 43.

10. During this time, Mr. Carr was “leaning down” on Supervisory Investigator Stewart and pushing him against the wall with his chest and shoulder. *Id.* at 24, 44; *see also id.* at 78, 109. While Mr. Carr pushed against Supervisory Investigator Stewart, the supervisory investigator was able to slowly walk forward. *Id.* at 25; *see also id.* at 79.

11. Eventually, the supervisory investigator managed to enter the establishment’s main room. *Id.* at 26.

12. Upon entering the main room, he encountered the establishment’s licensed manager, Keisha Hamilton. *Id.* at 26, 245. He identified himself as an investigator with ABRA and discussed the incident that just occurred. *Id.* at 26; *see also id.* at 79. In response, the manager said, “oh, I’m so sorry, they’re not supposed to do that.” *Id.* at 27; *see also id.* at 80. Supervisory Investigator Stewart then informed the manager that the team was investigating a noise complaint and overcrowding. *Id.*

13. Outside, the supervisory investigator told the manager that the establishment has a duty to provide investigators with access to the establishment and that the prior incident was inappropriate. *Id.* at 28; *see also id.* at 82. In response, the manager “apologized profusely.” *Id.* at 29. Mr. Carr then approached the supervisory investigator and stated “sir, I’m sorry . . . I didn’t mean it, I’m really sorry.” *Id.*

14. Outside the establishment, the supervisory investigator observed Sgt. Rooney and other members of the Metropolitan Police Department (MPD). *Id.* at 29. Investigator Brashears

contacted MPD officer Eric Kennedy for assistance, at the request of the supervisory investigator. *Id.* at 94-95; *see also id.* at 127. Supervisory Investigator Stewart requested that MPD identify Mr. Carr and take his information, which they did and then provided to ABRA. *Id.* at 30. After MPD identified Mr. Carr, he attempted to shake Supervisory Investigator Stewart's hand, but the supervisory investigator refused to take his hand. *Id.*

15. At some point during the evening, Investigators Brashears and Fox went to the second floor to count patrons, while the supervisory investigator remained on the first floor to count patrons. *Id.* at 253. In total, the team found that there were approximately 150 to 160 patrons inside the establishment. *Id.* at 28; *see also id.* at 82. Supervisory Investigator Stewart then informed the manager of their findings, and the team exited the establishment from the front. *Id.* at 28.

Rejected Factual Claims

16. In making its findings of fact, the Board has an obligation to make findings of "all contested issues of material fact." *Butler-Truesdale v. AIMCO Properties, LLC*, 945 A.2d 1170, 1171 (D.C. 2008). In fulfilling this requirement, the Board explains its findings related to various contested factual issues.

I. The Respondent's Skipping Video Is Not a True and Accurate Representation of the Entire Incident; Therefore, It Does Not Undermine the Credibility of the ABRA Investigators.

17. During his testimony, Mr. Carr testified that the video truly and accurately represented the incident on September 5, 2016. *Tr.*, 5/9/16 at 152-54. This assertion by Mr. Carr is wrong. As a casual review of the videos indicate, the footage skips randomly. *See Tr.*, 7/20/16 at 158-59. For example, footage from Side Camera #9 starting at 6:27:48 skips two seconds at a time, except at 6:27:54 through 6:27:55 when the video only skips only one second. *Side Camera #9*, 6:27:48 – 6:27:48. This random skipping then appears throughout the entire video. *Id.* at 6:27:48 – 6:31:45. Likewise, the same phenomenon appears throughout the footage from Front Camera #10. *Front Camera #10*, 6:28:50 – 6:28:51 (an example of the video skipping one second), 6:28:53 – 6:28:59 (an example of two second skipping). In light of these facts, rather than being a true and accurate depiction of the incident, the videos clearly miss and exclude parts of the incident that may have occurred within the field of view of the cameras. This means that the individual pictures presented by the recording must be taken for what they are: an incomplete recording of the incident that occurred. Therefore, the Board finds it reasonable to make inferences about events that occurred within the missing moments of the footage, as well as anything obscured in the video or occurring off-camera, which may contradict the testimony given by various witnesses.

II. Supervisory Investigator Stewart Had His Badge Displayed Before Entering the Premises.

18. As noted above, the Board credits testimony that Supervisory Investigator Stewart had his badge visibly displayed on his chest when he first approached Mr. Carr. *Supra*, at ¶ 7. In

making its findings, the Board considered Mr. Carr's testimony that Supervisory Investigator Stewart's badge was not visible and that the supervisory investigator "refused to show it." *Tr.*, 3/9/16 at 141. Nevertheless, Front Camera #10 shows the corner of a black object and Mr. Carr's body obscuring one of Supervisory Investigator Stewart's arms as he attempted to enter the establishment. *Front Camera #10*, 6:28:11. Based on these facts, the Board infers that the black object is the leather case that contains the supervisory investigator's badge and that Mr. Carr's body obscures the investigator holding it up to Mr. Carr. *Id.* To the extent the establishment's cameras do not show the badge as Supervisory Investigator Stewart approached the establishment, the Board is satisfied that the badge was being obscured by the crowd, individual bodies, and a pole obscuring the view of the Side Camera #10. *See, e.g., Front Camera #10*, 6:28:13; *Side Camera #9*, 6:28:06 – 6:28:14. Moreover, witness testimony by the Respondent's doorman and manager attempting to bolster Mr. Carr's testimony cannot be deemed reliable based on the lack of firsthand knowledge possessed by these witnesses. *Infra*, at ¶¶ 21-22. Consequently, the Board does not adopt the finding that Supervisory Investigator Stewart did not have his badge visible when he approached the establishment.

III. Supervisory Investigator Stewart Description of His Attempt to Evade Mr. Carr is Credible.

19. The Board further credits Supervisory Investigator Stewart's testimony regarding his attempts to get around Mr. Carr and the incident generally.

20. First and Foremost, Mr. Carr's testimony is unreliable for several reasons. First, Mr. Carr testified that he did not step in front of Supervisory Investigator Stewart and only "stood there." *Tr.*, 3/9/16 at 142. But it is not the case that Mr. Carr just "stood there." *Id.* Instead, the footage shows Mr. Carr step to his left with his arm out in front of the supervisory investigator as the investigator attempted to enter the establishment. *Front Camera #9*, 06:28:11 – 06:28:15. Second, Mr. Carr indicated that the Supervisory Investigator opened the front door. *Tr.*, 3/9/16 at 141. Nevertheless, Side Camera #9 shows that Mr. Carr—not the supervisory investigator—first opens the door. *Side Camera #9*, 06:28:14 – 06:28:17. Third, Mr. Carr indicated that he held the door open for Supervisory Investigator Stewart. *Tr.*, 3/9/16 at 141-42. Yet, Side Camera #9 shows Mr. Carr backing into the establishment, which then requires Supervisory Investigator Stewart to hold the door open himself. *Side Camera #9*, 06:28:16 – 06:28:23. Fourth, Mr. Carr claims that Supervisory Investigator Stewart walked "past" him and that Mr. Carr followed. *Tr.*, 3/9/16 at 143. But this statement is contradicted by footage from Side Camera #9 that shows Mr. Carr remaining in front of the supervisory investigator as the supervisory investigator makes his way into the venue. *Side Camera #9*, 06:28:17 – 06:28:21. The Board is also persuaded that if the incident occurred in the manner described by Mr. Carr, then the establishment's other doorman, Mr. Gray, the investigators, and a patron standing outside of the establishment would not have been intrigued and watched the incident as it unfolded in the hallway. *Front Camera #9*, 06:28:20 – 06:28:35; *Tr.*, 7/20/16 at 161.

21. Keisha Hamilton's testimony also does not undermine the supervisory investigator's testimony, because she admits that she could not see the front door from her vantage point. *Tr.*, 3/9/16 at 265. Therefore, she missed the key parts of the incident and cannot reliably undermine the testimony of the investigators.

22. The Board is also not persuaded by the testimony of Darian Gray regarding the incident. During his testimony, Mr. Gray indicated that he did not observe Mr. Carr step in the way of Supervisory Investigator Stewart. *Tr.*, 7/20/16 at 63-64. Nevertheless, the video shows that he was busy checking identifications when Mr. Carr began blocking Supervisory Investigator Stewart; therefore, he missed a large portion of the incident and cannot be relied upon as a witness. *Front Video #10*, 6:28:11 – 6:28:22.

23. The Board is also not persuaded by the Respondent's attempt to paint Supervisory Investigator Stewart and Investigator Brashears as liars or engaging in harassment of the establishment. The Respondent argues that ABRA is engaged in a pattern of harassment against the establishment by continually checking its occupancy despite the court's decision in *2461 Corp.* *Tr.*, 3/9/16 at 11-12; *Tr.*, 7/20/16 at 121. The Board does not find this contention credible because the record is devoid of a reasonable motive for the alleged harassment and the record shows that the investigators only approached the establishment in response to a complaint. *Supra*, at ¶ 4. Furthermore, to the extent there is any veracity to the claim that investigators have repeatedly checked the occupancy of the establishment, the Board has no reason to view these actions as inappropriate when the Respondent's owner appears to be attracting investigators to the establishment by telling them that Madam's Organ has the right to violate the capacity figure on its license, even though this is not the case. *Tr.*, 7/20/16 at 120-22; *Infra*, at ¶¶ 42-49.

EVIDENTIARY RULINGS

24. During the show cause hearing, the Board excluded an affidavit and documents related to an eight year old case involving Supervisory Investigator Stewart and ABRA Investigator Felicia Martin because it was irrelevant and immaterial and not properly raised during cross-examination. *Tr.*, June 20, 2016 at 7, 38.

25. Under § 1714.3, "Any oral or documentary evidence may be received, but the Board shall exclude irrelevant, immaterial, or unduly repetitious evidence. 23 DCMR §1714.3 (West Supp. 2016). The court has also said that

a witness may be cross-examined on a prior bad act that has not resulted in a criminal conviction only where: (1) the examiner has a factual predicate for such question, and (2) the bad act bears directly upon the veracity of the witness in respect to the issues involved the trial Moreover, where such impeachment is permitted, evidence of the prior misconduct may be elicited only by cross-examination of the witness; it may not be proved by extrinsic evidence.

Sherer v. United States, 470 A.2d 732, 738 (D.C. 1983) (citations and quotation marks removed). Furthermore, the court noted that "the impeachment rules . . . serve the principal purpose of preventing the trial from spin[ning] off into a series of sub-trials on collateral issues both confusing and time-consuming." *Id.* at n. 5. (quotation marks removed).

26. In rejecting this submission of evidence and testimony, the Board considered a number of factors in ruling that the information is irrelevant and immaterial. First, there is no evidence or proffer that Investigator Martin has information regarding the present controversy, such as

statements made after the investigation. There is also no indication in the record that the documents related to the employment case relate to the instant case. Second, there is no evidence or proffer that Investigator Martin was present on the night of the incident. Third, an employment controversy that is over eight years old (and likely involving a situation that occurred even farther in the past) is simply too stale to have any bearing on the credibility of the witness during a separate enforcement case. Fourth, even though the Respondent had the capability to find the information before the first show cause hearing and the ability to cross-examine Supervisory Investigator Stewart on the matter, the Respondent did not do so, which falls below the generally accepted legal standard for accepting evidence related to alleged prior bad acts. Sixth, even if the Board accepted the Respondent's theory, the testimony and documents do not otherwise touch upon the credibility of Investigator Brashears, who corroborated the testimony provided by the supervisory investigator. Finally, even if the documents are completely true, the matter raised by the Respondent does not relate to any issue that has a bearing on the hearing or would otherwise change the outcome of this case. For these reasons, rather than allow the hearing to descend into a circus of confusing and time-consuming collateral issues, the Board excludes the documents as evidence.

CONCLUSIONS OF LAW

27. Turning to the charge brought by the Government, 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 (D.C.) Official Code pursuant to D.C. Official Code § 25-823(1). D.C. Official Code § 25-830; 23 DCMR § 800, *et seq.* (West Supp. 2016). In this matter, the Board shall only base its decision on the "substantial evidence" contained in the record. 23 DCMR § 1718.3 (West Supp. 2016). The substantial evidence standard requires the Board to rely on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clark v. D.C. Dep't of Employment Servs.*, 772 A.2d 198, 201 (D.C. 2001) *citing Children's Defense Fund v. District of Columbia Dep't of Employment Servs.*, 726 A.2d 1242, 1247 (D.C.1999).

IV. The Respondent's Employee Violated D.C. Official Code § 25-823(a)(5) By Intentionally Blocking Supervisory Investigator Stewart From Entering The Premises During the Course of a Lawful Investigation.

28. The Board finds that on September 5, 2015, Daniel Carr, working as a doorman, failed to allow Supervisory Investigator Stewart entrance into the Respondent's premises without delay by attempting to block his path and pushing on him with his body, which violates D.C. Official Code § 25-823(a)(5).

a. Supervisory Investigator Stewart and his team appropriately entered establishment on September 5, 2015 and had the legal right to do so.

29. The Board is persuaded that Supervisory Investigator Stewart had a lawful and appropriate reason, as well as the right, to enter the establishment on September 5, 2016 when Mr. Carr unlawfully delayed the supervisory investigator's passage into the establishment.

30. Under § 25-802(a)(1), a "licensee[] shall allow . . . any ABRA investigator . . . full opportunity to examine, at any time during business hours: . . . The premises where an alcoholic

beverage is . . . kept, sold, or consumed . . . for which a license has been issued.” D.C. Official Code § 25-802(a), (a)(1). ABRA’s noise statute further directs ABRA to “attempt to contact the establishment by phone or in person and inform the ABC manager on-duty that a noise complaint has been received and describe the nature of the complaint.” D.C. Official Code § 25-725(d)(3).

31. In this case, the Board credits the Government that Supervisory Investigator Stewart and his team received a noise complaint from MPD and that noise was coming from the establishment. *Supra*, at ¶¶ 4-5. Under § 25-802, Supervisory Investigator Stewart and his team had the right to enter the premises to investigate the complaint. Moreover, the team’s actions in response to the noise complaint appear compliant with the statutory encouragement of § 25-725(d) to contact the establishment’s management “in-person.” D.C. Official Code § 25-725(d)(3).

b. The Respondent is liable for any violations committed by Mr. Carr, because Mr. Carr was acting on behalf of the Respondent on September 5, 2015.

32. Under the doctrine of *respondeat superior*, an employer may be held liable for the acts of his employees committed within the scope of their employment.” *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 757 (D.C. 2001).³ On September 5, 2015, Daniel Carr was employed by the Respondent as a doorman and security when he confronted Supervisory Investigator Stewart. The business was currently open and operating at the time of the incident and his statements at the time indicate that he was aware that Supervisory Investigator Stewart was an ABRA official. *Supra*, at ¶¶ 6-7. Because regulating entrance into the establishment, complying with the liquor laws, and interacting with ABRA officials fall within his scope of employment, the Respondent is liable for any violations committed by Mr. Carr during his interaction with ABRA investigators.

c. Mr. Carr delayed Supervisory Investigator Stewart from entering the premises by attempting to physically block him and by pushing on him with his body.

33. Under § 25-823(a)(5), a “licensee” shall not “fail[] or refuse[] to allow an ABRA investigator . . . to enter or inspect without delay the licensed premises or examine the books and records of the business, or otherwise interferes with an investigation.” D.C. Official Code § 25-823(a)(5).

34. In *K Street*, the Board previously indicated that a violation under § 25-823(a)(5) may be found where the delay is only “momentary.” *In re Jasper Ventures, LLC, t/a K Street*, Case Nos. 10-CMP-00540, 10-251-00282, Board Order No. 2011-403, ¶ 27 (D.C.A.B.C.B. Oct. 12, 2011)

35. The Board also considers the interpretation of Ohio courts interpreting R.C. 2921.31 relevant to this proceeding. Specifically, similar to the District law at issue, R.C. 2921.31 states that “No person, without privilege to do so [shall] . . . delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers

³ See also *Sami Restaurant, LLC, t/a Bistro 18 v. District of Columbia Alcoholic Beverage Control Board*, No. 14-AA-277, 5 (D.C. 2015) (unpublished).

or impedes a public official in the performance of the public official's lawful duties.” *State v. Flickinger*, No. 06CA44, 2007 WL 1821685, *2 (C.A.O.H. 4th Dist., Jun. 21, 2007) (emphasis added). The Board considers the Ohio and District statutes similar, because the phrase “without delay” in § 25-823(a)(5) implies that hampering or impeding an ABRA investigator or other official named in the act is sufficient to constitute a violation. Moreover, like the Ohio statute, § 25-823(a)(5) “does not require the accused to be successful in preventing officers from doing their job.” *Id.*

36. The case history of R.C. 2921.31 further shows that even minor or brief contacts between the accused and government officials may result in a violation, even if the official is not ultimately prevented from fulfilling their desired intent.

37. For example, in *Flickinger*, an Ohio court reviewed a factual scenario where the defendant being detained by a police officer merely tensed up, grabbed the officer’s wrist with his hand, refused to remove his hand from the officer’s wrist, and required multiple officers to detain the defendant. *Id.* at *1. The defendant was charged and convicted of violating R.C. 2921.31. *Id.* The court upheld the charge because by “plac[ing] his hand” on the defendant’s wrist and refusing to let go, the defendant committed an “affirmative act” that “intentionally obstructed and delayed” the officer, even though he was ultimately detained. *Id.* at *3.

38. Likewise, in *McCoy*, the defendant was convicted under R.C. 2921.31. *State v. McCoy*, No. 22479, 2008 WL 4763231, *1 (C.A.O.H. 2nd Dist., Oct. 31, 2008). The underlying facts involve three police officers approaching a house where they believed a violent suspect was located. *Id.* The defendant stepped out onto the porch when the officers approached and began questioning the defendant about the suspect. *Id.* One of the officers called out to his fellow officers when he saw someone through the window that he believed to be the suspect. *Id.* At this time, the defendant on the porch hit an officer with a “body-check” and began “press[ing] up against” the officer. *Id.* Even though the defendant did not cause the officers “to fail in their duties,” the court upheld the conviction because the push “disrupted their performance of them.” *Id.* at *4.

39. The Board is persuaded that on September 5, 2015, Supervisory Investigator Stewart was impeded and delayed by Daniel Carr, who in his capacity as a doorman for the Respondent, attempted to block his entrance into the establishment by stepping in front of the investigator, putting his arm out, and pushing on the supervisory investigator with his body. *Supra*, at ¶¶ 9-10. In response to these actions, Supervisory Investigator Stewart had to slowly squeeze past Mr. Carr in order to enter the premises. *Supra*, at ¶¶ 10-11. Similar to the Ohio court’s findings in *Flickinger* and *McCoy*, even though the delay was only momentary and did not prevent the supervisory investigator from ultimately entering the premises, this act is sufficient to constitute a violation of § 25-823(a)(5).

40. Therefore, the Board sustains the charge brought by the Government.

V. The Board Imposes a \$1,000 Fine for the Offense.

41. This offense represents the Respondent's first primary tier violation. The fine range for such an offense ranges from \$1,000 to \$2,000. 23 DCMR § 801.1(a) (West Supp. 2016). The Board imposes a \$1,000 fine. In imposing the minimum fine, the Board considered the fact that the supervisory investigator was not hurt during the incident and that Mr. Carr apologized after the incident occurred. *Supra*, at ¶ 13.

VI. The Respondent is Advised that the Current Terms of its License Restrict it From Allowing More Than 99 People on the Premises.

42. On a final note, during opening arguments, the Respondent took the position that due to the court's 2008 ruling in *2461 Corp.*, it was entitled to a capacity of more than 99 patrons, even though this contradicts the capacity number posted on its liquor license. *Tr.*, 3/9/16 at 11-12; *Tr.*, 7/20/16 at 121. Furthermore, the owner of Madam's Organ appeared to indicate that he has no intent to comply with the capacity limit set by his liquor license. *Tr.*, 7/20/16 at 120-21 (saying the establishment can have up to 409 people inside the premises at any one time). *Id.* This argument is simply wrong and fails to appreciate changes to the liquor laws since the court issued its decision in 2008.⁴

43. Specifically, the Board informs the Respondent that changes in the regulations render *2461 Corp.* no longer operable or controlling; therefore, it is obligated to comply with a maximum occupancy of 99 patrons until it applies for and receives approval for a substantial change. This means that the Respondent may be charged for engaging in a substantial change or violating the terms of its license if it exceeds its capacity of 99 people or other figure listed on its liquor license in the future. D.C. Official Code §§ 25-762, 25-823(a)(5)

44. In *2461 Corp.*, an ABRA investigator in 2005, observed more than 99 people inside the Respondent's establishment. *2461 Corp. v. D.C. Alcoholic Beverage Control Bd.*, 950 A.2d 50, 51 (D.C. 2008). The Respondent was charged with illegally expanding its capacity in violation of D.C. Official Code § 25-762(a) and found guilty of the violation. *Id.* The Respondent's Certificate of Occupancy issued in 1997 and initial application for licensure indicated that it had a capacity of 99 seats. *Id.* at 52. A prior version of 23 DCMR § 208.10, stated that capacity was based on the certificate of occupancy. *Id.* at 53. Under this prior version of the regulation, the court further wrote that "The regulation nowhere states that a restaurant's 'capacity' is the maximum number of patrons that may be in the establishment at any one time." *Id.* The court further indicated that no "regulation or case law" in existence at the time of the decision supported the contention that "a number of 'seats' specified on a certificate of occupancy is intended as a limit on the number of patrons that may be in an establishment at any one time." *Id.* at 55. For these reasons, the court overturned the Board's decision because there was no evidence of a substantial change. *Id.* at 55.

⁴ It could also be argued that the argument is not relevant to the charge, but the Board feels obligated to advise of the Respondent of its interpretation of the law before it engages in a pattern of intentional violations based on an ignorant interpretation of the law.

45. Since 2008, 23 DCMR § 208.10 has been amended to reflect that the term “capacity” means the maximum number of people allowed on the premises. 23 DCMR § 208.10 (West Supp. 2016). Judge Ferren has explained that “one should not lose sight of the legislature's prerogative to overrule court decisions when no constitutional issue is involved.” *Carl v. Children's Hosp.*, 702 A.2d 159, 174 (D.C. 1997) (J. Ferren, concurring). Indeed, the court has recognized that the Council of the District of Columbia may make such a change in the law “swiftly.” *Woodroof v. Cunningham*, No. 14-CV-1426, 2016 WL 5956986, at *3 (D.C. 2016) (“there is nothing unusual about the proposition that the legislature may change the law and, by doing so, essentially overrule court decisions.”). Such is the case here.

46. The court released its decision in *2461 Corp.* on June 12, 2008. The prior version of § 208.10 reviewed by the court reads as follows:

The annual license fees for all Class C licenses, except the Washington Convention Center and the DC Arena, shall be based on the certificate of occupancy for the establishment

51 DCR 2924 (Mar. 19, 2004) (See § 208.10); 55 DCR 12991 (Dec. 26, 2008) (See § 208.10).

47. Following the court’s decision, in February 2009, the Council enacted the “Alcoholic Beverage Enforcement Amendment Act of 2008” (Enforcement Act). 56 DCR 1204, 1207 (Feb. 6, 2009). The act struck the language identified above and rewrote it so that § 208.10 now reads:

The annual license fees for all Class C licenses, . . . shall be based on its capacity load, *which shall be defined as the maximum number of patrons that may be in the establishment at any one time.* The holder of a Class C license shall submit both its capacity placards identifying the maximum number of patrons and certificate of occupancy identifying the number of seats from the Department of Consumer and Regulatory Affairs with both its initial and renewal license applications.

23 DCMR § 208.10 (West Supp. 2016) (emphasis added).

48. The Committee Report discussing the “Alcoholic Beverage Enforcement Amendment Act of 2008” describes the reasoning behind the change to § 208.10. According the report, the act “amends Title 23” and “clarifies that DCRA’s capacity placards and Certificate of Occupancy, identifying number of seats, will both be used to set a clear limit on capacity in an establishment.” *D.C. Council, “Bill 17-983, the ‘Alcoholic Beverage Enforcement Act of 2008,’*” at 3 (Nov. 21, 2008); *see also id.* at Testimony of Peter B. Feather, Chairperson, Alcoholic Beverage Control Board, at Page 2-3 (discussing the court’s decision in *2461 Corp.* and stating “This Bill . . . seeks to address the capacity issue by requiring licensees to list their capacity, which would include both seated and standing patrons.”). It should also be emphasized that the new language inserted into the regulation quotes the court verbatim, which further indicates that the Council acted to overrule the court. *Compare 2461 Corp.*, 950 A.2d 50, 53 *with* § 208.10 (West Supp. 2016). In light of this history, the 2008 holding in *2461 Corp.* has not been applicable or representative of the state of the law since 2009.

49. For this reason, the Respondent is advised that the 99 capacity or any other capacity figure on the Respondent's license represents the maximum amount of people that may be allowed on the premises at any one time. The Respondent is further advised that this has been the case since the passage of the 2009 Enforcement Act. If the Respondent seeks to exceed this capacity, it should immediately file an updated Certificate of Occupancy with an application for a substantial change so that its license reflects the true or desired capacity of the premises.

ORDER

Therefore, the Board, on this 30th day of November 2016, finds that 2461 Corporation, t/a Madam's Organ, guilty of violating D.C. Official Code § 25-823(a)(5). The Board imposes the following penalty on Madam's Organ:

(1) For the violation described in Charge I, Madam's Organ shall pay a \$1,000 fine

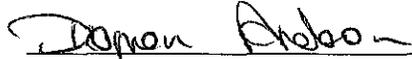
IT IS FURTHER ORDERED that the Respondent must pay all fines imposed by the Board within thirty (30) days from the date of this Order, or its license shall be immediately suspended until all amounts owed are paid.

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

IT IS FURTHER ORDERED that the Board's findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

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

District of Columbia
Alcoholic Beverage Control Board



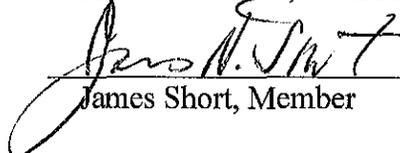
Donovan Anderson, Chairperson



Nick Alberti, Member



Mike Silverstein, 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, 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, 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 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).