

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

In the Matter of:)	
Union Kitchen, LLC)	Case No.: 15-CMP-00662
t/a Union Kitchen)	License No: 98204
Holder of a)	Order No: 2016-499
Retailer's Class B License)	
at premises)	
538 3rd Street, N.E.)	
Washington, D.C. 20002)	
)	

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

ALSO PRESENT: Union Kitchen, LLC, t/a Union Kitchen, Respondent

Fernando Rivero, Assistant Attorney General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING MOTION FOR RECONSIDERATION

INTRODUCTION

In Board Order No. 2016-381, the Board dismissed the sole charge of violating D.C. Official Code § 25-726(a), because the Government failed to show the presence of litter—a necessary element of the statute. *In re Union Kitchen, LLC, t/a Union Kitchen*, Case No. 15-CMP-00662, Board Order No. 2016-381, ¶ 13 (D.C.A.B.C.B. Jun. 15, 2016).

In response, the Government filed a motion for reconsideration. Preliminarily, the Government does not take issue with the Board's interpretation or decision related to part (a) of the statute. *Mot. for Recon.*, at 4. Instead, the Government argues that the Board's prior Order is wrong for the following four reasons: (1) the Board should have determined whether the

Respondent violated § 25-726(b) by finding a violation of 21 DCMR § 705.5 (West Supp. 2016), which requires trash be kept in “legal containers, in a manner so as to prevent litter,” *id.*, at 5; (2) the Government argues that it provided adequate notice that it was also charging § 25-726(b) by generally citing § 25-726, *id.*, at 4; (3) the Government argues that D.C. Official Code § 25-823(a)(1) does not grant the Board the authority to enforce laws outside of Title 25 of the D.C. Official Code, *id.*, at 6; and (4) the Board should not have issued a warning. *Id.* at 7. The Respondent did not respond to the motion.

Nevertheless, the Board is unpersuaded by the motion for the following reasons:

I. The Government Has Not Provided Adequate Notice to the Respondent that the Sole Charge Included a Violation of § 25-726(b); Therefore, The Board Has No Legal Basis for Adjudicating a Violation of § 25-726(b).

First, the Board is unpersuaded that the Government provided adequate notice to the Respondent that the sole charge brought by the Government includes § 25-726(b), or that the Board may find the Respondent in violation of § 25-726(b).

The District of Columbia Administrative Procedure Act (DCAPA) provides that in contested cases

all parties thereto shall be given *reasonable notice* of the afforded hearing The notice shall state the time, place, and *issues involved*, but if, by reason of the nature of the proceeding, the Mayor or the agency determines that the issues cannot be *fully stated* in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be *fully stated* as soon as practicable”

D.C. Official Code § 2-509(a) (emphasis added). It has also been said that a “charging document must assert a plain and concise statement of an alleged offense sufficient to put the accused on notice of the nature of the offense charged.” *Lazo v. United States*, 54 A.3d 1221, 1227 (D.C. 2012) *citing Patterson v. United States*, 575 A.2d 305, 305 (D.C.1990).

The Government claims that the charging notice is inclusive of § 25-726(b), which provides that “The licensee under a retailer's license shall comply with the Litter Control Expansion Amendment Act of 1987, effective October 9, 1987 (D.C. Law 7-38; 23 DCMR § 720).” D.C. Official Code § 25-726(b).

This claim of inclusiveness is based on the following paragraph in the charging notice, which states, “You failed to take reasonable measures to ensure that property used by you to conduct business is kept free of litter, in violation of D.C. Official Code § 25-726 . . .” *Notice of Status Hearing and Show Cause*, at 2 (unbolded). The notice further indicates that the charge is based on an investigator’s observations of a dumpster overflowing with trash. *Id.*

While the Board has no reason to doubt the Government’s sincerity that it intended to cite both parts (a) and (b) of the statute, this intention did not appear in the actual notice document provided to the Respondent. First, the charge expressly used the “reasonable measures” language, which only appears in part (a) of the statute. Second, the document does not expressly

cite part (b). Third, even if it did, the document does not cite the specific portion of the Litter Control Expansion Amendment Act that the Government intended to incorporate. Under these circumstances, if the Board found that part (b) was included in the charge, it could not be said that the Respondent was adequately, fully, or reasonably apprised of the issues in accordance with the DCAPA. Consequently, because the Board is not convinced that the Government provided sufficient notice that § 25-726(b) was included in the charge, the procedural posture of the case does not allow for a finding on the merits of § 25-726(b) as suggested by the Government in its motion.

II. The Government's Argument Regarding § 25-823(a)(1) is Unsupported by the Plain Language of the Statue and Case Law.

The Board is further unpersuaded that it lacks the authority to adjudicate violations of District law occurring outside of Title 25 of the D.C. Official Code under the auspices of D.C. Official Code § 25-823(a)(1); therefore, the Board's guidance on charging open trash container violations under § 707.11 of Title 21 of the District of Columbia Municipal Regulations remains correct and appropriate. *In re Union Kitchen, LLC, t/a Union Kitchen*, Board Order No. 2016-381, at 2.

Section 25-823(a)(1) states, "The Board may fine, as set forth in the schedule of civil penalties . . . , and suspend, or revoke the license of any licensee . . . if: (1) The licensee . . . *any other laws of the District*, including the District's curfew law." D.C. Official Code §25-823(a)(1) (emphasis added). The Government provides no compelling reason for disregarding what is plainly written, except to argue that such a broad interpretation of the Board's powers is absurd. *Mot. for Recon.*, at 6. Nevertheless, it has been settled since 1982 by the District of Columbia Court of Appeals that the Board may enforce laws and regulations falling outside the liquor laws under § 25-823(a)(2), which permits punishing a licensee for allowing unlawful or disorderly conduct. *Club 99, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 457 A.2d 773, 774 (D.C. 1982) (upholding the Board's decision to discipline licensee for violating the city's child labor laws, which were administered by the Board of Education). Based on this precedent regarding § 25-823(a)(2), the Board sees no compelling reason for arbitrarily limiting the scope of § 25-823(a)(1), as advocated by the Government, when these two statutes share equally broad language regarding the scope of the Board's enforcement powers.

III. The Board Did Not Issue a Formal Warning in its Prior Order.

In its motion, the Government argues that the Board should not have issued a warning to the Respondent. *Mot. for Recon.*, at 7. The Board notes that it did not issue a formal warning in the prior Order; instead, the Order merely contains dicta that notifies the Respondent that it may be found guilty of other offenses in the future if it does not change its current behavior. Consequently, this portion of the Government's argument is without merit.

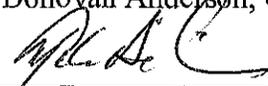
ORDER

Therefore, the Board, on this 7th day of September 2016, **DENIES** the motion for reconsideration filed by the Government. The ABRA shall deliver copies of this Order to the Government and the Respondent.

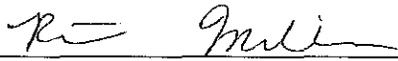
District of Columbia
Alcoholic Beverage Control Board



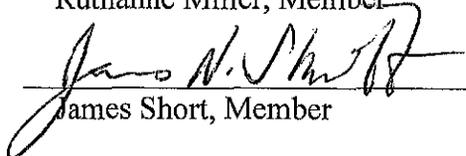
Donovan Anderson, Chairperson



Mike Silverstein, Member



Ruthanne Miller, Member



James Short, Member

I dissent from the position taken by the majority of the Board for the reasons I expressed in the prior Order.



Nick Alberti, 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).