

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

In the Matter of:)	
)	
Prospect Dining, LLC)	License Number: 78058
t/a George)	Case Number: 09-CMP-00723
)	Order No.: 2010-339
Holder of a Retailer's Class CR License)	
at premises)	
3251 Prospect Street, N.W.)	
Washington, D.C. 20007)	

BEFORE: Charles Brodsky, Chairperson
Mital Gandhi, Member
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member

ALSO PRESENT: Prospect Dining, LLC, t/a George (Respondent)

Louise Phillips, 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**

On January 22, 2010, the Alcoholic Beverage Control Board (Board) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated January 6, 2010, on Prospect Dining, LLC, t/a George (Respondent), at premises 3251 Prospect Street, N.W., Washington, D.C., charging the Respondent with the following violation:

Charge I: The Respondent violated D.C. Code § 25-446(a) on September 18, 2009, and September 19, 2009, by violating the Voluntary Agreement dated February 2, 2005, and signed by the Respondent, for which the Board may take the proposed action pursuant to D.C. Official Code § 25-823(6) (2009).

Charge II: The Respondent violated D.C. Code § 25-762(b)(1) by making a substantial change in operation without the approval of the Board, for which the Board may take the proposed action pursuant to D.C. Official Code § 25-823(1) (2009).

PRELIMINARY MOTION TO DISMISS

These charges were heard before the Board at a Show Cause Hearing on April 7, 2010. At the beginning of the Hearing, the Respondent moved that the Board dismiss Charge I arguing that the phrase “ninety-nine persons” in the Voluntary Agreement means ninety-nine seats, not people. *Tr.*, 4/7/10 at 8. The Respondent bolstered this point by arguing that this definition made sense in the context of the restaurant business and that the Department of Consumer and Regulatory Affairs (DCRA), not the Alcoholic Beverage Regulation Administration (ABRA), controlled the maximum occupancy of establishments. *Tr.*, 4/7/10 at 8-9. Furthermore, the Respondent argued that in order for the Board to find a violation of the Voluntary Agreement, it had to wait for ANC 2E to provide notice of a violation under Section 8 of the Voluntary Agreement. *Tr.*, 4/7/10 at 11.

The Board denies Respondent’s motion to dismiss Charge I. The Board has the power to enforce the Respondent’s Voluntary Agreement under D.C. Code 25-823(6) and Section 1 of the Voluntary Agreement, which forbids the Respondent from exceeding the agreed capacity of 99 persons. Further, the Respondent’s argument that Section 8 of the Voluntary Agreement requires the ANC to give notice to the Respondent before the Board can find a violation is incorrect. Section 8 of the Voluntary Agreement states, “Prior to . . . petitioning [the Board]. . . the ANC shall notify the Applicant.” Based on the Voluntary Agreement’s plain language, the Board interprets this clause to mean that Section 8 solely governs the ANC’s conduct, not the Board’s ability to find a violation. Therefore, the Respondent’s motion to dismiss Charge I is **DENIED**.

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 January 6, 2010. (*See* ABRA Show Cause File Number 09-CMP-00723). The Respondent holds a Retailer’s Class CR License and is located at 3251 Prospect Street, N.W., Washington, D.C. (*See* ABRA Licensing File No. 78058).
2. The Show Cause Hearing in this matter was held on April 7, 2010. The Notice to Show Cause, dated January 6, 2010, charges the Respondent with the two violations enumerated above. (*See* ABRA Show Cause File Number 09-CMP-00723).

3. The Board notes that the Government has withdrawn Charge II, leaving only Charge I to the determination of the Board. *Transcript*, April 7, 2010 (hereinafter "*Tr.*, 4/7/10"), at 6.
4. The Government presented its case through the testimony of two witnesses, ABRA Supervisory Data Management and Records Manager, William Hager and ABRA Investigator Jabriel Shakoor. *Tr.*, 4/7/10 at 15.
5. The Respondent presented its case through the testimony of three witnesses, Logan West, David Chung, and Ki Jun Sung. *Tr.*, 4/7/10 at 71, 94, 119. Furthermore, the Respondent entered the following documents into evidence: the Voluntary Agreement between the Respondent and ANC2E (Exhibit A); a Memorandum of Agreement between DCRA and ABRA (Exhibit B); a Board Order regarding the Voluntary Agreement (Exhibit C); an ABC application to change the license class of Respondent's establishment (Exhibit D); a Certificate of Occupancy (Exhibit 1); an application filed by the Respondent in October 2007 (Exhibit 2); a letter from previous counsel to the Board (Exhibit 3); and a Board Order regarding the Voluntary Agreement and Withdrawal of Protest (Exhibit 4). (See ABRA Show Cause File Number 09-CMP-00723).
6. William Hager's testimony focused on identifying documents presented by the Government, which were entered into evidence by the Respondent. *Tr.*, 4/7/10 at 15-22, 125.
7. The Voluntary Agreement, dated February 5, 2005, states that: "The establishment shall have a maximum capacity of ninety-nine persons. This limit shall be prominently posted and shall not be exceeded. The Applicant shall ensure that a clear passageway is maintained at all times for the safe egress of occupants in case of fire or other emergency." (ABRA Show Cause File Number 09-CMP-00723, Exhibit A).
8. Investigator Shakoor visited the Respondent's establishment on September 18, 2009, based upon a complaint stated that the establishment had previously had "unruly patrons vomiting, urinating, and shouting" near residential condominium units. *Tr.*, 4/7/10 at 24-25. Investigator Shakoor stated that he began his regulatory inspection at 12:30 p.m. on September 18, 2009. *Tr.*, 4/7/10 at 26. Investigator Shakoor stated that he reviewed the establishment's Voluntary Agreement with the Respondent's ABC Manager, Logan West. *Tr.*, 4/7/10 at 26. During the inspection, Investigator Shakoor also met briefly with David Chung. *Tr.*, 4/7/10 at 34.
9. The Government noted that Exhibit 2, an ABRA application signed by the Respondent, states that the seating will be limited to ninety-nine. *Tr.*, 4/7/10 at 33-34, 103.
10. Investigator Shakoor stated that there were 148 patrons inside the establishment at the time of his investigation on September 18, 2009. *Tr.*, 4/7/10 at 30, 36. Investigator Shakoor testified that the Respondent had one employee at the door in charge of counting the number of entering and exiting patrons. *Tr.*, 4/7/10 at 61-62. According to Investigator

Shakoor, the Respondent derived the 148 patron figure by taking the number generated by the entering counter and subtracting it by the counter number on the counter counting the patrons exiting the establishment. *Tr.*, 4/7/10 at 35. Based on this method, the Investigator derived the 148 figure. *Tr.*, 4/7/10 at 64.

11. Investigator Shakoor stated that he did not count the number of patrons in the establishment himself. *Tr.*, 4/7/10 at 35, 60. He stated that it would have been hard to count the patrons in the establishment because the Respondent's establishment was dark, large, and many people were moving and dancing. *Tr.*, 4/7/10 at 62. Investigator Shakoor stated that his practice was to agree with the Respondent on a way to count the patrons. *Tr.*, 4/7/10 at 64. As a result, Investigator Shakoor agreed to count the patrons using the establishment's counters based on the suggestion of David Chung, the owner, during the investigations undertaken on September 18, 2010, and September 19, 2010. *Tr.*, 4/7/10 at 63-64. According to Investigator Shakoor, Mr. Chung agreed that the difference between the two counters would be an acceptable count of the patrons inside the establishment during both investigations. *Tr.*, 4/7/10 at 68-69.

12. Investigator Shakoor stated that he visited the establishment a second time on September 19, 2009, at around the same time as his previous inspection. *Tr.*, 4/7/10 at 40. Consulting the establishment's counters in the same manner as his first visit, Investigator Shakoor found that there were 107 patrons inside the establishment. *Tr.*, 4/7/10 at 41. Based on his findings, Investigator Shakoor cited the Respondent for violating his Voluntary Agreement's occupancy requirements. *Tr.*, 4/7/10 at 41.

13. Investigator Shakoor admitted that he noticed individuals smoking outside of the establishment. *Tr.*, 4/7/10 at 69.

14. Logan West, the ABC Manager for the Respondent's establishment, testified that he was present during Investigator Shakoor's investigation on September 18, 2009. *Tr.*, 4/7/10 at 71. He disagreed with the Investigator's conclusion that there were 148 patrons in the establishment. *Tr.*, 4/7/10 at 72. According to Mr. West, on the night in question, he had one employee counting patrons entering and another employee counting patrons exiting. *Tr.*, 4/7/10 at 72. He stated that patrons have the ability to go out through the patio to the street if they want to smoke or get some air. *Tr.*, 4/7/10 at 78. Mr. West testified that the employee counting patrons exiting the establishment did not mark that patrons had left the establishment when patrons went outside to smoke or get air. *Tr.*, 4/7/10 at 72-73. Furthermore, Mr. West testified that the employee counting patrons entering the establishment marked that the same patrons reentering the establishment were new patrons in the establishment's count. *Tr.*, 4/7/10 at 72-73, 78. Based on these facts, Mr. West concluded that the establishment was double counting patrons. *Tr.*, 4/7/10 at 73. Therefore, Mr. West concluded that the numbers calculated by Investigator Shakoor were too high and did not reflect the true number of patrons in the establishment during ABRA's investigations on September 18, 2009, and September 19, 2009. *Tr.*, 4/7/10 at 73.

15. Mr. West believed that he raised up the possibility of double counting by the establishment to the attention of the Investigator. *Tr.*, 4/7/10 at 75. In contrast to

Investigator Shakoor, Mr. West stated that the restaurant was not crowded on September 18, 2009, or on September 19, 2009, during Investigator Shakoor's investigations. *Tr.*, 4/7/10 at 75-76. Mr. West estimated that on September 18, 2009, there were approximately 60 to 70 people in the establishment and approximately 70 to 80 people on September 19, 2009. *Tr.*, 4/7/10 at 75, 76. Mr. West admitted that on both nights he did not actually count the patrons inside the establishment nor ask the Investigator to do a head count, even after reviewing the Voluntary Agreement with the Investigator. *Tr.*, 4/7/10 at 77.

16. Mr. West stated that during Investigator Shakoor's investigations, there were ongoing fundraisers at the establishment. *Tr.*, 4/7/10 at 83. Mr. West testified that he had five employees at the door, including: two acting as security, two acting as door people, and one taking donations for fundraisers during Investigator Shakoor's investigations. *Tr.*, 4/7/10 at 83. Mr. West stated that there was one security personnel stationed in the courtyard and two stationed in the establishment itself. *Tr.*, 4/7/10 at 87. Mr. West stated the establishment also had five bartenders working at the time of the ABRA investigations on September 18, 2009, and September 19, 2009. *Tr.*, 4/7/10 at 88.

17. Mr. West stated that the events on September 18, 2009, and September 19, 2009 were invitation only events. *Tr.*, 4/7/10 at 81. Mr. West testified that he did not know how many invitations were sent or the total number of people at the event. *Tr.*, 4/7/10 at 81-82. Mr. West testified that Hunter Campbell, one of the establishment's partners, gave him the guest list for the fundraisers. *Tr.*, 4/7/10 at 90. Mr. West estimated that there were approximately 200 names on the guest list for both nights. *Tr.*, 4/7/10 at 91.

18. Mr. West stated that before he reviewed the Voluntary Agreement with the Investigator Shakoor, he believed that the establishment's capacity was 200 persons. *Tr.*, 4/7/10 at 92.

19. David Chung, an owner of the Respondent's establishment, testified that he was present during Investigator Shakoor's investigation on September 18, 2009. *Tr.*, 4/7/10 at 94. He stated that the establishment's procedure is to count "how many people come in and how many people go out." *Tr.*, 4/7/10 at 95. He stated that employees were not supposed to "double count the number of people that have already been inside." *Tr.*, 4/7/10 at 95. Mr. Chung emphasized that patrons who leave to smoke should not be counted again when they reenter the establishment. *Tr.*, 4/7/10 at 95. Mr. Chung estimated that on September 18, 2009, there were "a lot less than 100" people in the establishment. *Tr.*, 4/7/10 at 106.

20. In his testimony, Mr. Chung stated that his establishment employs a large number of security personnel in order to control the noise emanating from the establishment and prevent disturbances outside because they are located in a residential neighborhood. *Tr.*, 4/7/10 at 97. Furthermore, because the establishment had recently opened, a large number of bartenders were on duty during the nights of Investigator Shakoor's investigation so that they could train. *Tr.*, 4/7/10 at 97.

21. During Investigator Shakoor's investigation on September 18, 2009, Mr. Chung did not recall specifically discussing the capacity of the Respondent's establishment. *Tr.*, 4/7/10 at 100. Although he disagreed with how Investigator Shakoor interpreted his Voluntary Agreement, he admitted that the Voluntary Agreement stated that his "establishment shall have a maximum capacity of 99 persons." *Tr.*, 4/7/10 at 102. He also stated that he did not ask the Investigator to perform a headcount. *Tr.*, 4/7/10 at 104.

22. Mr. Chung believed that he had to ensure that there were fewer than 200 people in his establishment at any one time based on his Certificate of Occupancy. *Tr.*, 4/7/10 at 107-08. He stated that he believed that the 99 number contained in the Voluntary Agreement only referred to seats. *Tr.*, 4/7/10 at 107.

23. Mr. Chung testified that the Voluntary Agreement was originally signed by the previous owner, Scott Woggling, and ANC2E. *Tr.*, 4/7/10 at 110. He stated that his establishment has sent a letter to ANC2E asking them to change the term "persons" to "seats" in Section 1 of the Voluntary Agreement and the Respondent is currently awaiting a response. *Tr.*, 4/7/10 at 116.

24. Ki Jun Sung, an owner of the Respondent's establishment, stated that in Exhibit 2, he crossed out "99 seats" and wrote "30 seats" in order to alter his establishment's food sales requirements. *Tr.*, 4/7/10 at 120. He stated that he did not sign Exhibit 2 with the intent of limiting the Respondent's seating to 30 seats or 99 seats. *Tr.*, 4/7/10 at 120-21.

CONCLUSIONS OF LAW

25. 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 and 23 D.C.M.R. 800, *et seq.*

26. Charge II is dismissed.

27. The Board finds that the Government has proven Charge I. The Respondent violated D.C. Code § 25-762(b)(1) on two occasions by violating the terms of his Voluntary Agreement, which limits his establishment's maximum capacity to ninety-nine persons on both September 18, 2009, and September 19, 2009.

28. The Board finds that the Respondent violated the terms of his Voluntary Agreement on both September 18, 2009, and September 19, 2009, in violation of D.C. Code § 25-762(b)(1). The Voluntary Agreement reads: "The establishment shall have a maximum capacity of 99 persons." The plain meaning of this phrase is that the Respondent is limited to having 99 people in his establishment at any one time, not ninety-nine seats, as argued by the Respondent. Investigator Shakoor appropriately calculated the occupancy of the

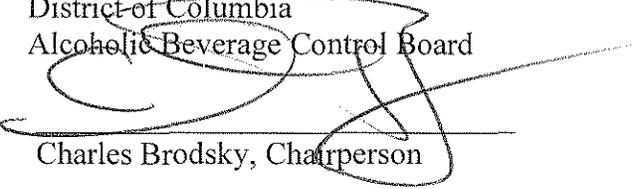
Respondent's establishment by utilizing the Respondent's own counters, a method Mr. Chung agreed to during the investigations. In addition, the Board does not credit the arguments made by the Respondent that its employees were double counting patrons. The Board simply finds it hard to believe that over half the patrons went outside to get air or smoke a cigarette. Instead, the Board can infer that the Respondent violated the occupancy limit set by the Voluntary Agreement because both Mr. West and Mr. Chung believed that the establishment's occupancy was 200 and the guest list for both nights was estimated to contain approximately 200 names. Therefore, the Board holds that the Government has proven Charge I.

ORDER

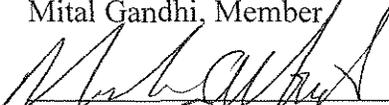
Based on the foregoing findings of fact and conclusions of law, the Board, on this 12th day of May, 2010, finds that the Respondent, Prospect Dining, LLC, t/a George (Respondent), at premises 3251 Prospect Street, N.W., Washington, D.C., holder of a Retailer's Class CR License, violated D.C. Code § 25-762(b)(1) and D.C. Code § 25-446(a). The Board hereby **ORDERS** that:

1. The Respondent shall pay a fine in the amount of \$1,000.00 by no later than thirty (30) days from the date of this Order. The Respondent shall receive a suspension of two days, both stayed for one year, provided that the Respondent does not commit any ABC violations during that time.

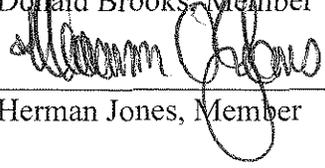
District of Columbia
Alcoholic Beverage Control Board


Charles Brodsky, Chairperson

Mital Gandhi, Member


Nick Alberti, Member


Donald Brooks, Member


Herman Jones, 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).