

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

In the Matter of:)	
)	
Johana's Inc.)	Case No.: 14-CMP-00250
t/a Johana's Restaurant)	License No: 25996
)	Order No: 2015-246
Holder of a)	
Retailer's Class CT License)	
)	
at premises)	
4728 14th Street, N.W.)	
Washington, D.C. 20011)	

BEFORE: Nick Alberti, Acting Chairperson
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Johana's Inc., t/a Johana's Restaurant, Respondent

Michael Fonseca, of the firm Mallios & O'Brien 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

The Alcoholic Beverage Control Board (Board) finds Johana's Inc., t/a Johana's Restaurant, (hereinafter "Respondent" or "Johana's Restaurant") violated its occupancy limits, dispensed alcohol to a minor, and failed to comply with the terms of its settlement agreement on

April 27, 2014. The Board imposes a \$6,000 fine and eight-day stayed suspension for the violations found in this Order.

Procedural Background

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on December 10, 2014. *ABRA Show Cause File No., 14-CMP-00250*, Notice of Status Hearing and Show Cause Hearing, 2 (Dec. 10, 2014). The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 4728 14th Street, N.W., Washington, D.C., on December 19, 2014, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 14-CMP-00250*, Service Form. The Notice charges the Respondent with multiple violations, 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 violations:

Charge I: [On April 27, 2014,] [the licensee's] . . . agent or employee made substantial changes to the interior of the establishment which substantially changed the nature of the operation as set forth in your initial application for an ABC license without prior approval of the Board, specifically by increasing the occupancy of the licensed establishment or using interior space not previously used in violation of D.C. Official Code § 25-762(a) . . .

Charge II: [On April 27, 2014,] [y]ou or some other person at the licensed establishment, gave, served, delivered, or in any other manner dispensed alcoholic beverages to persons under 21 years of age, in violation of D.C. Official Code § 25-781(c) . . .

Charge III: [On April 27, 2014,] [y]ou failed to take reasonable steps necessary to ascertain whether any person to whom the licensee sells, delivers, or serves an alcoholic beverage is of legal drinking age, in violation of D.C. Official Code § 25-783(a) . . .

Charge IV: [On April 27, 2014,] [y]ou violated your Board-approved Security Plan, in violation of D.C. Official Code § 25-823(6) . . .

Notice of Status Hearing and Show Cause Hearing, 2-4.

Both the Government and Respondent appeared at the Show Cause Status Hearing on January 21, 2015. The parties proceeded to a Show Cause Hearing and argued their respective cases on February 25, 2015.

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. Johana's Restaurant holds a Retailer's Class CT License at 4728 14th Street, N.W., Washington, D.C. *ABRA License No. 25996*.

II. ABRA Investigator Earl Jones

2. Alcoholic Beverage Regulation Administration (ABRA) Investigator Earl Jones has inspected the Respondent's establishment on multiple occasions. *Transcript (Tr.)*, February 25, 2015 at 15. On April 27, 2015, Investigator Jones visited the establishment as part of a Noise Task Force investigation, which was triggered by noise complaints related to the establishment. *Id.* at 16. The Noise Task Force comprised of Investigator Jones, ABRA Investigator Kofi Apraku, and Metropolitan Police Department (MPD) Sergeant Heraud. *Id.* at 17.

3. Investigator Jones arrived at the establishment around midnight with the Noise Task Force. *Id.* at 16. Standing outside the establishment, the investigator could hear noise emanating outside the premises and observed a line of approximately eight to ten people standing outside. *Id.* at 16, 59. Investigator Jones then walked to the back of the establishment and heard music emanating from the rear as well. *Id.* at 16-17.

4. Investigator Jones returned to the front of the establishment, and the team identified themselves to the Respondent's security. *Id.* Security directed the team inside so that they could speak to the owner. *Id.* at 17.

5. Upon entering the establishment, Investigator Jones observed a large amount of patrons inside the establishment; indeed, there were no gaps between any of the people and the team had to wade through the crowd to maneuver through the establishment. *Id.* at 18; *Government Exhibit No. 1* (Exhibit Nos. 4, 5) (Pictures). He further observed that many people in the crowd appeared under the age of twenty-one. *Id.* at 18, 98; *Government Exhibit No. 1* (Exhibit Nos. 4, 5) (Pictures). The team met the owner, Douglas Jones, inside the establishment. *Id.* Investigator Jones asked the owner to obtain the licenses. *Id.* at 18. He noted that only two to three minutes passed between entering the establishment and meeting with the owner near the bar. *Id.* at 97.

6. While the owner obtained the license, Investigator Jones began counting the people inside the establishment. *Id.* at 18. Before the owner returned two minutes later, Investigator Jones counted 102 people inside. *Id.* at 19, 34-35, 69, 80. Based on a review of the Respondent's license and certificate of occupancy, the establishment could not have more than 75 people inside. *Id.* at 19; *Government's Exhibit No. 1* (Exhibit No. #6) (Certificate of Occupancy).

7. The team then joined the owner and his son in the establishment's kitchen. *Tr.*, 2/25/15 at 93. The owner informed the team that his son was hosting a party for patrons eighteen years of age and older. *Tr.*, 2/25/15 at 19.¹

8. The team briefly stepped in the main club area in order converse. *Id.* at 21, *see also id.* at 88. Based on the age of the patrons inside the establishment, the team decided to check the identification of patrons drinking alcoholic beverages. *Id.* at 19. Investigator Jones observed a female patron standing by the bar that had a Heineken beer in her hand. *Id.* at 21, 38, 278-79. Sgt. Heraud walked over to the patron, removed the beer from her hand, and asked the patron to step outside the establishment. *Id.*; *Government Exhibit No. 1* (Exhibit Nos. 7-9 (Pictures)). Sgt. Heraud had the bottle in his hand as he exited the establishment. *Id.* at 279.

9. Once outside, Sgt. Heraud explained to the female patron why she had been detained, but when Investigator Jones began to interview the patron she initially refused to answer his questions. *Tr.*, 2/25/15 at 21, 281-82. Sgt. Heraud informed the patron that she would be arrested if she did not answer their questions. *Id.* at 22, 283.

10. The patron, "Patricia," informed the team that she was nineteen years old and arrived with two eighteen year old friends. *Id.* She indicated that neither her friends nor herself had to show identification to enter the establishment. *Id.* The picture of Patricia also shows that she lacked any markings whatsoever on her hands, and that she had a youthful appearance based on her complete lack of sagging or wrinkly skin and overall appearance. *Government Exhibit No. 1* (Exhibit Nos. 7, 8) (pictures of a girl wearing a black dress and sneakers). Investigator Jones never saw Patricia drink from the beer bottle, but observed that it was open and in her hand. *Tr.*, 2/25/15 at 38, 72. Patricia indicated that she obtained the beer from one of buckets of beer strewn about the club on tables placed near the walls. *Id.* at 22; 69-70; 74. The investigator noted that the beers on the tables were available for anyone to drink without the need for interacting with a server or bartender. *Id.* at 74-75. At the end of the interview, the investigative team gave the bottle back to the patron and took pictures of her. *Id.* at 284-85. The patron was then released by Sgt. Heraud without arrest. *Id.* at 286.

11. Investigator Jones wanted to go back inside the establishment in order to conduct additional identification checks; however, based on the crowd, Sgt. Heraud asked the team to wait outside while he called for backup from MPD and the D.C. Fire Marshal. *Id.* at 23, 88. While they waited for support, Investigator Jones observed about forty to fifty patrons exit the establishment. *Id.* at 23, 89. When the Fire Marshal finally arrived, he reported that the establishment was not overcrowded. *Id.* at 26

12. After the Fire Marshal arrived, Investigator Jones observed that patrons were exiting the establishment, but getting back into the Respondent's admission line. *Id.* at 26. He then observed that the Respondent would allow patrons that had recently exited to reenter the establishment. *Id.*

¹ At some point in the evening, there may have been an angry verbal exchange between Investigator Apraku and the owner. *Tr.*, 2/25/15 at 30, 217. Nevertheless, there is no evidence that Investigator Apraku engaged in misconduct, misbehavior, or any other action that undermined the Government's case. *Id.* at 314. As a result, the Board views the Respondent's argument on this point as nothing more than "making a mountain out of a molehill." *Id.*

13. Exhibit 4 in the Investigative Report shows a photograph of the crowd inside the establishment. *Government's Exhibit No. 1* (Exhibit No. 4). In the middle of the picture, a female patron with dark hair, a black top, and a black and white skirt is dancing in the middle of the picture. *Id.* Her left side is facing the camera. *Id.* The picture shows both arms lacking a wristband. *Id.*; *Tr.*, 2/25/15 at 172. The lower right corner of Exhibit 4 also shows another female patron lacking a wrist band. *Government's Exhibit No. 1* (Exhibit No. 4); *Tr.*, 2/25/15 at 175.

III. Sally Ross

14. Sally Ross was working security at the Respondent's establishment on the night of the incident. *Tr.*, 2/25/15 at 107-08, 150-151. Ms. Ross is a Maryland licensed security guard and was wearing her security vest and duty belt while she was working at the establishment. *Id.* at 109. She was conducting pat downs and identification checks as part of her duties that night near the front entrance. *Id.* 108. She was accompanied by another security employee outside while she monitored the door, while another security employee roamed the establishment. *Id.* at 142, 187-88.

15. Ms. Ross also described the establishment's method of preventing underage drinking on the night of the incident. *Id.* at 108. That night, the establishment placed half-inch, lime-green arm bands on patrons' right arms to identify people who paid for admission. *Id.* at 108, 163-64. Furthermore, patrons under the age of twenty-one received a black "X" mark on the back of their hands. *Id.* at 108, 167. A patron that was twenty one or older received a black "21" mark on the back of their hand. *Id.* Ms. Ross indicated that she only had seventy arm bands in her possession during the night of the incident. *Id.* at 115. Ms. Ross admitted that she did not have a clicker in her possession to count patrons while she was in front of the establishment. *Id.* at 138. She also admitted that the establishment was holding a "kids' party" where at least half of the crowd was under the age of twenty-one. *Id.* at 136-37.

16. Ms. Ross claimed that Sgt. Heraud checked her credentials during the evening and told her that she was illegally providing security. *Id.* at 110-11, 118.² She then claimed that Sgt. Heraud told her to take off her vest and duty belt, because she was not permitted to provide security in the District of Columbia. *Id.*

17. Ms. Ross then left her post at the door and went to the bar area at the request of one of the investigative team members. *Id.* at 110, 119, 190. She waited at the bar while the investigative team spoke to the owner near the bar and after they emerged from the kitchen. *Id.* at 112-13. Ms. Ross stayed by the bar because she believed that she ". . . couldn't work [anymore]." *Id.* at 119-21. Ms. Ross indicated that she stood by the bar for three hours, and did not tell anyone that she was no longer monitoring the front entrance. *Id.* at 122-25, 148-49.

² The issue of whether Ms. Ross was illegally providing security in the District of Columbia is not the focus of this contested case. Nevertheless, besides abetting illegality, the use of unlicensed security by a license holder is an inadvisable practice, and supports the view that the license holder has sloppy, inconsistent, and unsafe security procedures. *See* D.C. Official Code § 25-823(1).

18. Ms. Ross saw the team approach Patricia, the female patron detained by the investigative team. *Id.* at 113, 199-200. While she did not see the bottle in Patricia's hand, she does not know what the female patron was doing before the team approached her. *Id.* ("Pretty much I really never seen her until . . . the MPD and ABC [Investigator] was talking to her . . .") She observed that Patricia had an empty bucket by her feet. *Id.* at 113, 128. Ms. Ross then observed that Sgt. Heraud carried the bottle out as they escorted Patricia outside the establishment. *Id.* at 113.

19. While standing at the bar, she observed only a couple of people come into the establishment without being checked. *Id.* at 143, 201. Ms. Ross admitted that the number of people that came in while she was at the bar was not large. *Id.* at 143.

20. The Board rejects Ms. Ross' claim that the door was unmanned. *Id.* at 112. According to Ms. Ross, a cashier processing cover charge payments was present at the window near the front entrance. *Id.* at 146, 166, 168-69, 192. In addition, Ms. Ross could not state definitively that no one else was manning the door. *Id.* at 191, 202. As a result, there is no support for the contention that the door was unsupervised, or that the establishment lost control of the entrance once the investigative team entered. *Id.* at 112.

IV. Douglas Jones

21. Douglas Jones owns the establishment. *Id.* at 207. Mr. Jones was at the establishment on April 27, 2014. *Id.* at 208.

22. Mr. Jones met the investigative team at the bar when they entered the establishment. *Id.* at 208. Upon meeting the team, he retrieved his licenses upon their request. The licenses were hanging on the wall inside a glass frame. *Id.* at *Respondent's Exhibit No. 2; Tr.*, 2/25/15 at 214-15.³

23. Mr. Jones and the investigative team then entered the Respondent's kitchen to converse. *Id.* at 215-16. Upon leaving the kitchen, Mr. Jones performed identification checks with ABRA Investigator Kofi Apraku around the establishment until they returned to the bar. *Id.* at 217-18, 226.

24. Mr. Jones saw the underage female patron identified by the investigative team when they returned to the bar. *Id.* at 218. At the instruction of one of the ABRA investigators, Mr. Jones requested identification from the woman. *Id.* The girl claimed that she lost her identification. *Id.* Sgt. Heraud then instructed the girl to go outside. *Id.* He saw one of the team members have a beer bottle in their hand as they walked out, but he did not know where the bottle came from. *Id.* at 219.

³ The Board finds the owner's testimony stating that it only took him ten to twenty seconds to retrieve the license not credible and exaggerated. Even though the distance may have been short, the record does not indicate how fast the owner walked or otherwise preclude the possibility of an obstruction (e.g., a bartender) slowing his pace. Finally, there is no persuasive reason to discredit Investigator Jones' testimony or otherwise doubt his veracity.

25. Mr. Jones followed the team outside with the girl. *Id.* at 218. He heard Sgt. Heraud assure the patron that no harm would come to her. *Id.* He then spent the rest of the evening dealing with other government officials. *Id.* at 219.

V. Security Plan

26. The Respondent's security plan contains the following provisions:

- a. "No Ins & Outs," *Government's Exhibit No. 1* (Exhibit No. 10) (page 4 of the security plan);
- b. "Must be 21 to enter after 9pm," *id.*;
- c. "A counter will be used to ensure that we do not exceed the allowable number of patrons according to code," *id.* (page 5 of security plan).

VI. Claims Regarding the Closure of the Establishment

27. The Board rejects the claim that the ABRA investigators or MPD ordered the closure of the establishment. *Id.* at 131-32, 222, 224. While the matter is not relevant to the charges at issue, the Board is not convinced by the owner's one-sided and uncorroborated testimony that he was ordered to close the establishment; instead, the Board finds it more likely that he voluntarily closed the establishment based on the increasing presence of government officials and the exodus of patrons caused by their presence. *Id.* at 220, 247, 293.

CONCLUSIONS OF LAW

28. 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. 2015). 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 BURDEN OF PROOF RESTS WITH THE GOVERNMENT.

29. In a show cause action, the Government must substantiate the charges by presenting "substantial evidence" that the Respondent committed the alleged offenses. D.C. Official Code § 2-509(b); 23 DCMR § 1718.3 (West Supp. 2015).

II. THE RESPONDENT ENGAGED IN AN ILLEGAL SUBSTANTIAL CHANGE BY HAVING 102 PATRONS INSIDE THE ESTABLISHMENT.

30. On April 27, 2014, the substantial evidence shows that the Respondent violated its occupancy. Under § 25-762(a), "[b]efore a licensee may make a change in the interior or

exterior, or a change in format, of any licensed establishment, which would substantially change the nature of the operation of the licensed establishment as set forth in the initial application for the license, the licensee shall obtain the approval of the Board in accordance with § 25-404.” D.C. Official Code § 25-762(a). Under part § 25-762(b)(1) a substantial change includes any “[i]ncrease [in] the occupancy of the licensed establishment . . .” D.C. Official Code § 25-762(b)(1); *In re 2408 Wisconsin Avenue, LLC, t/a Mason Inn*, Case No. 12-251-00368, Board Order No. 2013-595, ¶ 20 (D.C.A.B.C.B, Dec. 11, 2013) (saying “§ 25-762(b)(1) requires the Respondent not to use the establishment in a manner that violates its occupancy.”) In this case, the Respondent should not have had more than 75 people inside the establishment; nevertheless, on April 27, 2014, Investigator Jones counted 102 people inside the establishment in violation of the Respondent’s occupancy limitation. *Supra*, at ¶ 6.

a. The Board finds the testimony of Investigator Jones credible.

31. The Board is not persuaded by the Respondent’s attempt to cast doubt or dispersions on the testimony of Investigator Jones. As noted in *Resper*, “[i]t is clearly within the province of the trial court to make the credibility determinations needed to resolve conflicts in witnesses’ testimony.” *Resper v. U.S.*, 793 A.2d 450, 457 (D.C. 2002).

32. In *Mason Inn*, the Board discredited testimony that the licensee was not over its occupancy because it “. . . lost track of the number of admitted patrons” and “. . . deviated from its regular counting procedures.” *In re 2408 Wisconsin Avenue, LLC, t/a Mason Inn*, Board Order No. 2013-595 at ¶ 25.

33. The Board does not credit the theory that the establishment could not have had more than sixty people inside based on the number of arm bands given out, that Investigator Jones did not have sufficient time to count the patrons, or that the investigative team allowed a large number of people to enter the establishment. *Tr.*, 2/25/15 at 115, 130-31; *supra*, at ¶ 20. Similar to *Mason Inn*, the Respondent’s theory is contradicted by evidence that the number of people inside did not change significantly before Investigator Jones counted the patrons, evidence showing that there were people without arm bands roaming inside the establishment, and evidence showing that the Respondent failed to use a clicker in compliance with its security plan. *Supra*, at ¶¶ 6, 13, 15, 19. It should also be noted that the owner was not present when Investigator Jones conducted his count; therefore, he does not have sufficient knowledge to discredit Investigator Jones’ count. *Supra*, at ¶¶ 6, 22 n. 3. Further, the Respondent cannot argue that the investigative team caused the overcrowding by removing Ms. Ross from her station, as, at the very least, there is no evidence that the cashier was incapable of stopping people from entering the establishment, or communicating with the owner or remaining security about the situation at the door. *Supra*, at ¶¶ 14, 20. Finally, it appears the only reason that the Fire Marshal did not find overcrowding inside the establishment was because a large number of patrons exited the establishment.⁴ *Supra*, at ¶¶ 11-12. Therefore, sufficient credible evidence exists in the record to sustain Charge I.

⁴ The Board finds this credible, because it is believable that patrons—especially underage patrons—will quickly leave an establishment once they see MPD or other government officials attempting to card patrons.

II. THE RESPONDENT DISPENSED AN ALCOHOLIC BEVERAGE TO A MINOR IN VIOLATION OF § 25-781(c).

34. The Board finds that the Respondent violated § 25-781 on April 27, 2014, by dispensing a beer to a minor.

35. Under § 25-781(c), “[a] licensee . . . shall not, at a licensed establishment, give, serve, deliver, or in any manner dispense an alcoholic beverage to a person under 21 years of age” D.C. Official Code § 25-781(c). Thus, in order to prove a violation of § 25-781(c), the Board must determine (1) whether the person receiving the alcoholic beverage was under the age of 21 and (2) whether the Respondent, in some manner, dispensed an alcoholic beverage to that person.

a. There exists sufficient circumstantial evidence to establish that “Patricia” was less than twenty-one years of age.

36. The record contains sufficient circumstantial evidence to establish that “Patricia” was under twenty-one years of age.

37. In order to sustain a violation of § 25-781(c), it must be shown that the person served an alcoholic beverage was under twenty-one years of age. § 25-781(c). The mere fact that a case “. . . rest[s] on circumstantial evidence is of little consequence if the evidence is such that it may reasonably convince a trier of fact” *Smith v. United States*, 837 A.2d 87, 92 (D.C. 2003). Similar to other tribunals, the Board finds it reasonable to rely on the “youthful appearance” of an individual to determine circumstantially that a person is under the age of 21. *Case v. Newman*, 154 So. 3d 1151, 1154 (Fla. Dist. Ct. App. 1st Dist., Dec. 17, 2014), *reh'g denied* (Jan. 29, 2015) (“Circumstantial evidence of knowledge of the age of a person ‘may consist of facts relating to the apparent age of a person. The appearance of a person alone can impart knowledge of his or her age within certain ranges and to certain degrees of certainty’”); *Gorman v. Albertson's, Inc.*, 519 So. 2d 1119, 1120 (Fla. Dist. Ct. App. 2nd Dist., Feb. 10, 1988) (“Although at this point there is no direct evidence of the state of mind of the clerk who allegedly sold the alcoholic beverages to Kimbrell, knowledge that a purchaser of alcoholic beverages is not of lawful drinking age may be established by circumstantial evidence relating to the apparent age of the person Furthermore, whether in a particular instance the person's appearance alone imparted such knowledge, and to what extent, is normally a question of fact for the jury to determine.”); *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 453 N.E.2d 430, 434-35 (Sup. Jud. Ct. Mass., Apr. 18, 1983) (finding that the alcohol seller knew or should have known the purchaser was a minor because the purchaser “. . . had a youthful appearance”); *State v. Benioh*, No. 27,920, 2009 WL 6567167, at *4 (N.M. 2009) (“While lack of facial hair alone is insufficient to support a reasonable suspicion that a person is under age twenty-one, we are not persuaded that ‘youthful appearance’ is a meaningless term merely because Slaughter was unable to describe it with specificity.”).

38. It is true that Patricia did not testify during the hearing and did not have identification on her person when detained by Sgt. Heraud; nevertheless, the picture of Patricia speaks a thousand words. *Supra*, at ¶ 10. The photograph of Patricia shows a girl lacking any indicia of maturity,

such as sagging or wrinkly skin. *Id.* Therefore, the Board is quite comfortable determining from the picture alone that Patricia was under the age of twenty-one on April 27, 2014.

39. The Board further notes that Patricia's statement further confirms that she was under the age of twenty-one. Even though hearsay evidence in administrative hearings is subject to additional scrutiny, "hearsay found to be reliable and credible may constitute substantial evidence especially where the evidence is uncontradicted." *Coal. for the Homeless v. D.C. Dep't of Employment Servs.*, 653 A.2d 374, 377-78 (D.C. 1995) (citations and quotation marks removed). In this case, Patricia admitted to the investigative team that she was nineteen years old. *Supra*, at ¶ 10.

40. While the Respondent contests the credibility of "Patricia's" statement, the Board finds her statements sufficiently reliable. *Resper*, 793 A.2d at 457. First, given that it is against the law for a minor to possess alcohol, it would be strange for someone twenty-one years of age or older to lie about a basic fact like their age. See D.C. Official Code § 25-1002(e). Second, the Respondent's event was for people eighteen years of age or older, which increases the likelihood that someone under the age of eighteen would be present inside the establishment. Therefore, for these reasons, the Board is confident that Patricia was under the age of twenty-one.

b. There exists sufficient circumstantial evidence to establish that the Respondent dispensed an alcoholic beverage to a minor.

41. The record also contains sufficient circumstantial evidence to demonstrate that the Respondent "deliver[ed]" or "dispense[d]" an alcoholic beverage to "Patricia" in violation of § 25-781(c).

42. In order to sustain a violation of § 25-781(c), it must also be shown that the licensee ". . . g[a]ve, serve[d], deliver[ed], or in any manner dispense[d] an alcoholic beverage to" someone under the age of twenty-one. § 25-781(c). The Board interprets § 25-781(c) as covering multiple types of alcohol service situations. For example, it would violate § 25-781 for a bartender to directly hand a drink to a minor; for a server to provide a pitcher of an alcoholic beverage to table of people of mixed ages where the minor obtains the pitcher or a serving from the pitcher; or for an establishment to allow a third party to pass an alcoholic beverage to a minor. Finally, it would also violate § 25-781(c) for an establishment to provide underage individuals with access to alcohol by simply leaving alcohol out in a manner that allows the minor to obtain the beverage without interacting the establishment's servers or bartenders.

43. On April 27, 2014, the Respondent was selling multiple beer bottles in buckets during a nightclub event where people under the legal could obtain admission. *Supra*, at ¶¶ 10, 15. Patricia was observed with a beer bottle in her hand and a bucket by her feet. *Supra*, at ¶¶ 10, 18. Patricia also told the investigative team that she was able to obtain the beer from a bucket. *Supra*, at ¶ 10. Further, the Board does not credit the Respondent's intimation that the investigative team planted the bottle in Patricia's hand; instead, it is clear that the bottle was in her possession, and was merely removed by Sgt. Heraud while he interviewed her. *Supra*, at ¶ 8. Consequently, it is reasonable to presume that the establishment served her or her party the beer; or, at the very least, the licensee or its employees engaged in such a careless and sloppy manner

of serving alcohol, that it effectively gave Patricia access to the beer by failing to superintend or monitor the buckets strewn about the establishment. *Supra*, at ¶ 10.

44. Therefore, the Board finds sufficient evidence to sustain Charge II.

III. THE GOVERNMENT HAS NOT DEMONSTRATED A VIOLATION OF § 25-783(a).

45. Under § 25-783(a), “A licensee shall refuse to sell, serve, or deliver an alcoholic beverage to any person who, upon request of the licensee, fails to produce a valid identification document.” D.C. Official Code § 25-783(a). In this case, there is insufficient evidence to determine that the licensee requested identification before the commencement of alcohol service; therefore, the Board cannot sustain a violation of Charge III.

IV. THE RESPONDENT KNOWINGLY VIOLATED ITS SECURITY PLAN ON APRIL 27, 2014.

46. The Board finds that the Respondent knowingly failed to prevent patrons from exiting and reentering the establishment, allowed patrons under the age of twenty-one after 9:00 p.m., and failed to use a counter in violation of the establishment’s security plan.⁵

47. Under § 25-823(6), all licensees are obligated to comply with the terms of their security plan. D.C. Official Code § 25-823(6). In general, a violation may be substantiated by a showing of a “continuous course of conduct” or a “pattern of deviations” from the plan. *1900 M Rest. Associations, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 56 A.3d 486, 495 (D.C. 2012). The purpose of the continuous course of conduct test is to demonstrate “actual” or “imputed knowledge,” which justifies a finding of vicarious liability. *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d 515, 519 (D.C. Cir. 1970). The Government can satisfy this test by showing (1) improper acts were committed by (2) the licensee, his or her employees or agents, or others on the premises (3) for a time long enough to establish that the licensee allowed the act or acts to occur. *Id.*

48. The establishment’s security plan prohibits patrons from entering and exiting the establishment, allowing patrons under twenty-one to enter after 9:00 p.m., and requires the use of a counter or clicker. *Supra*, at ¶ 26.

49. In this case, the violation of the security plan was not isolated, incidental, or the actions of a rogue employee; instead, the owner was present at the establishment and the violations in question were part of the establishment’s method of operation. *Supra*, at ¶¶ 15, 21. Specifically, the Board finds it reasonable to infer that the Respondent permitted patrons under the age of twenty-one to enter the establishment in violation of its security plan, because security was providing patrons under the age of twenty-one with marks on their hands, there was no effort to turn patrons under the legal age away from the establishment after 9:00 p.m., and underage

⁵ Based on these violations, the Board does not find it necessary to reach the issue of whether the establishment’s failure to check “Patricia’s” identification satisfies the continuous course of conduct test.

patrons made up half the crowd at the “kids’ party.” *Supra*, at ¶ 15. Furthermore, over the course of evening, security never had or used a counter to keep track of the admitted patrons. *Supra*, at ¶ 15. As a result, because the ownership knew or should have known that it could not operate in this manner under the terms of its security plan, the Board finds that the Government has satisfied the continuous course of conduct test.

50. Therefore, there is sufficient evidence in the record to demonstrate a violation of the Respondent’s security plan on April 27, 2014.

PENALTY

51. In this case, the Respondent has no prior primary tier violations; therefore, the violations found in this Order shall be fined as first time violations. D.C. Official Code § 25-830(c)(1)(A)-(C); *Investigative History* (ABRA License No. 25996). The fine range for a first time primary tier violation falls between \$1,000 and \$2,000. 23 DCMR § 801.1 (West Supp. 2015). Further, under the special penalty schedule provided for violations of § 25-781, a first time violation may result in the imposition of a fine between \$2,000 and \$3,000 and a mandatory five-day suspension. D.C. Official Code § 25-781(f)(1).

52. In this case, the Board imposes a \$1,000 fine and one day stayed suspension for the violation of § 25-762; a \$3,000 fine and five-day stayed suspension for the violation of § 25-781; and a \$2,000 fine and two-day stayed suspension for the violation of § 25-823(6). The Board uses its discretionary authority to impose additional suspension days and the higher fine for the violation of § 25-823(6), because the violations have a direct connection to overcrowding, which imperils the safety of patrons, first responders, and the surrounding community.

ORDER

Therefore, the Board, on this 6th day of May 2015, finds that Johana’s Inc., t/a Johana’s Restaurant, guilty of violating §§ 25-762, 25-781, and 25-823(6). The Board imposes the following penalty on Johana’s Restaurant:

- (1) For the violation described in Charge I, Johana’s Restaurant shall pay a \$1,000 fine. The Respondent shall also receive one (1) day stayed suspension days, which shall go into effect if the Respondent is found to have committed an additional violation of Title 25 or Title 23 within one year from the date of this Order.
- (2) For the violation described in Charge II, Johana’s Restaurant shall pay a \$3,000 fine. The Respondent shall also receive a five (5) day stayed suspension of its license for this offense, which shall go into effect if the Respondent is found to have committed an additional violation of Title 25 or Title 23 within one year from the date of this Order.
- (3) Charge III is dismissed.
- (4) For the violation described in Charge IV, Johana’s Restaurant shall pay a \$2,000 fine. The Respondent shall also receive a two (2) day stayed suspension of its license for this

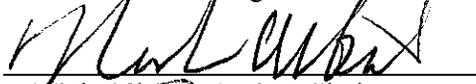
offense, which shall go into effect if the Respondent is found to have committed an additional violation of Title 25 or Title 23 within one year from the date of this Order.

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 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.

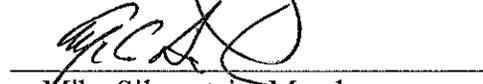
The ABRA shall deliver copies of this Order to the Government and the Respondent.

District of Columbia
Alcoholic Beverage Control Board


Nick Alberti, Acting Chairperson


Donald Brooks, Member


Herman Jones, 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, 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).