THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
Jasper Ventures, LLC t/a K Street	License No.: 72225 Case Nos.: 10-CMP-00540 10-251-00282 Order No.: 2012-121	
Holder of a Retailer's Class CN License at premises 1301 K Street, N.W. Washington, D.C. 20005		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member
Mike Silverstein, Member
Jeannette Mobley, Member

ALSO PRESENT: Jasper Ventures, LLC, t/a K Street, Respondent

Andrew Kline, on behalf of the Respondent

Michael Stern, Senior Assistant Attorney General,
on behalf of the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER GRANTING IN PART AND DENYING IN PART THE GOVERNMENT'S MOTION FOR RECONSIDERATION

This matter comes before the Alcoholic Beverage Control Board (Board) on the Government's Motion for Reconsideration (Motion) in Case Numbers 10-CMP-00540 and 10-251-00282. We determine that § 25-830(f) permits the Board to treat unlisted violations as primary tier violations. We further determine that § 25-830(f) only permits the Board to fine a licensee for unlisted violations as if they were primary tier violations and consider past unlisted violations as primary tier violations when calculating primary tier fines. The Board will amend Board Order No. 2011-403 to reflect this interpretation of § 25-830(f).

Background

On January 14, 2011, and March 19, 2011, the Board served Notices of Status Hearing and Show Cause Hearing (Notices), dated January 5, 2011, and March 16, 2011, respectively, on Jasper Ventures, LLC, t/a K Street (Respondent), at premises 1301 K Street, N.W., Washington, D.C. The Notices contained three charges related to Case Numbers 10-CMP-00540 and 10-251-00282. In the Notice for Case Number 10-CMP-00540, the Government charged the Respondent with failing to allow Alcoholic Beverage Regulation Administration (ABRA) investigators and Metropolitan Police Department officers to enter the establishment without delay under District of Columbia Official Code § 25-823(5). In the Notice for Case Number 10-251-00282, the Government charged the Respondent with failing to have an ABC-licensed manager on the premises while the establishment served alcoholic beverages, and violating the establishment's security plan.

The Board held the Show Cause Hearing related to the charges on June 22, 2011. At the hearing, the Board dismissed the charges appearing in Case Number 10-251-00282, which were dismissed on the motion of the Government. *Transcript* (*Tr.*), June 22, 2011 at 5. Thus, only the Respondent's alleged violation of § 25-823(5), which is not listed in the schedule of civil penalties, remained at issue. See 23 DCMR § 800 (West Supp. 2012).

On October 12, 2011, the Board sustained the § 25-823(5) charge filed by the Government. The Board ordered the Respondent to pay a fine of $6,000.00, and suspended the Applicant's license for seven days, with four days stayed for one year, provided the Respondent did not commit any additional violations. Jasper Ventures, LLC, t/a K Street, Board Order No. 2011-403, 8-9 (D.C.A.B.C.B. Oct. 12, 2011). In determining the penalty, the Board incorrectly determined that because § 25-823(5) was not classified under the penalty schedule as a primary or secondary tier violation, we could not count the violation as a primary tier violation. Id. at ¶ 31.

Subsequently, the Respondent appealed the Board's ruling, and the Government filed a Motion for Reconsideration (Motion). Before the District of Columbia Court of Appeals, the Respondent consented to remand the case back to the Board so that it could consider the Government's Motion. Respondent's Consent Mot. to Remand, 1-2. The District of Columbia Court of Appeals granted the Respondent's request, and remanded the matter back to the Board. Jasper Ventures, LLC, t/a K Street v. D.C. Alcoholic Beverage Control Bd., No. 11-AA-1310, 1-2 (D.C. 2011). On February 22, 2012, the Board held a Remand Hearing limited to the issue raised by the Government's Motion for Reconsideration.

Arguments of the Parties

The Government's Motion argues that violations not listed in the penalty schedule found in Title 23 of the District of Columbia Municipal Regulations should count towards the Respondent's total number of primary tier violations. As a result, under the Government's argument, a licensee should be subject to mandatory revocation if a licensee

accumulates a sufficient number of unlisted violations, or a combination of unlisted and listed primary tier violations, under District of Columbia Official Code § 25-830(c)(3).

In turn, the Respondent argues that § 25-830(f) gives the Board the power to fine unlisted violations as if they are primary tier violations, but that such violations should not count for the purposes of mandatory revocation under § 25-830(c)(3). Opp. to Mot. for Recon., 3.

Discussion

In our original Order, we broadly stated that unlisted violations do not count as primary tier violations. Jasper Ventures, LLC, t/a K Street, Board Order No. 2011-403, at ¶ 32. Upon further examination, we find this statement erroneous, and inconsistent with the plain language of § 25-830(f). Accordingly, we agree with the Government's argument that unlisted violations should be treated as primary violations for purposes of enhanced penalties under District of Columbia Official Code § 25-830. Yet, we disagree with the Government that an accumulation of unscheduled violations may subject the licensee to mandatory revocation.

a. Relevant Authority

Violations of Title 25 of the District of Columbia Official Code and Title 23 of the District of Columbia Municipal Regulations are classified as primary tier violations or secondary tier violations in the schedule of civil penalties. D.C. Code § 25-830(a) (West Supp. 2012); see also 23 DCMR § 800 (West Supp. 2012). Primary tier violations apply to severe offenses; whereas, secondary tier violations apply to minor violations of the District of Columbia's alcoholic beverage control laws. D.C. Code § 25-830(b)(1)(A)-(B) (West Supp. 2012). As licensees accumulate additional primary tier or secondary tier offenses, the amount of the fine increases based on the number of prior violations within the statutory time period. D.C. Code §§ 25-830(c)(1)(A)-(C), 25-830(d)(1)(A)-(C) (West Supp. 2011) Unlike secondary tier offenses, if a licensee obtains four primary tier violations within a four year period they are subject to mandatory revocation under Title 25. D.C. Code § 25-830(c)(3) (West Supp. 2012).

In reference to violations not listed in the schedule of civil penalties, § 25-830(f) states, "The Board may fine for a violation not listed on the schedule consistent with the primary tier violation penalties set forth in subsection (c)(1) of this section." D.C. Code § 25-830(f) (West Supp. 2012). Because § 25-830(f) uses the language "may," the Board has the discretion to consider whether the offense is sufficiently serious to justify the imposition of a primary tier fine, rather than a secondary tier penalty. Because § 25-830(f) only references fines, and no other form of punishment, prior unlisted violations cannot be used to calculate whether a licensee should be subject to mandatory revocation.

Further, to "fine consistent with the primary tier violation penalties," the Board must follow the fine schedule set forth at District of Columbia Official Code §§ 25-

830(c)(1)(A)-(C). Subsection (c)(1) states as follows, "For primary tier violations, the penalties shall be no less than the following: (A) For the first violation, no less than $ 1,000; (B) For the second violation within 2 years, no less than $ 2,000; and (C) For the third violation within 3 years, no less than $ 4,000." D.C. Code § 25-830(c)(1) (West Supp. 2012). Consequently, a fine cannot be consistent with the primary tier schedule unless the fine increases based on the number of prior violations.

b. Analysis

The plain language of § 25-830(f) specifically provides that the Board may treat unlisted violations as primary tier violations for purposes of assessing penalties. See Hood v. U.S., 28 A.3d 553, 559 (D.C. 2011) (saying that when the court faces a clear statute it should look no further than the plain meaning of the statute's words). It provides no such authority with respect to mandatory revocation.

Under Title 25, increasing fines play a critical role in deterring future violations as licensees accumulate additional violations. See § 25-830(c)(1)(A)-(C). We agree with the Government that failing to subject licensees to increasing fines for multiple unlisted violations creates inconsistency with the schedule of penalties for primary tier violations. Therefore, in order to be consistent with the schedule of civil penalties, § 25-830(f) permits the Board to count serious unlisted violations as primary tier violations.

Nevertheless, we further interpret § 25-830(f) to mean that the Board cannot include unlisted violations when determining whether the license is subject to mandatory revocation. The statute instructs the Board to fine unlisted violations "consistent with the primary tier violation penalties set forth in subsection (c)(1)." § 25-830(f). Because the statute does not mention or reference the mandatory revocation provision in § 25-830(c)(3), we are convinced that the drafters did not want the Board to consider unlisted violations when determining whether an establishment qualifies for mandatory revocation. §§ 25-830(f), 25-830(c)(3). For these reasons, the Board will not consider unlisted violations when determining whether a license is subject to mandatory revocation under § 25-830(c)(3). Of course, this does not prevent the Board from using its discretionary authority to revoke the license under § 25-823.

Conclusion

In light of our reasoning above, the Board shall amend paragraphs 29 to 32 in our prior Order to properly reflect our interpretation of § 25-830(f). In addition, we will also amend the dates of the Respondent's suspension, because the stay granted by the Board prevented the Respondent from serving the original suspension days we selected. See Jasper Ventures, LLC, t/a K Street, Board Order No. 2011-463 (D.C.A.B.C.B. Nov. 2, 2011).

ORDER

Therefore, the Board, on this 25th day of April 2012, hereby **ORDERS** that the Government's Motion for Reconsideration is **GRANTED IN PART** and **DENIED IN PART**. The Board **FURTHER ORDERS** that

(1) Paragraphs 29 to 32 in Board Order No. 2011-403 shall be struck, and replaced by the following provisions:

> 29. The Respondent has also argued that a violation of § 25-823(5) can only be fined as a primary tier violation but should not count towards the number of primary tier violations that an establishment has accumulated. We agree with the Respondent that unlisted violations may not be used by the Board to consider whether it should be subject to mandatory revocation under § 25-830(c)(3). Nevertheless, contrary to the Respondent's argument, we remain convinced that under § 25-830(f), the Board is authorized to consider unlisted violations as primary tier violations and count previous unlisted violations as primary tier violations for the purposes of determining an appropriate fine.
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> 30. The Board recognizes that its interpretation of § 25-830(f) departs, in part, from the Board's decision in Morton's of Chicago, which held that such violations count towards an establishment's tally of primary tier violations. Morton's of Chicago/Washington Square, Inc., t/a Morton's of Chicago, Board Order No. 2010-462, 2 (D.C.A.B.C.B. Sept. 15, 2010). Nevertheless, for the reasons stated below, we find it necessary to depart in part from this ruling.
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> 31. Section 25-823, which is not listed in the civil penalty schedule, states that when a licensee violates § 25-823(5), "The Board may fine, as set forth in the schedule of civil penalties established under *§ 25-830*, and suspend, or revoke the license of any licensee during the license period if . . . . [t]he licensee fails or refuses to allow an ABRA investigator, a designated agent of ABRA, or a member of the Metropolitan Police Department 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. Code §§ 25-823, 25-823(5) (2001); see generally 23 DCMR § 800, *et seq*. (2008).
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> 32. Section 25-830(f) then states that: "The Board may fine for a violation not listed on the schedule consistent with the primary tier violation penalties . . . ." D.C. Code § 25-830(f) (2001). Subsection (c)(1) states, "For primary tier violations, the penalties shall be no less than the following: (A) For the first violation, no less than $ 1,000; (B) For the second violation within 2 years, no less than $ 2,000; and (C) For the third violation within 3 years, no less than $ 4,000." D.C. Code § 25-830(c)(1) (West Supp. 2012).

Subsection (c)(3) then goes on to state, "A licensee found in violation of a primary tier offense for the fourth time within 4 years shall have the license revoked." D.C. Code § 25-830(c)(3) (West Supp. 2012).

33. We interpret § 25-830(f) to permit the Board to treat violations that are not identified in the penalty schedule found in Title 23 of the D.C. Municipal Regulations as primary tier violations, except for the purpose of determining whether the license is subject to mandatory revocation under §25-830(c)(3). The Board may not count unlisted violations for the purpose of mandatory revocation under the plain language of § 25-830(f), because it only authorizes the Board to levy fines consistent with the primary tier schedule found in § 25-830(c)(1). We further note that the statute does not mention or reference the mandatory revocation provision in § 25-830(c)(3); thus, we are convinced that the drafters did not want the Board to consider unlisted violations when determining whether an establishment qualifies for mandatory revocation. §§ 25-830(f), 25-830(c)(3). For these reasons, the Board will consider serious unlisted violations as primary tier violations, but will not count unlisted violations when determining whether a license is subject to mandatory revocation under § 25-830(c)(3).

(2) Provision four on page nine in Board Order No. 2011-403 shall be struck, and replaced by the following provision:

a. the suspension shall be served from Thursday, June 21, 2012, to Saturday, June 23, 2012.

(3) All other terms and conditions of Board Order No. 2011-403 shall remain in full force and effect.

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

We note that Chairperson Miller, Board Member Jones, Board Member Mobley, and Board Member Nophlin did not participate in the Board's original Order resolving this matter. Nevertheless, these Board Members participated and decided this specific matter for the sole purpose of determining the treatment of serious unlisted violations. We note that Chairperson Miller and Board Member Mobley were not serving on the Board at the time this matter was originally decided. Board Member Jones did not participate in the original Order, because he objected to the concurrence issued by Board Member Silverstein. Finally, Board Member Nophlin recused himself from this matter, because he was at the establishment when this incident occurred, and only joins in this opinion to support the legal decision related to the treatment of unlisted violations reached by the majority of the Board, which will apply to all licensees charged with such violations.

District of Columbia
Alcoholic Beverage Control Board

Ruthanne Miller, Chairperson

Nick Alberti, Member

Donald Brooks, Member

Herman Jones, Member

Calvin Nophlin, Member

Mike Silverstein, Member

Jeannette Mobley, Member

Pursuant to 23 DCMR § 1719.1 (2008), 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, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (2008) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b) (2004).