THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
	)	
Khan's BBQ, Inc.	)	
t/a Khan's	)	
	)	Case No. 11-CMP-00301
Holder of a Retailer's Class CR License	)	License No. ABRA-084082
	)	Order No. 2013-086
at premises	)	
1125 H Street, N.E.	)	
Washington, D.C. 20002	)	
	)	

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member

ALSO PRESENT: James Lee, on behalf of Khan's BBQ, Inc., t/a Khan's, 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 October 20, 2012, the Alcoholic Beverage Control Board (Board) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated October 10, 2012, on Khan's BBQ, Inc., t/a Khan's (Respondent), at premises 1125 H Street, N.E., Washington, D.C., charging the Respondent with the following violation:

Charge I: The Respondent failed to uphold the Cooperative/Settlement Agreement for the licensed establishment, in violation of D.C. Official Code § 25-446 (2012), for which the Board may take the proposed action pursuant to 23 DCMR § 1609.2 and D.C. Official Code § 25-823(6) (2012).

Charge II: The Respondent failed to obtain a Sidewalk Café and Summer Garden Endorsement, in violation of 23 DCMR §§ 1004, 1005, for which the Board may take the proposed action pursuant to 23 DCMR § 1609.2 and D.C. Official Code § 25-823(1) (2012).

The Board held a Show Cause Status Hearing on December 5, 2012. There was no settlement of the matter and it proceeded to a Show Cause Hearing on March 27, 2013.

The Board having considered the evidence, the testimony of the witnesses, the arguments of parties, 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 to the Respondent, dated October 10, 2012. *See* Alcoholic Beverage Regulation Administration (ABRA) Show Cause File No. 11-CMP-00301. The Respondent holds a Retailer's Class CR license and is located at 1125 H Street, N.E., Washington, D.C. *See* ABRA Licensing File No. ABRA-084082. Mr. Lee is the President of Khan's BBQ, Inc., t/a Khan's. *See* ABRA Licensing File No. ABRA-084082.

2. The Show Cause Hearing was held on March 27, 2013. *See* ABRA Show Cause File No. 11-CMP-00301. The Notice charges the Respondent with the two violations enumerated above. *See* ABRA Show Cause File No. 11-CMP-00301.

3. The Government presented its case through the testimony of one witness, ABRA Investigator Tyrone Lawson. *Transcript (Tr.),* 3/27/13 at 18. Investigator Lawson and Supervisory Investigator Craig Stewart visited the Respondent's establishment on July 2, 2011. *Tr.,* 3/27/13 at 26. Investigator Lawson testified that Supervisory Investigator Stewart observed some violations while he was conducting a compliance check and requested that Investigator Lawson assist him with the inspection. *Tr.,* 3/27/13 at 26. Investigator Lawson completed an investigative report following his visit to the establishment. *See* ABRA Show Cause File No. 11-CMP-00301.

4. Investigator Lawson arrived at the Respondent's establishment at approximately 12:50 a.m. *Tr.,* 3/27/13 at 27. After identifying himself to the owner James Lee, he informed Mr. Lee about the violations regarding the establishment's open door and using the sidewalk café without a Sidewalk Café Endorsement. *Tr.,* 3/27/13 at 26.

5. Investigator Lawson then photographed the sidewalk café and the open door. *Tr.,* 3/27/13 at 27-28; *see* ABRA Show Cause File No. 11-CMP-00301. Mr. Lee informed Investigator Lawson that his lawyer advised him that the sidewalk café was approved. *Tr.,* 3/27/13 at 28. Investigator Lawson advised Mr. Lee that his ABC-license did not have a Sidewalk Café Endorsement. *Tr.,* 3/27/13 at 28.

6. Investigator Lawson reviewed the Respondent's Voluntary Agreement, which provides that the Respondent shall keep the doors closed and that sounds should not be audible from the center line of H Street, N.E. *Tr.,* 3/27/13 at 28-29; *see* ABRA Show

Cause File No. 11-CMP-00301. Investigator Lawson testified that Supervisory Investigator Stewart went to the opposite side of H Street, N.E., and informed Investigator Lawson that he was able to hear noise emanating from the Respondent's establishment. *Tr.,* 3/27/13 at 29. The center line of H Street, N.E., is approximately fifty feet from the Respondent's establishment's sidewalk café. *Tr.,* 3/27/13 at 48.

7. Though there is a tavern located next door to the Respondent's establishment, Investigator Lawson is confident that the noise that was audible from the center line of H Street, N.E., emanated from the Respondent's establishment. *Tr.,* 3/27/13 at 29-30. Supervisory Investigator Stewart confirmed to Investigator Lawson that the song which was playing on the Respondent's establishment was the same song that he heard from the center line of H Street, N.E. *Tr.,* 3/27/13 at 30.

8. Investigator Lawson described the practices employed by the Enforcement Division when investigating noise violations. *Tr.,* 3/27/13 at 30. One investigator remains at the establishment and another investigator determines whether the noise is audible from a certain location; whether the source of the noise audible from a specific location is originating from the establishment under investigation; and the approximate noise level. *Tr.,* 3/27/13 at 30-31.

9. Investigator Lawson visited the Respondent's establishment a second time on July 7, 2011, to inform Mr. Lee that he had to obtain a public space permit from the District Department of Transportation (DDOT). *Tr.,* 3/27/13 at 34.

10. Investigator Lawson testified that the Respondent's Sidewalk Café application was approved by the Board on September 15, 2010, but the sidewalk café endorsement was not issued until July 8, 2011, six days after his initial investigation. *Tr.,* 3/27/13 at 31; *see* Government's Exhibit 10; copy of Issuance Notice of License No. ABRA-08402.

11. The Respondent, James Lee, testified that he operates a restaurant, and not a nightclub. *Tr.,* 3/27/13 at 59. The level of the music played at his establishment is low enough to allow his customers to engage in conversation. *Tr.,* 3/27/13 at 59. He has never received noise complaints from his neighbors. *Tr.,* 3/27/13 at 59. The noise complaints are from the nightclub located next to his establishment, which offers live music. *Tr.,* 3/27/13 at 59.

12. Mr. Lee testified that he opens the door to permit access to the sidewalk café from inside of the establishment. *Tr.,* 3/27/13 at 60. Mr. Lee plays music from an iPod, and that the noise does not emanate from his establishment. *Tr.,* 3/27/13 at 63, 71. He testified that the center line of H Street, N.E., is approximately eighty feet from his establishment. *Tr.,* 3/27/13 at 64.

13. Mr. Lee obtained the public space permit for his sidewalk café from DDOT on July 6, 2011. *Tr.,* 3/27/13 at 67-68. He signed the Issuance Notice on July 8, 2011. *Tr.,* 3/27/13 at 66; *see* Government's Exhibit No. 10

14. The Board takes administrative notice that the violations enumerated in the Notice are the Respondent's first secondary tier violations.

CONCLUSIONS OF LAW

15. 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.*

16. In order to hold a Licensee liable for a violation of the ABC laws, the Government must show that there is substantial evidence to support the charge. Substantial evidence is defined as evidence that a "reasonable mind might accept as adequate to support the conclusion" and there must be a "rational connection between facts found and the choice made." 2461 Corp. v. D.C. Alcoholic Bev. Control Bd., 950 A.2d 50, 52-53 (D.C. 2008).

17. With regard to Charge I, the Board finds that the Respondent failed to comply with Sections 4.1 and 8 of its Voluntary Agreement by keeping its door open after 10:00 p.m. and allowing noise to be audible from the center line of H Street, N.E. The Board finds that during Investigator Lawson's visit to the Respondent's establishment, on July 2, 2011 at approximately 12:50 a.m., the Respondent was operating its establishment with the door open and the noise could be heard from the center line of H Street, N.E. Moreover, Mr. Lee admitted that on July 2, 2011, he was operating its establishment with the door open to permit access to the sidewalk café from inside of the establishment.

18. With regard to Charge II, the Board finds that the Respondent was operating a sidewalk café without having an approved Sidewalk Café Endorsement on its ABC-license. The Board again relies on the credible testimony of Investigator Lawson and the documentary evidence admitted as Government's Exhibit 10. The Board finds that although the Respondent's Sidewalk Café Application was approved on September 15, 2010, the license was not issued until July 8, 2011, because the Respondent did not submit the Public Space Permit to ABRA until July 6, 2011. Mr. Lee admitted that he signed the Issuance Notice on July 8, 2011, when ABRA issued the ABC-license with the Sidewalk Café Endorsement.

19. Therefore, based upon the above, the Board finds that the Respondent's violation of D.C. Official Code § 25-446, as set forth in Charge I, and 23 DCMR §§ 1004, 1005, as set forth in Charge II, of the Notice to Show Cause, dated October 10, 2012, warrants the imposition of a fine set forth below.

20. The Board takes administrative notice that two other cases, Case Nos. 11-CMP-00488 and 11-CMP-00415 were also heard by the Board on March 27, 2013, the same date as this matter. In those two cases, the Respondent and the Government entered into an Offer in Compromise (OIC) which was approved by the Board. Therefore, the Board will not factor the two OIC cases for purposes of imposing the penalty in the case at hand. The Board finds that these violations in the current matter are the first secondary tier violations and it imposes a $500.00 fine for each violation.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board, on this 1st day of May, 2013, finds that the Respondent, Khan's BBQ, Inc., t/a Khan's, located at 1125 H Street, N.E., Washington, D.C., holder of a Retailer's Class CR license, violated D.C. Official Code § 25-446, and 23 DCMR §§ 1004, 1005.

The Board hereby **ORDERS** that:

1) Charge I: Respondent shall pay a fine in the amount of $500.00.

2) Charge II: Respondent shall pay a fine in the amount of $500.00.

3) In total, the Respondent shall pay a fine in the amount of $1,000 by no later than thirty (30) days from the date of this Order. Failure to remit the fine in a timely manner may subject the Respondent to additional sanctions.

Copies of this Order shall be sent to the Respondent and the Government.

District of Columbia
Alcoholic Beverage Control Board

Nick Alberti, Member

Donald Brooks, Member

Herman Jones, Member

Mike Silverstein, Member

I concur with the majority's decision as to its finding of the Respondent's liability, but I dissent as to the penalty for Charge I selected by the majority of the Board. I would issue a warning for this violation because no neighbors complained of any noise disturbance and this is the first and only noise violation with which Respondent has been charged.

Ruthanne Miller, Chairperson

Pursuant to D.C. Official Code § 25-433, 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, 2000 14th Street, N.W., Suite 400S, Washington, DC 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 D.C. Official Code § 25-433, 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).