

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

In the Matter of:)	
)	
2408 Wisconsin Avenue, LLC)	License No.: 79644
t/a Mason Inn)	Case No.: 12-251-00368
)	Order No.: 2013-595
)	
)	
)	
Holder of a Retailer's Class CT License)	
at premises)	
2408 Wisconsin Avenue, N.W.)	
Washington, D.C. 20007)	

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

ALSO PRESENT: 2408 Wisconsin Avenue, LLC, t/a Mason Inn, Respondent

Ki Jun Sung, on behalf of the Respondent

Chrissy Gephardt, Assistant Attorney General,
on behalf of 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 that 2408 Wisconsin Avenue, LLC, t/a Mason Inn, (Respondent) increased its occupancy in violation of District of Columbia (D.C.) Official Code § 25-762(b)(1). The Board levies a \$3,000 fine for the violation.

Procedural Background

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on June 19, 2013. *ABRA Show Cause File No.*, 12-251-00368, Notice of Status Hearing and Show Cause Hearing, 4 (Jun. 19, 2013). The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 2408 Wisconsin Avenue, N.W., Washington, D.C., on June 22, 2013. *ABRA Show Cause File No.*, 12-251-00368, Service Form. The Notice charges the Respondent with a single violation, which if proven true, would justify the imposition of a fine, suspension, or revocation of the Respondent's ABC-license.

Specifically, the Notice, charges the Respondent with the following violations:

Charge I: [On November 22, 2012,] [y]ou mad[e] a substantial change in the operation of the establishment by increasing the capacity of the establishment in violation of D.C. Official Code § 25-762(b)(1)

Notice of Status Hearing and Show Cause Hearing, 2-3.

Both the Government and Respondent appeared at the Show Cause Status Hearings for this matter on August 14, 2013. The parties proceeded to a Show Cause Hearing where they argued their respective cases on September 18, 2013.

The Board notes that the Respondent submitted Proposed Findings of Fact and Conclusions of Law, which the Board includes as part of the record.

FINDINGS OF FACT

The Board having considered the evidence contained in the record, the testimony of witnesses, and the documents comprising the Board's official file, makes the following findings:

1. The Respondent holds a Retailer's Class CT License, ABRA License Number 79644. See ABRA Licensing File No. 79644. The establishment's premises are located at 2408 Wisconsin Avenue, N.W., Washington, D.C. Id.

I. Testimony of ABRA Investigator Felicia Martin

2. Alcoholic Beverage Regulation Administration (ABRA) Investigator Felicia Martin visited the Respondent's establishment on November 22, 2012, in order to investigate an alleged assault that occurred at the establishment. *Transcript (Tr.)*, September 18, 2013 at 9-10. Upon arriving at the scene with ABRA Investigator Kofi Apraku, she met with Metropolitan Police Department (MPD) Officer Timothy Carter. Id. at 10-11. Officer Carter advised Investigator Martin that he believed that the Respondent's establishment was overcrowded. Id. at 11.

3. Investigator Martin then spoke with the establishment's ABC Manager, Ryan Roller about the alleged assault and overcrowding. Id. at 11. Mr. Roller told Investigator Martin to

speak with the establishment's doorperson for further information about the number of people inside the establishment. Id. at 12.

4. Investigator Martin approached the establishment's doorperson, identified herself, and asked how many people were inside the establishment. Id. at 13. The doorperson showed the investigator the establishment's clicker for keeping track of patrons. Id. at 13. The clicker read "205." Id. The doorperson also told Investigator Martin that there were 205 people inside the establishment. Id. at 19.

5. Mr. Roller showed Investigator Martin the establishment's certificate of occupancy (COO). Id. at 13. The COO stated that the establishment's occupant load was "125" people. Id. at 13-14; Case Report 12-251-00368, Exhibit No. 2.

6. Upon receiving the COO, Investigator Martin began to count the number of people inside the establishment. Id. at 14. Using a clicker, Investigator Martin counted approximately 150 people inside the establishment. Id. at 14, 22. The count took approximately two minutes. Id. at 30.

7. Investigator Martin then advised Mr. Roller that the establishment had exceeded its occupancy. Id. at 24.

II. Testimony of Ryan Roller

8. Ryan Roller testified on behalf of the Respondent. Id. at 36. According to Mr. Roller, the establishment's capacity is limited to 125 people. Id. at 37.

9. Mr. Roller described the establishment's procedure for preventing overcrowding. Id. at 38. The establishment has a doorperson that counts patrons entering the establishment and checking identifications. Id. The establishment then has a second doorperson that counts individuals leaving the establishment for any reason. Id. Finally, the establishment determines its occupancy by comparing the numbers on the clickers maintained by the two doorpersons. Id. at 38-39.

10. Mr. Roller testified that it is the establishment's practice is to notify him when the establishment is approximately twenty people away from reaching capacity. Id. at 39. Furthermore, the establishment's practice is to hold the line when the number of people inside the establishment reaches 125. Id. Mr. Roller noted that he typically checks capacity every ten to fifteen minutes. Id. at 57.

11. On November 22, 2012, Igor Milosevic was counting the patrons entering the establishment, while Milan Stankovich counted the patrons leaving the establishment. Id. at 40. Mr. Roller did not believe that the establishment was overcapacity or that Investigator Martin took into account the patrons leaving the establishment while she counted. Id. at 43-44. Mr. Roller admitted that he did not know the total patron count recorded by the establishment's clickers. Id. at 44, 56, 63-64. However, he noted that at the time of the assault, the establishment was holding the line, because it had reached capacity. Id. at 58, 71.

12. Mr. Roller further admitted that between the time of the assault and 1:00 a.m., Mr. Stankovich was not conducting an outgoing count. Id. at 78-79. Mr. Roller admitted that Mr. Milosevic was counting incoming and outgoing patrons by himself for a period of five to ten minutes after MPD arrived in response to the alleged assault. Id. at 83.

13. Mr. Roller admitted that at the time of the investigation, the exterior of the establishment was chaotic due to the number of people in the streets and the police presence. Id. at 48. He further admitted that based on the confusion outside, the Respondent's doormen may have lost track of the occupancy count. Id. at 48.

14. Mr. Roller noted that the establishment has not changed the interior of the establishment or increased the establishment's official occupant load. Id. at 45.

CONCLUSIONS OF LAW

15. 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. 2013). Furthermore, after holding a Show Cause Hearing, the Board is entitled to impose conditions if we determine "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.

16. The Board finds that the Respondent permitted its establishment to exceed the 125-person occupant load in accordance with its application for licensure on November 22, 2012, in violation of § 25-762(b)(1).

17. Section 25-762(a) states,

Before 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). Section 25-404 provides that in order to obtain approval for a substantial change, the "applicant shall file with the Board an amendment to its application or last application, providing the information required on an application under § 25-402(a). D.C. Code § 25-402(a). Finally, under § 25-402(a)(5), new license applications must provide information regarding "The size and design of the establishment, which shall include both the number of seats (occupants) and the number of patrons permitted to be standing, both inside and on any sidewalk café or summer garden." D.C. Official Code § 25-402(a), (a)(5). Finally, under § 25-762(b)(1),

In determining whether the proposed changes are substantial, the Board shall consider whether they are potentially of concern to the residents of the area surrounding the

establishment, including changes which would . . . [i]ncrease the occupancy of the licensed establishment

§ 25-762(b), (b)(1).¹

I. Interpretation of § 25-762

18. The Respondent argues that the Government cannot meet its burden of proof.

19. The Respondent first argues that the Board must dismiss the Charge against it, because the Government failed to show a physical change to the establishment. Proposed Findings of Fact and Conclusions of Law, 2. We disagree. Section 25-762 does not only apply to physical changes to an establishment, but may also apply to situations where a licensee changes the manner in which the establishment is used. See D.C. Official Code § 25-762(b)(8)-(13), (15). For example, when not approved by the Board, part (b)(8) prohibits merely providing “music or entertainment if none was provided previously”; part (b)(10) prohibits adding “nude performances”; part (b)(11) prohibits changing “from on-premise consumption of food to carry-out sales or offering carry-out sales if non existed previously”; and part (b)(15) prohibits changing “the trade name or corporate name, coupled with a change in ownership of the establishment.” D.C. Official Code §§ 25-762(b)(8), (10), (11), (15). None of these examples involve physical changes to the establishment; as a result, so long as the usage occurs in the “interior” or “exterior” of the establishment, it is sufficient to trigger a violation of § 25-762.

20. Similar to these statutes prohibiting unapproved uses, § 25-762(b)(1) requires the Respondent not to use the establishment in a manner that violates its occupancy. Part (b)(1) notes that licensees shall not “[i]ncrease the occupancy . . .” § 25-762(b)(1). The term occupancy means “[t]he act of taking or holding possession.” Webster’s II New College Dictionary (2001) (occupancy). Under this definition, when a licensee permits more patrons than allowed by the COO provided to the Board, it is acting to increase the occupancy of the establishment. For this reason, the Board finds that there is no need for the Government to show that the licensee made a physical change to the establishment to sustain the Charge; instead, the Government merely has to show an act that results in a violation of the occupant load stated in the establishment’s COO.

21. The Respondent further argues that the Board must dismiss the Charge against it, because the Government must show a pattern or permanent change. *Tr.*, 9/18/13 at 94. We disagree, because there is no such requirement in the statute. Instead, licensees are required to operate in accordance with their license at all times without deviation. See D.C. Official Code §§ 25-315(b)(1); 25-447(a); 25-822(1); 25-823(1). Furthermore, the Board has consistently interpreted § 25-762 as applying to single events or incidents. Indeed, if the Board adopted the

¹ The Board also notes that an establishment must report its “capacity load, which [is] . . . defined as the maximum number of patrons that may be in the establishment at any one time . . .” for the purpose of determining an establishment’s annual licensing fee. 23 DCMR § 208.10 (West Supp. 2013).

Respondent's interpretation, the Board would essentially allow establishments to engage in illegal, unauthorized, and dangerous acts so long as such acts did not occur on a regular basis.²

22. Finally, the Respondent argues that the Board must dismiss the Charge against it, because the Government did not present evidence related to the establishment's initial application. Proposed Findings of Fact and Conclusions of Law, 2. Under §§ 25-402 and 25-404, the Respondent is required to report its occupancy to the Board in its initial application and any such changes are considered an amendment to the initial or original application for licensure. Therefore, the COO provided by the Respondent in ABRA's records is considered part of the Respondent's initial application.

23. For this reason, the Board finds that there is sufficient evidence in the record to make a finding on the merits.

II. Charge I

24. On the merits, the Board finds that the Government has provided credible evidence that the Respondent engaged in a substantial change by exceeding its occupancy in violation of § 25-762(b)(1) on November 22, 2012.

25. The Board credits the testimony of Investigator Martin that the establishment contained approximately 150 or more patrons inside the establishment in violation of the establishment's COO, which limited the establishment to 125 occupants. Supra, at ¶¶ 5, 6. As stated in Resper, "It 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). While the Respondent provided conflicting testimony, we resolve the conflicts in the testimony in favor of the Government. Investigator Martin used a clicker to count patrons inside the establishment ensuring the accuracy of her count and the establishment's doorperson reported a figure that was above the figure listed in the establishment's COO. Supra, at ¶¶ 4, 6. We further credit Investigator Martin's testimony over Mr. Roller, because his testimony revealed that the establishment likely lost track of the number of admitted patrons. Supra, at ¶¶ 12-13. This conclusion is supported by the fact that Mr. Roller could not provide a patron total from the establishment's clickers on the night of the incident and the establishment deviated from its regular counting procedures. Supra, at ¶¶ 11, 12. The Board also does not find persuasive speculation that a sufficient number of patrons left the establishment while Investigator Martin was counting, because such an occurrence does not counter the fact that Investigator Martin counted approximately 150 patrons inside the establishment. Supra, at ¶ 11.

² Furthermore, such an interpretation would allow establishments to avoid their obligations under the protest process to notify the community of their intended activities; thereby, avoiding lawful objections to their licenses. For example, under the Respondent's interpretation, an establishment seeking a restaurant license could hide the fact that the establishment would be used for activity commonly associated with a nightclub, such as dancing, live music, or minimal food sales. We also note this would permit non-nightclubs to engage in nightclub-related activity without having a security plan in place to govern the establishment's security procedures.

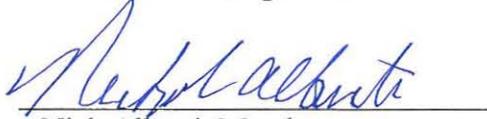
ORDER

Therefore, based on the foregoing findings of fact and conclusions of law, the Board, on this 11th day of December 2013, finds that 2408 Wisconsin Avenue, LLC, t/a Mason Inn, is guilty of violating D.C. Official Code § 25-762(b)(1). For the violation described in Charge I, the Respondent shall pay a fine of \$3,000.

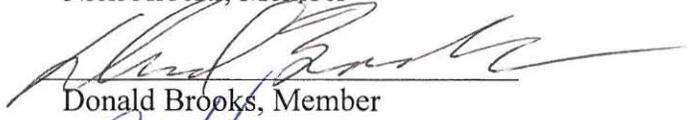
IT IS FURTHER ORDERED that the Respondent must pay the fines imposed by the Board within thirty (30) days from the date of this Order, or its license shall be immediately suspended until all amounts owed are paid.

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

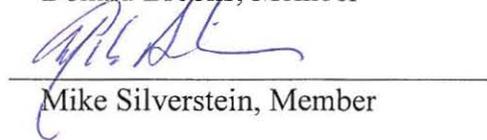
District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Member



Donald Brooks, Member



Mike Silverstein, Member

I dissent from the position taken by the majority of the Board. I agree with Respondent that Section 25-762 -Substantial changes in operation must be approved - does not apply to the circumstances of this case.

Section 25-762(a) states as follows:

Before 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 Section 404. (Emphasis added.)

Section 404—Application for approval of substantial change in application—requires the Applicant to file an amendment for a substantial change to its application, providing the detailed information required by Section 402 for a new application.

25-762(b) provides the following guidance for determining whether a change is substantial:

(b) In determining whether the proposed changes are substantial, the Board shall consider whether they are potentially of concern to the residents of the area surrounding the establishment, including changes which would:

(1) Increase the occupancy of the licensed establishment or the use of interior space not permitted.

The Majority finds that an increase in occupancy per se is a substantial change. However, the language of the provision speaks in terms of “a change which would increase the occupancy.” The Government did not identify any change which increased the occupancy, only that the certificate of occupancy was exceeded. In my reading of this provision, a change resulting in an increase in occupancy, such as a physical expansion, or use of an area not approved in the initial licensing, would be required for a finding of a violation under this provision. Further, a momentary increase in the number of patrons does not necessarily show a change in the nature of an operation.

If the evidence shows only that an Establishment exceeded its certificate of occupancy, then that may more accurately be a violation under Section 25-823 (1) which states:

The Board may fine, as set forth in the schedule of civil penalties established under Section 25-830, and suspend, or revoke the license of any license during the license period if:

- (1) The licensee violates any of the provisions of this title, the regulations promulgated under this title, or any other laws of the District, including the District's curfew law. (Emphasis added.)

Exceeding a certificate of occupancy is a violation of the Fire Code. *See* F-110.1 (11) of the *District of Columbia Building Code Supplement of 2003*. listing "Overcrowded conditions caused by permitting the posted maximum occupant load to be exceeded" as a dangerous condition that the code official is authorized to remedy.

If this violation were encompassed by Section 25-762, I would find that the Government did not meet its burden to show by substantial evidence that the Establishment exceeded its certificate of occupancy. In this case, as the majority notes, the testimony was conflicting. On the one hand, while the Investigator used a clicker to count patrons inside the Establishment, this method was not totally reliable as it did not account for patrons leaving and it was subject to error in a crowded bar. On the other hand, the Licensee stated that he had a reliable protocol for clicking individuals as they entered the establishment and as they exited and that the policy was to hold the line when the establishment was twenty people away from reaching capacity. The Licensee was unable to provide an exact count for the time when the Investigator counted 150 patrons because the employee responsible for the exiting count was distracted when MPD came earlier in response to an alleged assault. To me, the evidence is inconclusive.

Accordingly, I would dismiss this case on grounds that the violation does not fall under Section 25-762. Alternatively, I would dismiss this case because the Government did not meet its burden of proof to show by substantial evidence that the Establishment exceeded its certificate of occupancy.


Ruthanne Miller, Chairperson

Pursuant to 23 DCMR § 1719.1 (April 2004), 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, N.W., 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, District of Columbia 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).