

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

_____)	
In the Matter of:)	
Shaw's Tavern, LLC)	License No.: 87014
t/a Shaw's Tavern)	Case No.: 11-CMP-00314
)	Order No.: 2012-018
)	
Application for a New)	
Retailer's Class CT License)	
at premises)	
520 Florida Avenue, N.W.)	
Washington, D.C. 20001)	
_____)	

BEFORE: Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member
Mike Silverstein, Member

ALSO PRESENT: Shaw's Tavern, LLC, t/a Shaw's Tavern, Applicant

Abbas Fathi, Managing Member, on behalf of the Applicant

Andrew Kline, on behalf of the Applicant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING APPLICANT'S MOTION FOR RECONSIDERATION

Shaw's Tavern, LLC, t/a Shaw's Tavern, (Applicant) submitted an Application for a new Retailer's Class CT License (Application). On July 27, 2011, the Alcoholic Beverage Control Board (Board) reviewed Case Report 11-CMP-00314, which, in pertinent part, alleged that Abbas Fathi violated District of Columbia Official Code § 25-102 and is generally unfit for licensure under D.C. Official Code § 25-301. The Board held a contested Fact Finding Hearing on August 10, 2011. On November 2, 2011, we found Mr. Fathi unfit for licensure and denied the Application, because he permitted the sale of alcohol without a license and did not have sufficient knowledge of the alcoholic beverage control laws. Shaw's Tavern, LLC, t/a Shaw's Tavern, Board Order No. 2011-458, 6-9 (D.C.A.B.C.B. Nov. 2, 2011).

Subsequently, Mr. Fathi submitted a Motion for Reconsideration, requesting that the Board reverse Board Order No. 2011-458 and approve the Application. *Motion for Reconsideration*, 1. The Motion contains additional evidence, and challenges the findings of fact in Paragraphs 8, 9, 12, 14, and 16 in the Board's prior Order. In addition, the Motion challenges the Board's ability to deny the Application based on Mr. Fathi's lack of knowledge of the alcoholic beverage control laws and contests the Board's legal conclusion that Mr. Fathi violated § 25-102(d). We deny the Motion for Reconsideration, because the Findings of Fact in our prior Order are supported by substantial evidence and we see no reason to overturn our legal conclusions.

I. THE BOARD CANNOT CONSIDER EVIDENCE SUBMITTED AFTER THE HEARING ON AUGUST 10, 2011, UNDER 23 DCMR § 1719.4.

A Motion for Reconsideration "based in whole or in part on a new matter . . . shall . . . be accompanied by a statement that the petitioner could not by due diligence have known or discovered the new matter prior to the date the case was presented to the Board for decision." 23 DCMR § 1719.4 (2008).

Here, Mr. Fathi's Motion for Reconsideration does not include a statement indicating that the new evidence submitted by the Applicant was unknown or undiscovered prior to the hearing on August 10, 2011. The voicemail from Tiwana Hicks (Attachment A), the Sales Tax Audit (Attachment D), the establishment's payroll report (Attachment E), and the establishment's Certificate of Occupancy (Attachment F) were not presented to the Board during the hearing. As such, we reject these submissions, because the Board will not consider untimely submissions of evidence.

II. PARAGRAPHS 8, 9, 12, 14, AND 16 ARE BASED ON THE SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD.

Mr. Fathi argues that the Board's Findings of Fact in Paragraphs 8, 9, 12, 14, and 16 are incorrect. We disagree, because each finding of fact is supported by the substantial evidence contained in the record.

All findings of fact must be based on "substantial evidence in the record as a whole" sufficient to convince a reasonable mind that the Board has adequately supported its conclusions. 2641 Corp. v. District of Columbia Alcoholic Beverage Control Bd., 950 A.2d 50, 52 (D.C. 2008). Paragraphs 8, 9, 12, 14, and 16 meet this standard.

A. The Board based its Findings of Fact in Paragraph 8 on the substantial evidence contained in the record.

The Applicant argues that the following finding in paragraph 8 is incorrect: "On July 13, 2011, because the Applicant submitted an incomplete Application, the Board denied the Applicant's request for a stipulated license." Shaw's Tavern, LLC, t/a Shaw's Tavern, Board Order No. 2011-458, at ¶ 8.

Yet, the Board's agenda on July 13, 2011, states definitively that the Board denied the Applicant's request in a five to zero vote, because "[t]he placard period is over, and the Applicant is no longer eligible for a stipulated license." *Supplemental Agenda*, ¶ 1, (Jul. 13, 2011). Consequently, the Applicant's assertion has no basis in fact.

The Applicant also argues that its behavior should be excused, based on the untimely submitted voicemail it included with its Motion. Even if we accepted this new evidence, it would not change the Board's determination. Certainly, Tiwana Hicks's voicemail was mistaken when she stated that the Board approved the stipulated license. *Motion for Reconsideration*, Attachment A. Nevertheless, the message also stated that the stipulated license could not be issued unless the Applicant submitted its certificate of occupancy. *Motion for Reconsideration*, Attachment A. Furthermore, even if Ms. Hicks mistakenly told the Applicant that Board approved the stipulated license, Mr. Fathi still could not operate until he physically obtained the stipulated license. As a result, there is no merit to the claim that the Board granted the stipulated license, or even that Mr. Fathi or his employees reasonably believed the establishment possessed a stipulated license.

For these reasons, the Board affirms its finding in paragraph 8.

B. The Board based its Findings of Fact in Paragraph 9 on the substantial evidence contained in the record.

Mr. Fathi argues that the Board misquoted the anonymous complaint, in paragraph 9, when we stated that "The complaint stated that the Applicant's 'establishment was operating as if [it was] licensed.'" In fact, the Board was quoting ABRA Investigator's Vincent Parker's summary of the complaint he received.

Investigator Parker's summation is an accurate paraphrase of the complaint. In full, the complaint noted that "Shaw's Tavern at 6th and Florida in your ward [sic] has been serving liquor without a licence [sic] for the past several weeks. Just check thier [sic] web site on facebook for proof." *Motion for Reconsideration*, Attachment C-2. As a result, there is nothing misleading or incorrect about the Board's Findings of Fact in Paragraph 9.

Finally, we note that the Board's determination that Mr. Fathi violated § 25-102(d) does not rest on the complaint received by ABRA, but rather, Investigator Parker's investigation, which demonstrated that alcoholic beverages were consumed at the establishment on June 30, 2011, July 16, 2011, and July 20, 2011. Shaw's Tavern, LLC, t/a Shaw's Tavern, Board Order No. 2011-458, at ¶¶ 22-29.

C. The Board based its Findings of Fact in Paragraph 12 on the substantial evidence contained in the record.

Paragraph 12 discusses the fact that the establishment purchased alcohol from wholesalers and submitted altered Notices of Public Hearing to wholesalers. Shaw's Tavern, LLC, t/a Shaw's Tavern, Board Order No. 2011-458, at ¶ 12. The Applicant

argues that the facts contained in paragraph 12 improperly “infer [that] the [Applicant’s] representatives acted in a devious fashion.” *Motion for Reconsideration*, 3. This argument is irrelevant. The Applicant’s argument is irrelevant, because the Board did not base its Conclusions of Law on paragraph 12. See *id.* at ¶¶ 22-29. We only include information related to the altered notices to provide the context and background for the Board’s decision. If these facts demonstrate deviousness on the part of the establishment’s employees, Mr. Fathi only has himself to blame, as the actions occurred under his management.

Finally, Mr. Fathi had ample opportunity to present his arguments at the hearing on August 10, 2011. Indeed, the Applicant could have subpoenaed Steven May or the wholesalers who received the altered notices to testify at the hearing; however, Mr. Fathi did not avail himself of this opportunity. As a result, the Board affirms its Findings of Fact in paragraph 12, which we based solely on the substantial evidence contained in the record.

D. The Board based its Findings of Fact in Paragraph 14 on the substantial evidence contained in the record.

Mr. Fathi wrongly argues that the record does not support the Board’s Findings of Fact contained in Paragraph 14.

Paragraph 14 states that “Investigator Parker received an email from Mr. May to an ABC-licensed wholesaler explaining that a bar manager was ‘overzealous in his orders.’” *Id.* at ¶ 14. The Order then concludes that “an earlier fax to the wholesaler demonstrates that Mr. May, not a bar manager, ordered the beverages from the wholesaler.” *Id.*

The Board’s Findings of Fact relied on the testimony of Investigator Parker, the email forwarded by Mr. May, and a fax sent to one of the wholesalers. Shaw’s Tavern, LLC, t/a Shaw’s Tavern, Board Order No. 2011-458, at ¶ 14; see also *ABRA Case No. 11-CMP-00314, Exhibits Nos. 10, 11*. The Board is not obligated to credit Mr. May’s written excuse that a shadowy, unnamed employee altered the notices and sent them to the wholesalers—an excuse we deem to be untrustworthy and completely fabricated. See *Exhibit No. 11*.

Therefore, the Board affirms its Findings of Fact in paragraph 14, because we based our determination solely on the substantial evidence contained in the record and our view that the excuse submitted by Mr. May was not credible.

E. The Board based its Findings of Fact in Paragraph 16 on the substantial evidence contained in the record.

The Board found in Paragraph 16 that “Various websites indicate that the Applicant held a number of soft openings in the establishment.” Shaw’s Tavern, LLC, t/a Shaw’s Tavern, Board Order No. 2011-458, ¶ 16. In addition, we also found that “The

'Broads of the Beltway' blog . . . noted that the establishment intended to sell individual desserts for \$3.00." Id. (citing *Exhibit No. 20*).

Under general principles of administrative law, "duly admitted and reliable hearsay may constitute substantial evidence." Compton v. District of Columbia Bd. Psychology, 858 A.2d 470, 476 (D.C. 2004). "The weight . . . given to any piece of hearsay evidence is a function of its truthfulness, reasonableness, and credibility." Id. at 477.

The record in this matter persuades us that the information contained in the websites offered into evidence are accurate, credible, and reliable. We find it hard to believe that the owners of the Broads of the Beltway blog incorrectly advertised that the establishment was selling desserts when they were the ones hosting the event at the establishment on July 16, 2011. *Motion for Reconsideration*, Attachment G. Further, the websites submitted into evidence are credible, because we cannot imagine that scores of commentators on the blogs would pretend to attend an event and describe receiving free food and drinks. Shaw's Tavern, LLC, t/a Shaw's Tavern, Board Order No. 2011-458, ¶ 16. Indeed, the photographs posted on the website, showing patrons consuming alcohol at the establishment, further bolster the websites' credibility. Id. Finally, we note that the Applicant did not present any evidence contradicting the information contained in the websites during the hearing.

Consequently, we reject Mr. Fathi's arguments, because the record contains sufficient evidence to demonstrate the reliability and credibility of the websites introduced into evidence.

III. THE BOARD IS ENTITLED TO FIND MR. FATHI UNFIT FOR LICENSURE BASED ON HIS LACK OF KNOWLEDGE OF THE ABC-LAWS.

Mr. Fathi argues that it is unfair to require licensees to have knowledge of the liquor laws as a condition of licensure. We disagree.

Under § 25-301(a)(1), the Board must be satisfied that the Applicant "is of good character and generally fit for the responsibilities of licensure." D.C. Code § 25-301(a)(1) (West Supp. 2011). An applicant's knowledge and familiarity with the District of Columbia's alcoholic beverage control laws are an important factor in making this determination. Gerber v. District of Columbia Alcoholic Beverage Control Bd., 499 A.2d 1193, 1196 (D.C. 1985).

In Gerber, the Petitioner contested the Board's issuance of a license to John Mathisen. Gerber v. District of Columbia Alcoholic Beverage Control Bd., 499 A.2d 1193, 1194-95 (D.C. 1985). The Court of Appeals affirmed the Board's decision regarding Mr. Mathisen's personal qualifications because he "was a police officer with the Maryland State Police Department for eleven years prior to opening the convenience store at the Wisconsin Avenue location" and "was fully familiar with the District's laws

relating to the sale of alcoholic beverages, the hours that they may be sold and the age limitations for purchasers.” *Id.* at 1195. The court noted that the Board was also justified in finding that a different applicant was not qualified for licensure at the same location, because that applicant “ha[d] not indicated that [he] would take any special precautions to prevent the sale of alcoholic beverages to underage school children.” *Id.* at 1196. Thus, the Court of Appeals affirmed the Board’s decision regarding the qualifications of Mr. Mathisen. *Id.* at 1198.

We further note that the District of Columbia’s alcoholic beverage control laws recognize “that the selling of alcohol is something much more than the selling [other products]” because the sale of alcohol can lead to “addiction, violence, drunk driving, and the creation of public nuisances.” Council of the District of Columbia Committee on Consumer Regulatory Affairs, Report on Bill 13-449, the “Title 25, D.C. Code Enactment and Related Amendments Act of 2000,” 4 (Nov. 20, 2000). As a result, “holding . . . an ABC license [is] an honor” and we expect licensees to “act like honorable members of the community” *Id.*

It is not unrealistic for the Board to expect licensees to have a basic understanding of the law before issuing them a liquor license. Selling alcohol is a privilege, not a right, because the sale and consumption of alcohol has the potential to cause harm to both individuals and the community. Mr. Fathi’s lack of experience in the hospitality industry and testimony that he would rely exclusively on John Cochran to manage the establishment is insufficient evidence that Mr. Fathi is competent to run an ABC-establishment. *Shaw’s Tavern, LLC, t/a Shaw’s Tavern*, Board Order No. 2011-458, at ¶¶ 2, 30. In addition, similar to the rejected applicant in *Gerber*, it would be irresponsible to issue Mr. Fathi an ABC-license when the record shows Mr. Fathi had full knowledge of his manager’s unlawful activity, yet was too ignorant of the law to prevent it. *Id.* Consequently, unlike Mr. Mathisen in *Gerber*, we have no confidence that Mr. Fathi has the ability to uphold the ABC-laws.

Therefore, the Board affirms its conclusion that Mr. Fathi lacks sufficient knowledge of the ABC-laws and is unfit for licensure.

IV. THE CONSUMPTION OF ALCOHOL ON THE ESTABLISHMENT’S PREMISES WAS STRICTLY PROHIBITED BY § 25-102(d) BECAUSE MR. FATHI’S TAVERN WAS A PREMISE WHERE FOOD AND BEVERAGES WERE SOLD.

Mr. Fathi’s application for a tavern license demonstrates that he was operating an establishment that provided food and beverages in exchange for compensation; thus, § 25-102(d) and 23 DCMR § 213.1 prohibited Mr. Fathi from permitting the consumption of alcohol on his premises on June 30, 2011, July 16, 2011, and July 20, 2011, without a license. Furthermore, the exception provided in § 213.1 does not apply to the events on June 30, 2011, and July 16, 2011, because they were not private events, closed to the public. Finally, under § 25-102(d) and 23 DCMR § 213.1, the Applicant’s event on July

16, 2011, was not gratuitous, where patrons gave donations to a charity in exchange for food and beverages from the establishment.

A. Mr. Fathi could not permit the consumption of alcohol on his premises, because he operated an establishment that provides food, beverages, or entertainment in exchange for compensation.

Mr. Fathi argues that he did not violate § 25-102(d), because the establishment provided food and alcoholic beverages for free on June 30, 2011, and July 16, 2011, and the events were closed to the public. He, further, argues that § 25-102(d) and 23 DCMR § 213.1 require the Board to look at an event on a case-by-case basis when determining whether an operator provides food, beverages, and entertainment for compensation. This is an incorrect interpretation of the law.

Under § 213.1, “if the operator of the premises provides entertainment, food, or nonalcoholic beverages or rents out the facility for compensation, a license shall be required.” 23 DCMR § 213.1 (2008); see also § 25-102(d) (West Supp. 2011). Thus, the question is not whether Mr. Fathi received compensation at the time he provided food, beverages, or entertainment. Instead, the question is whether Mr. Fathi was *operating* a premise where food, nonalcoholic beverages, or entertainment are provided for compensation.

Determining whether Mr. Fathi was operating such a premise, requires the Board to analyze the establishment’s business model. Here, Mr. Fathi applied for a tavern license. A tavern is defined as a business that “[i]s regularly used and kept open as a place where food and alcoholic beverages are served.” D.C. Code § 25-101(52)(A) (West Supp. 2011). Thus, Mr. Fathi, as an operator of a tavern, regardless of whether it had officially opened or had yet to sell food, could not permit the consumption of alcohol on its premises unless it had obtained a license from the Board. As a result, the Board was entitled to find that Mr. Fathi violated § 25-102(d) on June 30, 2011, July 16, 2011, and July 20, 2011, because he permitted the consumption of alcohol on his premises.

Furthermore, even if we accepted Mr. Fathi’s case-by-case interpretation of § 25-102(d), we would still reach the same conclusion, because we remain convinced that the establishment sold desserts for \$3.00 at the July 16, 2011, fundraiser and permitted the consumption of alcohol on the premises. Shaw’s Tavern, LLC, t/a Shaw’s Tavern, Board Order No. 2011-458, ¶ 16. As such, regardless of the interpretation used by the Board, there is sufficient evidence in the record to support the conclusion that Mr. Fathi violated § 25-102(d).

B. The exception to § 25-102(d) described by 23 DCMR § 213.1 does not apply to the events held on June 30, 2011, and July 16, 2011, because they were not closed to the public.

Mr. Fathi argues that the events held on June 30, 2011, and July 16, 2011, were closed to the public. We disagree.

Under 23 DCMR § 213.1, “A license shall not be required for any event *closed to the public*, where alcoholic beverages are provided gratuitously.” § 213.1 (emphasis added). In addition, the regulation further states that “A license shall not be required if the operator of the premises does not provide services for the consumption of alcoholic beverages which are provided, gratuitously, to *guests of a private function* on the premises.” *Id.* (emphasis added)

The facts show that the events at the establishment on June 30, 2011, and July 16, 2011, were open to anyone who wanted to attend. On June 30, 2011, the establishment hosted a community walk that was advertised on the internet as open to everyone in the community. *Shaw’s Tavern, LLC, t/a Shaw’s Tavern*, Board Order No. 2011-458, at ¶ 16. Further, the event on July 16, 2011, offered free admission; thus, it was open to the public as well. *Id.* at ¶ 16; see also *Motion for Reconsideration*, Attachment G (One commentator noted that his friends only found out about the free food and drinks and attended the event, because they just happened to be walking past the establishment.) As such, because the events on June 30, 2011, and July 16, 2011, were open to the public and cannot be considered a private function, Mr. Fathi does not qualify for the exemption contained in § 213.1.

Therefore, even if we were to accept Mr. Fathi’s case-by-case interpretation of § 213.1, he still would not qualify for the exception, because the events held on June 30, 2011, and July 16, 2011, cannot be considered a private function or closed to the public.

C. Under § 25-102(d) and 23 DCMR § 213.1, the Applicant’s event on July 16, 2011, was not gratuitous, where patrons gave donations to a charity in exchange for food and beverages from the establishment.

Mr. Fathi’s argument that the event on July 16, 2011, was gratuitous is supported neither by the record nor by the law.

Under the alcoholic beverage control laws, the term “sale” is, in part, defined as “. . . bartering, delivering for value or in any way other than by purely gratuitously transferring.” D.C. Code § 25-101(45) (West Supp. 2011).

We consider the distribution of alcohol on July 16, 2011, a sale, because patrons gave money to Women Empowered Against Violence (WEAVE) in exchange for food and alcohol provided by the establishment. According to the blog post submitted with the Applicant’s Motion, “Shaw’s Tavern . . . provided their full menu and drinks for free in exchange for donations being made to [WEAVE] . . . [W]e raised almost \$1000 for WEAVE . . .” *Motion for Reconsideration*, Attachment G. The definition of “sold” in § 25-102(d) includes the term bartering. Therefore, we consider patrons giving money to a third party in exchange for receiving food and alcohol from an establishment a sale, because such activity qualifies as a form of “bartering.” §§ 25-101(45), 25-102(d); 23 DCMR § 213.1.

Consequently, even if we were to accept Mr. Fathi's case-by-case interpretation of § 213.1, he still would not qualify for the exception, because the alcohol delivered to patrons on July 16, 2011, was not delivered gratuitously. We, further, emphasize that such a strict interpretation of the term "sale" is called for, because allowing establishments without ABC licenses to distribute alcohol is a threat to public safety, and undermines the District of Columbia's efforts to fight alcohol-related crime, drunk driving, and underage drinking.

CONCLUSION

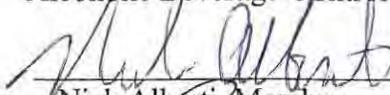
Therefore, we affirm our conclusion in Board Order No. 2011-458 that Mr. Fathi is unfit for licensure, and deny the Motion for Reconsideration.

Separately, we also note that Mr. Fathi's Motion for Reconsideration further supports the Board's conclusion that he is unfit for licensure. Under 11 DCMR § 3203.1, "no person shall use any structure, land, or part of any structure or land for any purpose until a certificate of occupancy has been issued to that person stating that the use complies with" Title 11 and Title 12 of the District of Columbia Municipal Regulations. 11 DCMR § 3203.1 (West Supp. 2011). Yet, Mr. Fathi, in his Motion, tells us that the District of Columbia Department of Consumer and Regulatory Affairs did not issue a Certificate of Occupancy for the premises until July 26, 2011. *Motion for Reconsideration*, Attachment F. As a result, under § 3203.1 Mr. Fathi was not authorized to hold events and fundraisers at the establishment on either June 30, 2011, or July 16, 2011. This revelation is especially disconcerting, because we would expect someone with Mr. Fathi's experience as a developer to know this rule. Shaw's Tavern, LLC, t/a Shaw's Tavern, Board Order No. 2011-458, at ¶ 4.

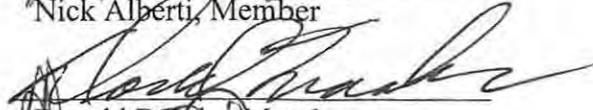
ORDER

Therefore, it is hereby **ORDERED** on this 25th day of January 2012, that the Motion for Reconsideration filed by Abbas Fathi on behalf of Shaw's Tavern, LLC, t/a Shaw's Tavern (Applicant), at premises 520 Florida Avenue, N.W., Washington, D.C., is hereby **DENIED**.

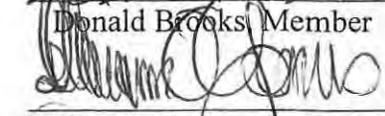
District of Columbia
Alcoholic Beverage Control Board



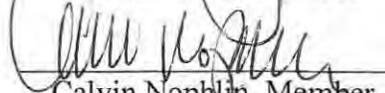
Nick Alberti, Member



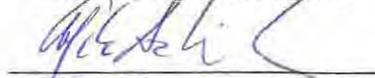
Donald Brooks, Member



Herman Jones, Member



Calvin Nophlin, Member



Mike Silverstein, 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, 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, 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).