

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

_____)	
In the Matter of:)	
)	
Tangier Corporation)	License No.: 87902
t/a Tangier Lounge)	Case No.: 12-CMP-00677
)	Order No.: 2013-585
)	
)	
)	
Holder of a Retailer's Class CR License)	
at premises)	
2305 18th Street, N.W.)	
Washington, D.C. 20009)	
_____)	

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

ALSO PRESENT: Tangier Corporation, t/a Tangier Lounge, Respondent

Gina Mondesir, Esq., 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 DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

INTRODUCTION

In Board Order No. 2013-384, the Alcoholic Beverage Control Board (Board) found Tangier Corporation, t/a Tangier Lounge, (Respondent) guilty of violating District of Columbia (D.C.) Official Code § 25-762 and 23 DCMR § 705.9 and required the Respondent to pay a \$3,000 fine for the violations. In re Tangier Corporation, t/a Tangier Lounge, Case No. 12-CMP-00677, Board Order No. 2013-384, 5-6 (D.C.A.B.C.B. Sept. 25, 2013).

Subsequently, the Respondent filed a Motion for Reconsideration, requesting that the Board dismiss the charges.¹ Mot. to Recon., 9. The basis of the Respondent's Motion is that the Alcoholic Beverage Regulation Administration (ABRA) allegedly failed to provide the Respondent's attorney with a "copy of the instruction manual for investigators on the manner in which to conduct an investigation." *Id.* at 4. The Respondent further adds that, supposedly, at an unidentified date and time, Supervisory Investigator Keith Gethers confirmed that such a manual existed and refused to provide it to the Respondent's counsel. *Id.* According to the Respondent, this alleged action on the part of ABRA violates § 2-536 of the District's Freedom of Information Act (FOIA), even though ABRA's records indicate that the Respondent has not, at any point, filed a written FOIA request with ABRA's Public Information Office (PIO).²

The Board also notes that the Respondent challenges the credibility determination made by the Board in relation to the testimony provided by ABRA's investigator. *Id.* at 7.

DISCUSSION

I. THE RESPONDENT WAIVED THE OPPORTUNITY TO PRESENT NEW INFORMATION INTO THE RECORD BECAUSE IT FAILED TO EXERCISE DUE DILIGENCE BY NOT FOLLOWING THE DISTRICT'S FOIA PROCEDURES.

The Respondent's Motion for Reconsideration demonstrates that the Respondent failed to exercise due diligence in pursuit of the "instruction manual" by not following the procedures outlined by the FOIA; therefore, the Respondent is prohibited from relying on evidence not in the record.³

A motion for reconsideration filed with the Board must "state briefly the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought."

¹ Even if correct, we note that dismissal of the charges is not an appropriate remedy based on the allegations raised by the Respondent. Instead, the more appropriate remedy is to permit an additional hearing where the Respondent would be permitted to cross-examine the investigator based on the allegedly withheld document. Because the Respondent failed to follow the FOIA in this case, the Board finds that such a remedy is not available in this matter. See 23 DCMR § 1717 .1 (West Supp. 2013) (permitting additional information to be submitted into the record post-hearing); 23 DCMR § 1719.4 (West Supp. 2013) (permitting new matters to be considered on reconsideration if filed with an appropriate affidavit); 23 DCMR § 1611.1 (West Supp. 2013) (permitting additional hearings to obtain further information from the parties).

² ABRA's Public Information Office (PIO) is tasked with managing the agency's record management program, and receiving and complying with all FOIA requests submitted to the agency. The Board takes administrative notice of its records, which indicate that ABRA's Public Information Office (PIO) has no record of the Respondent submitting a written FOIA request with the agency's PIO. Therefore, neither the ABRA nor the Board has made any determination as to whether the allegedly requested document exists or is subject to withholding.

³ While the Board addresses the Respondent's argument on the merits, the Board sees no evidence of the Respondent raising its FOIA argument outside of its Proposed Findings of Fact and Conclusions of Law; as a result, the Respondent may have failed to exhaust its administrative remedies by failing to raise it at the Show Cause Hearing.

23 DCMR § 1719.3 (West Supp. 2013). Further, “If a petition is based in whole or in part on a new matter, that matter shall be set forth in an affidavit and 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 (West Supp. 2013)

In this case, the Respondent allegedly requested an “instruction manual” for investigators from ABRA’s Supervisory Investigator. The Supervisory Investigator then allegedly did not provide this “instruction manual” to the Respondent.⁴

Under the District’s FOIA, “The public policy of the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2-531.

Any person has a right to inspect, and at his or her discretion, to copy any public record of a public body, except as otherwise expressly provided by § 2-534, in accordance with reasonable rules that shall be issued by a public body after notice and comment, concerning the time and place of access.

D.C. Official Code § 2-532(a). Under the Board’s regulations, “The records of the Board shall be available for inspection and copying during normal business hours without appointment at the request of any interested party or member of the public” 23 DCMR § 1708.1 (West Supp. 2013). The District’s FOIA further states,

. . . any person denied the right to inspect a public record of a public body may petition the Mayor to review the public record to determine whether it may be withheld from public inspection. Such determination shall be made in writing with a statement of reasons therefor in writing within 10 days (excluding Saturdays, Sundays, and legal holidays) of the submission of the petition.

D.C. Official Code § 2-537(a). Finally, the FOIA states that if a document is withheld by the Mayor, the petitioner is entitled to seek declaratory and injunctive relief in the Superior Court for the District of Columbia and compel production. § 2-537(a)(1)-(2).

In light of these rules and regulations, the Board denies the Motion for Reconsideration for the following separate reasons:

First, the Respondent has not filed a proper FOIA request with ABRA. It is not the job of ABRA’s Supervisory Investigator to comply with FOIA requests; instead, it is the responsibility of ABRA’s Public Information Office to comply with such requests. As a result, the Respondent had no right to expect ABRA’s Supervisory Investigator to search for or provide the requested documents. Consequently, the Board finds that the Respondent failed to exercise due diligence by relying solely on ABRA’s Supervisory Investigator to provide the requested information.

⁴ The Board notes that it has not determined whether such an “instruction manual” exists at this time, because the Respondent’s failure to comply with the FOIA makes such a determination unnecessary.

Thus, the Respondent does not have the right to enter new evidence into the record under the Board's motion for reconsideration regulations.

Second, nothing prevented the Respondent from walking up to the agency's front desk to request access to the Board's files under § 1708.1, or filing a motion with the Board requesting such access before the Show Cause Hearing. As a result, the Respondent failed to exercise due diligence before the Show Cause Hearing by failing to take advantage of its rights under § 1708.1 before the Show Cause Hearing; thus, waiving its right to enter new evidence into the record.

Third, even if the Respondent was deemed to have filed a proper FOIA request that was denied by ABRA, the Respondent failed to follow the appeals process outlined by the FOIA statute. Under § 2-537(a), when an agency withholds information under FOIA, petitioners may file an appeal with the Mayor. There is no indication in the record that the Respondent has filed an appeal with the Mayor at any point before the Show Cause Hearing. Therefore, we find that the Respondent failed to exercise due diligence and has waived the right to enter new evidence into the record.

II. THE BOARD'S CREDIBILITY DETERMINATION IS SUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD.

In addition, the Board affirms its reliance on the testimony of ABRA's Investigator. 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). In Board Order No. 2013-384, the Board based its credibility determination of the following facts: (1) the Respondent "conceded . . . that the curtain does not prevent someone on the exterior of the establishment from viewing the interior of the establishment"; (2) the Respondent presented "conflicting testimony as to whether beer bottles were situated on the bar"; and (3) the presence of employees is irrelevant to the determination as to whether the establishment permitted the consumption of alcoholic beverages after-hours. In re Tangier Corporation, t/a Tangier Lounge, Board Order No. 2013-384, at 4. As a result, the Board's credibility determination is firmly based on the substantial evidence contained in the record.

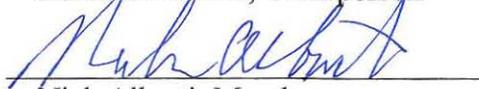
ORDER

Therefore, based on the foregoing findings of fact and conclusions of law, the Board, on this 4th day of December 2013, **DENIES** the Motion for Reconsideration filed by Tangier Corporation, t/a Tangier Lounge. The ABRA shall deliver copies of this Order to the Government and the Respondent.

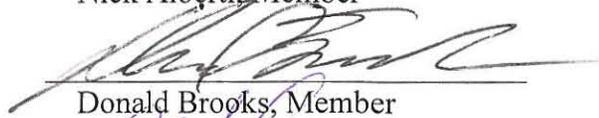
District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



Nick Alberti, Member



Donald Brooks, Member



Mike Silverstein, Member

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).