THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
1218 Wisconsin Avenue, Inc. t/a Third Edition/The Taqueria	License No.:	604
	Case Nos.:	11-251-00065 11-251-00069
	Order No.:	2011-493
Holder of a Retailer's Class CT License at premises 1218 Wisconsin Avenue, N.W. Washington, D.C. 20007		

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

ALSO PRESENT: 1218 Wisconsin Avenue, Inc., t/a Third Edition/The Taqueria, Respondent

Andrew Kline, on behalf of the Respondent

Louise Phillips, 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

On May 27, 2011,[1] the Alcoholic Beverage Control Board (Board) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated May 25, 2011, on 1218 Wisconsin Avenue, Inc., t/a Third Edition/The Taqueria, (Respondent) at premises 1218 Wisconsin Avenue, N.W., Washington, D.C., charging the Respondent, in Case Nos. 11-251-00065 and 11-251-00069, with the following violations, which if proven true, would justify the imposition of a fine, suspension, or revocation of the Respondent's ABC-license:

[1] The date of service listed on ABRA's Service Form is May 27, 2010, which is incorrect. We have indicated the correct date of service in the Board's Order.

Charge I: On January 27, 2011, and February 17, 2011, the Respondent violated District of Columbia Official Code § 25-783(b) by failing to take steps reasonably necessary to ascertain whether individuals served alcoholic beverages by the Respondent were of the legal drinking age, for which the Board may take the proposed action pursuant to District of Columbia Official Code § 25-823.

Charge II: On January 27, 2011, and February 17, 2011, the Respondent violated District of Columbia Official Code § 25-781(a)(1) by permitting the sale of an alcoholic beverage to persons under twenty one years of age, for which the Board may take the proposed action pursuant to District of Columbia Official Code § 25-823.

Before the Show Cause Hearing on November 2, 2011, the Board rejected three Offers-in-Compromise (OICs) submitted by the parties.

On August 3, 2011, the Government presented the first OIC to the Board. The Government offered to dismiss Charge II, in exchange for the Respondent paying a $10,000 fine, $5,000.00 to be paid on August 3, 2011, and $5,000.00 to be paid within 30 days. *Transcript* (*Tr.*), August 3, 2011 at 3-4. The Respondent also agreed to a fifteen-day suspension of its license; five days to be stayed for one year pending no further violations. *Tr.*, 8/3/11 at 4. The Government also told the Board that the agreement would trigger the imposition of an additional three-day suspension for a previous violation; however, the Respondent's investigative history did not support this contention. *Tr.*, 8/3/11 at 4; *ABRA Licensing File No. 604*, *Investigative History*. The Respondent also agreed to place an ad in The Hoya, Georgetown University's student newspaper, which would inform the community that the establishment does not accept fake identification and valid identification is required for entry. *Tr.*, 8/3/11 at 5. Finally, the establishment terminated the employees and managers that were working at the time of the violations, and provided those names to the Government. *Tr.*, 8/3/11 at 5.

On September 21, 2011, the Government presented the second OIC to the Board. The Government offered to dismiss Charge I, in exchange for the Respondent paying a $10,000.00 fine, $5,000.00 to be paid on August 3, 2011, and $5,000.00 to be paid within 30 days. *Tr.*, September 21, 2011 at 5. The Respondent also agreed to a fifteen-day suspension of its license; five days to be stayed for one year pending no further violations. *Tr.*, 9/21/11 at 5. The Government indicated that the offer would treat the violations as one primary tier offense in the Respondent's investigative history. *Tr.*, 9/21/11 at 6.

On October 12, 2011, the Government presented the third OIC to the Board. With the consent of the Respondent, the Government offered to amend Charge I to address a violation of § 25-781, instead of a violation of § 25-783, and dismiss Charge II. *Tr.*, October 12, 2011 at 5. The offer further required the Respondent to pay a $6,000.00 fine to be paid in ten days; $3,000.00 for the violations occurring on January 27, 2011, and $3,000.00 for the violation occurring on February 17, 2011. *Tr.*, 10/12/11 at 6, 9. The Respondent also agreed to serve a ten-day suspension; five days to be served for the violations occurring on January 27, 2011, and

five days to be served for the violation occurring on February 17, 2011. *Tr.*, 10/12/11 at 6. The Government indicated that the offer would treat the violations as one primary tier offense in the Respondent's investigative history. *Tr.*, 10/12/11 at 9.

The Board rejected these OICs, because the penalty appeared to be inconsistent with the alleged violations. The first OIC resulted in the Respondent being charged with a first time violation of § 25-783(b), which mandates a fine range of $1,000.00 to $2,000.00 and a suspension of the Respondent's license for five consecutive days. D.C. Code § 25-783(c)(1) (West Supp. 2011). Nevertheless, the $10,000.00 fine and 15-day suspension comported with a fine for a third violation of § 25-781(a)(1). The parties explained that the higher than statutorily required penalty was intended to account for the egregious nature of the violations of § 25-781(a)(1) on January 27, 2011, and February 17, 2011. We rejected this OIC, because the offer would treat multiple primary tier violations as one primary tier offense in the Respondent's investigative history. For the same reason, we also rejected the second and third OIC offered by the parties.

The Board was fundamentally concerned with setting a precedent that allows violators to exchange larger than statutorily required fines for fewer violations in their investigative histories. We reject this practice because such fines may be of no real consequence or deterrence to financially sound establishments. As such, in reviewing OICs, the Board will place more emphasis on creating accurate and representative investigative histories rather than generating large fines.

After the Board rejected the OICs submitted by the parties, the Government and the Respondent proceeded to a Show Cause Hearing on November 2, 2011. The Board granted the Government's Motion to Dismiss Charge I, and the Respondent admitted it committed the violation indicated in Charge II. *Transcript (Tr.)*, November 2, 2011 at 4-5. Thus, the only issue for the Board's consideration is determining an appropriate penalty for the violation admitted by the Respondent.

The Board, having considered the evidence, the arguments of the parties, and all documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. In Case Nos. 11-251-00065 and 11-251-00069, the Board issued a Notice, dated May 25, 2011. See *ABRA Show Cause File Nos. 11-251-00065 and 11-251-00069.*

2. The Respondent holds a Retailer's Class CT License and is located at 1218 Wisconsin Avenue, N.W., Washington, D.C. See *ABRA Licensing File No. 604.*

3. The Show Cause Hearing in this matter was held on November 2, 2011, and the Notice charges the Respondent with violating District of Columbia Official Code §§ 25-781(a)(1) and 25-783(b).

4. At 12:15 a.m., on January 27, 2011, officers with the Metropolitan Police Department (MPD) entered the Respondent's establishment. *Notice of Status Hearing and Show Cause Hearing*, 2 (May, 25, 2011) (*Notice*). The officers found fourteen patrons under the age of twenty-one consuming alcoholic beverages inside the establishment. *Notice*, 2. Twelve of the underage individuals used fake identification to obtain alcoholic beverages inside the establishment. *Notice*, 2-3 (See Nos. 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, and 14). In addition, two of the underage patrons simply used another person's identification. *Notice*, 2. The underage patrons using other individuals' identifications did not match the photographs contained in the identifications. *Notice*, 2. Finally, the officers found five additional patrons under the age of twenty-one that did not possess alcoholic beverages, even though the establishment requires patrons to be twenty-one or older to enter. *Notice*, 3.

5. MPD officers entered the establishment again on February 17, 2011, at approximately 11:55 p.m. *Notice*, 3. The officers found a twenty-year-old female patron consuming a vodka-cranberry inside the establishment. *Notice*, 3. The patron presented the officers with a friend's Texas identification card. *Notice*, 3. The photograph contained in the identification did not match the female patron. *Notice*, 3.

6. The Respondent admits that it committed the offense contained in Charge II. *Tr.*, November 2, 2011 at 4-5.

7. The Respondent has not previously violated § 25-781(a), or received a warning for violating § 25-781(a) in the past. See *ABRA Licensing File No. 604, Investigative History.*

CONCLUSIONS OF LAW

8. The Board has the authority to suspend or revoke the license of a licensee who violates any provision of Title 25 of the District of Columbia Official Code pursuant to D.C. Official Code § 25-823(1) (2001). Additionally, pursuant to the specific statutes under which the Respondent was charged, the Board is authorized to levy fines. District of Columbia Official Code § 25-830 and 23 DCMR § 800, *et seq.*

I. Charge II

9. We find that the Respondent delivered alcohol to patrons under the age of twenty-one in violation of § 25-781(a)(1). Under § 25-781(a)(1), an establishment may not "[sell] or deliver alcoholic beverages" to "[a] person under 21 years of age, either for the person's own use or for the use of any other person . . . ." D.C. Code § 25-781(a)(1) (West Supp. 2011). Here, the Respondent admits to the offense listed in Charge II, which indicates that the establishment sold alcohol to underage patrons. Supra, at ¶ 6. Specifically, the record shows that the establishment served fourteen underage patrons on January 27, 2011, and one underage female patron on February 17, 2011. Supra, at ¶ 4. As such, the Respondent is liable for violating § 25-781(a)(1).

II. Penalty

10. We further find that the § 25-781 violation contained in Charge II is egregious, and does not merit a warning.

11. Under § 25-830,

> Except for an egregious violation . . . no licensee shall be found to be in violation of a first-time violation of *§ 25-781* . . . unless the licensee has been given a written warning, or received a citation, for the violation, or had an enforcement proceeding before the Board, during the 4 years preceding the violation.

12. The Board has defined an egregious sale to minor violation as one where the licensee "intentionally sold an alcoholic beverage to a minor." 23 DCMR § 807.1 (2008). The courts define general intent "as the intent to do the prohibited act." Morgan v. District of Columbia, 476 A.2d 1128, 1132 (D.C. 1984). Further, in determining intent, it has been said, "the existence of [a] required state of mind is to be determined subjectively" through inference. Bethea v. U.S., 365 A.2d 64, 87 (D.C. 1976).

13. We find that the establishment intended to sell alcoholic beverages to minors on January 27, 2011, and February 17, 2011. We cannot attribute the repeated sale to minor violations witnessed by MPD on separate days to mere sloppiness, or negligence, on the part of the Respondent, or one of its employees. Supra, at ¶¶ 4-5. The record shows that two underage patrons on January 27, 2011, and another underage patron on February 17, 2011, presented another person's identifications to the Respondent's staff instead of their own; yet, even though the pictures in the identifications did not match the underage patrons, the Respondent's staff still admitted them into the establishment, and served them alcoholic beverages. Supra, at ¶¶ 4-5. Under these circumstances, we are left to believe that the Respondent's business practice is to merely "go through the motions" of checking identifications, without actually checking them. As such, we find that the establishment intended to sell alcoholic beverages to patrons under the age of twenty-one.

14. Under the alcoholic beverage control laws, the maximum penalty for a first-time sale to minor offense is a suspension of five days and a $3,000.00 fine. D.C. Code § 25-781(f) (West Supp. 2011). Based on the egregiousness of the offense, we find that the maximum penalty is an appropriate punishment for the Respondent.

15. Finally, the Respondent has indicated that it is taking affirmative steps to reform its business practices and improve the establishment's reputation in the community. We sincerely hope the Respondent's management is successful, because business as usual at Third Edition is currently unacceptable.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board, on this 14th day of December 2011, finds that the Respondent, 1218 Wisconsin Avenue, Inc., t/a Third

Edition/The Taqueria, violated D.C. Official Code § 25-781(a)(1). The Board hereby **ORDERS** that:

(1) Charge I is dismissed;

(2) The Respondent shall pay a fine in the amount of $3,000.00 by no later than thirty (30) days from the date of this Order;

(3) The Respondent shall receive a suspension of its license for five (5) days; and

(4) The Respondent shall serve its suspension December 29, 2011, through January 2, 2012.

The Alcoholic Beverage Regulation Administration shall deliver copies of this Order to the Government and the Respondent.

District of Columbia
Alcoholic Beverage Control Board

Nick Alberti, Interim Chairperson

Donald Brooks, Member

Herman Jones, Member

Calvin Nophlin, 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, 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 (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).