

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

_____)	
In the Matter of:)	
)	
1218 Wisconsin, Inc.)	License No.: 604
t/a Third Edition)	Case No.: 12-CMP-00153
)	Order No.: 2013-026
)	
Holder of a Retailer's Class CT License)	
at premises)	
1218 Wisconsin Avenue, N.W.)	
Washington, D.C. 20007)	
_____)	

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

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

Andrew Kline, Non-Lawyer Representative, on behalf of the Respondent

Louise Phillips, Esq., Assistant Attorney General,
on behalf of the District of Columbia

Martha Jenkins, Esq., General Counsel
Alcoholic Beverage Regulation Administration

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

INTRODUCTION

We find that the Respondent violated the prohibition on live entertainment contained in Section 9 of its Voluntary Agreement on April 14, 2012, and April 15, 2012, by permitting a disc jockey to perform inside the establishment. We impose a \$500 fine on the Respondent for the violation.

Procedural Background

On July 17, 2012, the Alcoholic Beverage Regulation Administration (ABRA) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated July 11, 2012, on the Respondent located at premises, 1218 Wisconsin Avenue, N.W., Washington, D.C. The Notice charged the Respondent with the following violation, which if proven true, would justify the imposition of a fine, suspension, or revocation of the Respondent's ABC-license:

Charge I: [On April 14, 2012, and April 15, 2012] [y]ou violated paragraph 9 of the Voluntary Agreement (VA), which was accepted by the Board on March 13, 2002, in violation of D.C. Official Code § 25-446 . . . , for which the Board may take the proposed action pursuant to . . . D.C. Official Code § 25-823(6).

ABRA Show Cause File No. 12-CMP-00153, Notice of Status Hearing and Show Cause Hearing (Jul. 11, 2012).

The parties came before the Alcoholic Beverage Control Board (Board) for a Show Cause Status Hearing on September 12, 2012. The matter proceeded to a Show Cause Hearing on November 14, 2012, where the Government sought to prove the charge through substantial evidence.

FINDINGS OF FACT

The Board having considered the evidence contained in the record, the testimony of witnesses, the arguments of the parties, 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 86037. See ABRA Licensing File No. 604.
2. The Respondent entered into a Voluntary Agreement on December 19, 2001, with ANC 2E, which was approved by the Board on March 13, 2002. In re 1218 Wisconsin, Inc., t/a Third Edition, Case No. 6864-01/01SP, Board Order No. 2002-65, 1-2 (D.C.A.B.C.B. Mar. 13, 2002). Section 9 of the Voluntary Agreement states,

There shall be no live entertainment, except that the Applicant may continue to provide its weekly single acoustical guitar performance. Applicant may provide recorded music and dancing by patrons with a dance floor no larger than 400 square feet, provided that no noise is generated external to the Establishment in violation of the law, included 23 DCMR 905.

Id. at *Voluntary Agreement*, § 9. The Respondent and Advisory Neighborhood Commission (ANC) 2E executed an amendment to the 2002 Voluntary Agreement, but the amendment did not amend or alter Section 9. In re 1218 Wisconsin Avenue Incorporated, t/a Third Edition/The

Taqueria, Case No. 10-PRO-00144, Board Order No. 2011-128, *Amendment to Agreement*, 1-2 (D.C.A.B.C.B. Feb. 16, 2011).

3. The parties stipulated to the fact that the establishment has a disc jockey booth and has made use of the booth for the past forty-four years. *Transcript (Tr.)*, November 14, 2012 at 4.

4. Alcoholic Beverage Regulation Administration (ABRA) Investigator Felicia Martin visited the Respondent's establishment on April 14, 2012, and April 15, 2012, to determine whether the Respondent's operations conformed with its Voluntary Agreement. *Id.* at 11. On Saturday, April 14, 2012, Investigator Martin observed a disc jockey inside the Respondent's premises, near the establishment's front window. *Id.* at 11-12. Investigator Martin then entered the establishment and spoke with one of the Respondent's employees, Jeffrey Smith. *Id.* at 12-13. Mr. Smith told Investigator Martin that the establishment had another disc jockey performing on the second floor of the establishment. *Id.* at 13.

5. Investigator Martin then returned to the establishment on April 15, 2012. *Id.* The Respondent's manager, Mr. Goss, admitted that the establishment had a disc jockey on the second floor, which Investigator Martin observed during her visit. *Id.* at 15. Specifically, she observed an employee wearing headphones in the establishment's disc jockey booth, and Investigator Martin saw the employee taking requests from patrons. *Id.*

6. Gregory Talcott also testified during the Show Cause Hearing. *Id.* at 35. He serves as President of the Respondent's corporation and has worked for the Respondent since 1977. *Id.* According to Mr. Talcott, the Respondent has always had a disc jockey perform at the establishment. *Id.* at 36-7. Furthermore, he noted that, in the past, the establishment has had a disc jockey perform five nights per week. *Id.* at 50.

7. Mr. Talcott observed that the establishment's disc jockeys only use the establishment's microphone to announce last call and inform the crowd when the establishment has closed. *Id.* at 69. He further noted that the establishment's disc jockeys primarily select and play music with input from the establishment's management, and they occasionally take requests from patrons. *Id.* at 69, 71-72.

8. Mr. Talcott interpreted Section 9 of the Voluntary Agreement as prohibiting live bands, not disc jockeys. *Id.* at 41. He stated that at the time he negotiated the agreement with ANC 2E, he believed both parties understood that the Respondent intended to continue having a disc jockey perform and that such activity was not meant to fall into the definition of "live entertainment." *Id.* at 42. He noted that the establishment has never received a complaint regarding its disc jockey performances in the past. *Id.* at 45.

9. The Respondent also submitted an ABRA "Premise-And-Business-Information" form, notarized on August 13, 1992. Respondent's Exhibit No. 1. In response to a question on the form regarding entertainment at the establishment, the Respondent wrote, "No live entertainment or nude performances—recorded music provide by tapes and disc jockey." *Id.*

10. The Respondent's investigative history shows that it incurred a prior secondary tier violation on June 27, 2012. ABRA License File No. 604, Investigative History.

CONCLUSIONS OF LAW

11. 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. D.C. Code § 25-830; 23 DCMR § 800, *et seq.* (West Supp. 2012). 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. Code § 25-447 (West Supp. 2012).

12. The questions presented to the Board by this case are (1) whether Section 9 of the Voluntary Agreement prohibits the Respondent from hosting disc jockey performances in the establishment; and (2) whether the activities witnessed by Investigator Martin constitute disc jockey entertainment. If we answer both of these questions in the affirmative, the record shows that the Respondent violated its Voluntary Agreement on April 14, 2012, and April 15, 2012. Furthermore, as the Respondent's second secondary tier violation in a two-year period, the Respondent will be subject to a \$500 fine for the violation described in Charge I. 23 DCMR § 804.1(B) (West Supp. 2012); supra, ¶ 10.

13. The Government argues that the plain language of the Voluntary Agreement prohibits the Respondent from having a disc jockey. *Tr.*, 11/14/2012 at 93. The Government supports its position by citing D.C. Official Code § 25-101(21A), which includes a disc jockey as a form of "live entertainment." *Id.* As such, the Government argues disc jockey performance witnessed by Investigator Martin on April 14, 2012, and April 15, 2012, constitute a violation of Section 9 of the Respondent's Voluntary Agreement. *Id.* at 6.

14. In turn, the Respondent argues that the parties never intended the term "live entertainment" in the Voluntary Agreement to cover a disc jockey, as demonstrated by the lack of complaints and practices of the establishment. *Id.* at 99. The Respondent further argues that the definition of entertainment contained in D.C. Official Code § 25-101(21A) promulgated by the Council of the District of Columbia in 2004 should not have any bearing on the interpretation of the Voluntary Agreement, because the Council enacted the law after the Voluntary Agreement was approved by the Board. *Id.*; D.C. Code § 25-101(21A) (West Supp. 2012). The Respondent also argues that the individual playing music in the establishment witnessed by Investigator Martin does not constitute a "disc jockey." *Tr.*, 11/14/2012 at 101-03.

15. We agree with the Government, because the term "live entertainment" has had a consistent meaning under Title 25 of the District of Columbia Official Code both before and after the Respondent and ANC 2E entered into its Voluntary Agreement. Furthermore, we conclude that the activities witnessed by Investigator Martin constitute a disc jockey performance. Therefore, we sustain the Charge brought by the Government.

16. Section 9 of the Voluntary Agreement states,

There shall be no live entertainment, except that the Applicant may continue to provide its weekly single acoustical guitar performance. Applicant may provide recorded music and dancing by patrons with a dance floor no larger than 400 square feet, provided that no noise is generated external to the Establishment in violation of the law, included 23 DCMR 905.

In re 1218 Wisconsin, Inc., t/a Third Edition, Board Order No. 2002-65, at *Voluntary Agreement*, § 9.

17. The Respondent's Voluntary Agreement is akin to a contract; therefore, we use principles of contract law to interpret it. North Lincoln Park Neighborhood Ass'n v. District of Columbia Alcoholic Beverage Control Bd., 727 A.2d 872, 875 (D.C. 1999); Letter from Peter J. Nickles, Attorney General, Office of the Attorney General of the District of Columbia, to Fred Moosally, General Counsel, Alcoholic Beverage Regulation Administration, 3-4 (Dec. 18, 2008). Accordingly, the Board generally construes a voluntary agreement "within its four corners and generally . . . enforce[s] it as written. Prince Const. Co., Inc. v. District of Columbia Contract Appeals Bd., 892 A.2d 380, 385 (D.C. 2006).

18. This general rule is set aside only when "the written language is not susceptible of a clear and definite undertaking . . ." District of Columbia v. Young, 39 A.3d 36, 40 (D.C. 2012). "A [voluntary agreement] is ambiguous when it is reasonably susceptible of different constructions or interpretations, or of two or more different meanings." Akassy v. William Penn Apartments Ltd. Partnership, 891 A.2d 291, 298 (D.C. 2006). "In considering whether a contract is ambiguous, we examine the document on its face, giving the language used therein its plain meaning." Id. "Extrinsic evidence of the parties' subjective intent may be resorted to only if the [contract] is ambiguous." Id. "[T]he endeavor to ascertain what a reasonable person in the position of the parties would have thought the words of a contract meant applies whether the language is ambiguous or not." Id. "In this context, a reasonable person is: (1) presumed to know all the circumstances surrounding the contract's making; and (2) bound by usages of the terms which either party knows or has reason to know." Id.

19. Under the law of contracts in the District of Columbia, the "laws in effect at the time of the making of a contract form a part of the contract 'as fully as if they had been expressly referred to or incorporated in its terms.'" Double H Housing Corp. v. Big Walsh, Inc., 799 A.2d 1195, 1199 (D.C. 2002). Furthermore, we recognize that "in the absence of a provision expressly incorporating future amendments to a statute, the parties will not be bound by such a change." Johnson v. Fairfax Village Condominium IV Unit Owners Ass'n, 548 A.2d 87, 92 (D.C. 1988).

20. Section 9 of the Voluntary Agreement is clear and unambiguous. Under its terms, the establishment shall not permit live entertainment in the establishment, but may have an acoustical guitar performance once per week, play recorded music, and permit dancing by patrons so long as the dance floor does not exceed 400 square feet. In re 1218 Wisconsin, Inc., t/a Third Edition, Case No. 6864-01/01SP, Board Order No. 2002-65, 1-2 (D.C.A.B.C.B. Mar. 13, 2002). In the context of our local liquor law, the term live entertainment is a term of art that expressly includes disc jockey performances within its meaning. D.C. Code §§ 25-101(21A);

25-762(b)(4) (West Supp. 2012); see also Akassy, 891 A.2d at 299 citing Kapusta v. District of Columbia Rental Hous. Comm'n, 704 A.2d 286, 287 (D.C. 1997) (saying that the term “rent” is a “term of art” in our “local landlord-tenant law.”) Therefore, by using the term “live entertainment” in their agreement, the Board must presume that the parties intended to adopt the meaning of “live entertainment” in Title 25 of the D.C. Official Code.

21. The Respondent’s argument that the definition of live entertainment was not adopted until 2004, after the Board adopted the Voluntary Agreement, is simply incorrect. The Respondent and ANC 2E entered into a Voluntary Agreement on December 19, 2001, which was later approved by the Board on March 13, 2002. Supra, at ¶ 2. At the time the parties signed the Voluntary Agreement in 2001, the term “live entertainment” directly appeared in the Board’s substantial change statute. Specifically, as of May 3, 2001, under D.C. Official Code § 25-762(b)(4), a licensee could not substantially change its premises without Board approval, which included the provision or expansion of “an area in which *live entertainment* would be performed by employees of the establishment, patrons, contract employees, or self-employed individuals, such as dancers or *disc jockeys*.” Council of the District of Columbia, Title 25, D.C. Code Enactment and Related Amendments Act of 2000, § 101 (D.C. Law 13-298, effective May 3, 2001) (see § 25-762(b)(4)) (emphasis added); see also D.C. Code § 25-762(b)(4) (West Supp. 2012). Consequently, at least nine months before the Respondent entered into the Voluntary Agreement with ANC 2E, the Council, the Board, and license holders generally understood that the term “live entertainment” included disc jockeys.

22. Furthermore, the legislative history of § 25-101(21A) does not support the contention that the inclusion of disc jockeys within the meaning of live entertainment was a new concept or should not have been reasonably known by the Respondent and ANC 2E at the time they negotiated the Voluntary Agreement. Section § 25-101(21A) defines entertainment as “live music or any other live performance by an actual person, including . . . disc jockeys. The term ‘entertainment’ shall not include the operation of a jukebox, a television, a radio, or other prerecorded music.” § 25-101(21A). The legislative history of § 25-101(21A) shows the purpose of law was not to add to the definition of “entertainment,” but rather merely “clarify the permitted business practices of restaurants and other establishments licensed to sell alcoholic beverages [and to add an entertainment endorsement requirement for taverns and restaurants that sought to provide entertainment].” Council of the District of Columbia, “Report on Bill 15-516, the ‘Omnibus Alcoholic Beverage Amendment Act of 2004,’” Committee on Consumer and Regulatory Affairs, 2 (Mar. 9, 2004). For this reason, the addition of § 25-101(21A) to Title 25 does not contradict our conclusion that the term “live entertainment” has included disc jockey performances, and been in effect, since at least May 2001.

23. Our determination that Section 9 is clear and unambiguous precludes our consideration of the extrinsic evidence submitted by the Respondent. See supra at ¶¶ 8-9. Nevertheless, even if we found Section 9 to be ambiguous, we would reach the same conclusion. First, there is insufficient evidence in the record to determine ANC 2E’s true intent—the mere fact that ANC 2E has submitted complaints to the Respondent is not sufficient to determine ANC 2E’s state of mind when it entered into the Voluntary Agreement with the Respondent. Supra, at ¶ 8. Second, the mere fact that this practice has been ongoing at the establishment for the past forty-four years is not relevant, because the issue raised by Charge I has never been addressed directly by the

Board. Supra, at ¶ 3. Third, the 1992 ABRA form submitted by the Respondent is not relevant, because the purpose of voluntary agreements is to restrict the operations of an establishment; therefore, it is both possible and conceivable that the Respondent gave up its right to have disc jockey performances in exchange for the ANC dropping its protest against the Respondent. Supra, at ¶ 9. Finally, while Section 9 permits the Respondent to provide recorded music and dancing, these activities do not require the presence of a disc jockey, as the Respondent could comply with Section 9 by just having a prerecorded music selection play during its operating hours or providing patrons with a jukebox. See e.g., 23 DCMR § 199 (West Supp. 2012) (“The operation of a jukebox, a television, a radio, or other prerecorded music shall not be considered entertainment.”)

24. We further conclude that the activities witnessed by Investigator Martin on April 14, 2012, and April 15, 2012, constituted a disc jockey performance in violation of the prohibition on live entertainment contained in Section 9. Supra, at ¶¶ 4-5. According to the Merriam-Webster Dictionary, a disc jockey “. . . plays recorded music for dancing at a nightclub or party.” Merriam-Webster, “disc jockey,” m-w.com, *available at* <http://www.merriam-webster.com/dictionary/disc%20jockey> (last visited Jan. 14, 2013); see also In re Washington Restaurants, LLC, t/a Buddha Bar, License No. 81339; Board Order No. 2012-166, ¶¶ 3, 7 (D.C.A.B.C.B. May 23, 2012) (saying that under 23 DCMR § 1000.1 an employee standing in a disc jockey booth—even if he or she does not address patrons—qualifies as a disc jockey under Title 25 of the D.C. Official Code). Here, Investigator Martin saw an employee wearing headphones and taking requests from patrons in a disc jockey booth. Supra, at ¶ 5. In addition, the Respondent admitted that it has a disc jockey booth, the employee in the booth generally selects the music played at the establishment with the input of management, and takes music requests from patrons. Supra, at ¶ 7. Based on these facts, we conclude that the employee witnessed by Investigator Martin during her inspection of the establishment constitutes a disc jockey.

25. Consequently, we find in favor of the Government and agree that Section 9 of the Voluntary Agreement precluded the Respondent from hosting a disc jockey at the establishment on April 14, 2012, and April 15, 2012.

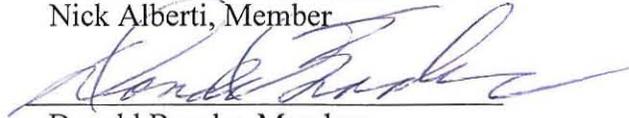
ORDER

Therefore, the Board, on this 6th day of February 2013, finds that the Respondent, 1218 Wisconsin, Inc., t/a Third Edition, violated D.C. Official Code § 25-446. The Board hereby **ORDERS** that, in total, the Respondent shall pay a fine of \$500 for the violation described in Charge I no later than thirty (30) days from the date of this Order. 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

Herman Jones, Member

I dissent to the majority opinion in this case because it is inconsistent with the law and public policy as articulated by the Attorney General in his legal opinion on Voluntary Agreements dated December 8, 2008. In that opinion the Attorney General explicitly stated that Board-approved agreements are not changed as a result of changes in the law and that voluntary agreements are to be treated as contracts between the parties to the agreement.¹ While the majority opinion espouses these principles, it ultimately undermines them.

In interpreting the words of the Agreement, the majority opinion relies on a provision in DC Code Section 25-101(21A) in the Definitions section that expressly includes disc jockeys in its reference to live entertainment. However, that provision was enacted in 2004—after the parties entered into their voluntary agreement on December 19, 2001. The majority relies on another section of Title 25, Section 25-762(b)(4), enacted in May 2001, regarding substantial change to an establishment in concluding that the parties intended in December 2001 that the term “live entertainment” in their agreement includes disc jockeys. That provision was not applicable to the Voluntary Agreement. However, because that provision included a reference to disc jockeys in its examples of live entertainment, the majority concludes that the Definitions section had the same meaning in May 2001, that the amendment in 2004 was just a clarification, and that the parties knew and intended that meaning.

The majority dismisses the following evidence presented by one of the parties to the Agreement, that the parties did not intend the words “live entertainment” to include a disc jockey that manages recorded music and has little interaction with the guests:

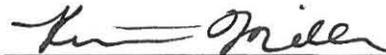
1. The establishment has had a disc jockey booth continuously for the past forty-four years, with the disc jockey performing five nights a week in the past. (Finding of Fact. #3 and #6);
2. The disc jockeys at this establishment have minimal contact with guests and primarily select and play recorded music. (Finding of Fact #7);
3. The establishment has never received a complaint about its disc jockey performances from ANC2E or anyone else. (Finding of Fact #8);

¹ In reaching his decision, the Attorney General reviewed several voluntary agreements, including the Third Edition Agreement. See Attorney General Opinion at 3.

4. The establishment submitted a notarized form to ABRA in 1992 in response to a question regarding entertainment at the establishment that stated, “ No live entertainment or nude performances – recorded music provided by tapes and disc jockey.” (Finding of Fact #9); and

5. The president of the establishment testified under oath that when he entered into the Agreement with ANC2E, that neither he nor the ANC, in his belief, understood live music to include DJs. (Finding of Fact #8)

This is not a case where any party to the Agreement is asserting a different interpretation. To date, ANC2E has never alleged or provided any indication that it believes the establishment violated the voluntary agreement by having a disc jockey who performed in the same manner before and after the parties entered into the voluntary agreement - for forty - four years. While the Board has the authority to enforce voluntary or settlement agreements, in my view this authority is exceeded when it takes punitive action against one of the parties to an Agreement where neither party has alleged a violation and a credible case has been made for an interpretation that supports compliance with the Agreement. Unfortunately, the majority opinion muddies the water that was previously made clear by the Attorney General regarding the impact of changes in the law on voluntary agreements.


Ruthanne Miller, Chairperson

I respectfully dissent.

The issue here is whether the licensee violated a Voluntary Agreement, which is legally a contract between two parties. Should there be any ambiguity, we are obligated to determine the original intent of the two parties when they agreed upon the language in that contract.

Any subsequent definition by an outside third party must be of no consequence to this determination.

The licensee testified that a disc jockey has been featured at this establishment for more than forty years. A disc jockey was part of the operation prior to the voluntary agreement, when it first went into effect, and in the years since then.

The licensee testified that there have been no complaints from the ANC to the establishment about the presence of a disc jockey violating the voluntary agreement. Nor have there been any such complaints by the ANC to ABRA.

While changes to the law and to legal definitions may prove dispositive in most cases, here we must limit ourselves to the original intent of the parties at the time they drew up their contract. Given the past practice and absent any complaints or protest, we should not be reviewing or redefining the contract to conform to any subsequent third party definition.

There is no evidence that the licensee violated either the letter or the spirit of the voluntary agreement, and therefore the charges should be dismissed.



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).