

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

In the Matter of:)	
)	
Union Kitchen, LLC)	Case No.: 15-CMP-00662
t/a Union Kitchen)	License No: 98204
)	Order No: 2016-381
Holder of a)	
Retailer's Class B License)	
)	
at premises)	
538 3rd Street, N.E.)	
Washington, D.C. 20002)	

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
Ruthanne Miller, Member
James Short, Member

ALSO PRESENT: Union Kitchen, LLC, t/a Union Kitchen, Respondent

Fernando Rivero, Assistant Attorney General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

Of late, the Alcoholic Beverage Control Board has seen a proliferation of enforcement and protest cases involving the management of trash by licensed establishments. The liquor laws encourage licensees to properly manage their trash, because poor trash management by licensees disrupts the quality of life of residents by making communities unhealthy, unsightly, and a haven for vermin. One law that ensures that licensees responsibly manage their trash is § 25-726(a), which requires that retailers “take reasonable measures to ensure that the immediate environs of the establishment . . . are kept free of litter.” D.C. Official Code § 25-726(a). Yet, to date, the Board has not clearly described the elements and threshold level of proof for showing a violation

of § 25-726(a). Based on the proliferation of these types of cases, the Board now articulates such a standard in order to clarify how trash cases in the future should and will be adjudicated.

In order to show a violation of § 25-726(a), or a potential violation of § 25-726(a) in the case of a protest, there must generally be a showing (1) that the retailer lacks reasonable measures to control trash and (2) that the area is not free of litter. The Board finds this interpretation appropriate because it creates a bright line rule; whereby, licensees whose environs remain clean do not violate § 25-726(a) regardless of the manner of the cleanliness is accomplished (whether through strict trash management policies or happenstance). The Board further approves of this interpretation because including the presence or non-presence of litter in the test provides clear guidance as to the minimum standard of conduct to which a licensee should adhere, which avoids potential vagueness issues.

Nevertheless, it should be noted that § 25-726(a) is not the only mechanism by which the Board may ensure that licensees properly dispose of their trash. Section 25-823(a)(1) requires licensees to comply with District laws and regulations generally. D.C. Official Code § 25-823(a)(1). In addition to the requirements of § 25-726(a), § 707.11 of Title 21 of the D.C. Municipal Regulations requires that “Waste container lids shall be kept closed at all times other than when the container is being filled or emptied. Waste container lids shall be free of large gaps, cracks or holes. The area where the waste [container] is stored shall be kept free of spilled waste at all times.” 21 DCMR § 707.11 (West Supp. 2016). Consequently, licensees may be held liable under the law for solely leaving the lids to their containers open, regardless of whether there is litter present. Moreover, licensees that leave their trash containers open should be prosecuted for the action because this type of behavior continued over time attracts vermin to the neighborhood.

Turning to this case, the Board dismisses the sole charge that Union Kitchen, LLC, t/a Union Kitchen, (hereinafter “Respondent” or “Union Kitchen”) violated § 25-726(a) on August 19, 2015, because the Government failed to show sufficient evidence of litter, which is a threshold element of the charge. The Board emphasizes that had the Government charged Union Kitchen with violating § 25-823(a)(1) based on a violation of § 707.11, the Board would likely have sustained the charge based on the evidence of the open trash lid in the record; especially, when community complaints indicate that trash management at the establishment has been problematical.

Accordingly, the Board puts Union Kitchen on notice that, at a minimum, it has an obligation to keep the lids to its trash containers closed when not in use, and to do a better job managing its trash.

Procedural Background

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on January 20, 2016. *ABRA Show Cause File No., 15-CMP-00662*, Notice of Status Hearing and Show Cause Hearing, 2 (Jan. 20, 2016). The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent on February 4, 2016, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 15-CMP-*

00662, Service Form. The Notice charges the Respondent with one violation, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

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

Charge I: [On August 19, 2015,] [y]ou failed to take reasonable measures to ensure that property used by you to conduct business is kept free of litter, in violation of D.C. Official Code § 25-726

*Notice of Status Hearing and Show Cause Hearing, 2.*¹

The parties proceeded to a Show Cause Hearing and argued their respective cases on May 4, 2016.

FINDINGS OF FACT

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

I. Background

1. Union Kitchen, LLC, t/a Union Kitchen, is located at 538 3rd Street, N.E., Washington, D.C., and holds a Retailer's Class B License. *ABRA License No. 98204*. The establishment's hours of operation indicate that the establishment may operate from 10:00 a.m. to 10:00 p.m. *Id.*

II. ABRA Investigator Earl Jones

2. Alcoholic Beverage Regulation Administration (ABRA) Investigator Earl Jones visited Union Kitchen on August 11, 2015, around 3:40 p.m. *Transcript (Tr.)*, May 4, 2016 at 14. Before his visit, Investigator Jones was aware that ABRA was receiving anonymous complaints regarding Union Kitchen's rear trash containers overflowing. *Id.* at 13, 37-38.

3. Upon arriving at the establishment, he spoke with owner Cullen Gilchrist. *Id.* at 14. Investigator Jones informed Mr. Gilchrist that the agency had been receiving complaints from

¹ The Board mentioned above that the Government could have prosecuted Union Kitchen under an alternative statute. The Board notes that it is not possible to include this theory in this case because a "charging document must assert a plain and concise statement of an alleged offense sufficient to put the accused on notice of the nature of the offense charged." *Lazo v. United States*, 54 A.3d 1221, 1227 (D.C. 2012) citing *Patterson v. United States*, 575 A.2d 305, 305 (D.C.1990). In this case, the Board is limited to only considering the violation of § 25-726(a) because the notice clearly only referred to part (a) and was not amended to include any additional charge before the conclusion of the trial. Therefore, the Board cannot consider penalizing Union Kitchen for the violation of another statute during this case.

the public regarding Union Kitchen’s trash facilities. *Id.* at 15. Mr. Gilchrist indicated that Union Kitchen is attempting to build a storage facility for the trash. *Id.* He then informed Mr. Gilchrist that he would be monitoring the establishment in the future to ensure that its trash facilities complied with the law. *Id.* at 16.

4. Investigator Jones returned to the establishment on August 19, 2015, at 8:00 p.m. *Id.* at 17. From inside his vehicle, he observed that Union Kitchen’s trash area. *Id.* He saw that one receptacle was open and overflowing with trash. *Id.* Nevertheless, while the picture of the bin taken by Investigator Jones shows that the trash bin has enough trash to prevent the lid of the bin from closing, there is no evidence of trash spilling from the lid. *Case Report No. 15-CMP-00662*, Exhibit No. 2.

5. Investigator Jones did not enter the establishment on August 19, 2015, because he believed it was closed at the time of his visit. *Tr.*, 5/4/16 at 19.

6. On August 27, 2015, Investigator Jones returned to the establishment to notify the ownership of the violation. *Id.* at 20-21.

III. Jonas Singer

7. Union Kitchen made sales after 8:00 p.m. on August 19, 2015, which demonstrate that the establishment was open. *Id.* at 61. Mr. Singer admitted that he is aware that at least one of his neighbors frequently complains about the operations of his business and admitted that some of the complaints are “probably valid.” *Id.* at 66, 80-81.

8. Mr. Singer indicated that Union Kitchen cannot utilize a largedumpster due to historic preservation rules. *Id.* at 68. He further noted that employees are instructed to compact trash thrown in the bins and to ensure that the lids are closed. *Id.* at 68.

9. Mr. Singer was not present at the establishment when Investigator Jones visited the establishment on August 19, 2015. *Id.* at 78.

CONCLUSIONS OF LAW

10. 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. 2015). Furthermore, after holding a Show Cause Hearing, the Board is entitled to impose conditions if the Board determines “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.

I. While the Government Demonstrated that Union Kitchen Had Unreasonable Trash Management Practices, the Lack of Evidence of Litter Merits a Finding That Union Kitchen Did Not Violate § 25-726(a).

11. The Board dismisses the charge based on the failure to show the presence of litter around the establishment.

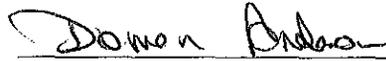
12. Under § 25-726(a), “[t]he licensee under a retailer's license shall take reasonable measures to ensure that the immediate environs of the establishment, including adjacent alleys, sidewalks, or other public property immediately adjacent to the establishment, or other property used by the licensee to conduct its business, are kept free of litter.” D.C. Official Code § 25-726(a). It is commonly understood that litter means a “[a] disorderly accumulation of objects [and] . . . carelessly discarded trash.” *Webster's II New College Dictionary*, 640 (2001) (litter). Moreover, an establishment that keeps its dumpsters' lid open while the dumpster is not in use is acting unreasonably, because such an action violates the city's regulations regarding the use of trash containers. *In re Neighborhood Restaurant Group, XV LLC, t/a Red Apron Butchery/The Partisan*, Case No. 14-CMP-00706, Board Order No. 2015-452, ¶ 16 (D.C.A.B.C.B. Oct. 28, 2015) *citing* 21 DCMR § 707.11 (West Supp. 2016) (“Waste container lids shall be kept closed at all times other than when the container is being filled or emptied The area where the waste [container] is stored shall be kept free of spilled waste at all times”). As noted above, the Board finds that the presence of litter is an element of the charge, which can be inferred from the Board's decision in *Red Apron Butchery* where the Board relied upon the presence of litter to merit the finding of a violation of § 25-726(a). *In re Red Apron Butchery*, Board Order No. 2015-452 at ¶¶ 12-13.

13. In this case, the Government proved that Union Kitchen left its trash container lid open on August 19, 2015, which satisfies the reasonableness element of § 25-726(a). *Supra*, at ¶ 4. Nevertheless, there is no evidence that the area surrounding the trash bin contained litter. *Id.* Instead, the only trash that can be seen in the picture provided by Investigator Jones is still contained within the bin. *Id.* Therefore, the Board finds that the Government has not satisfied the second element of the test articulated above.

ORDER

Therefore, the Board, on this 15th day of June 2016, **DISMISSES** the charge brought by the Government. The ABRA shall deliver copies of this Order to the Government and the Respondent.

District of Columbia
Alcoholic Beverage Control Board

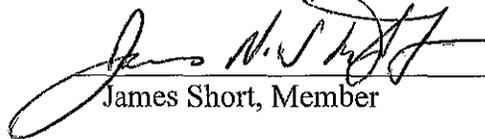


Donovan Anderson, Chairperson



Mike Silverstein, Member

Ruthanne Miller, Member



James Short, Member

I dissent from the position taken by the majority of the Board. In this instance the licensee was charged with violating D.C. Official Code § 25-726. This statute has two sections, only one of which the majority addressed in its decision. D.C. Official Code § 25-726 (b) was not addressed by the Board's decision. That paragraph states the following: "The licensee under a retailer's license shall comply with the Litter Control Expansion Amendment Act of 1987, effective October 9, 1987 (D.C. Law 7-38; 23 DCMR § 720)." The entirety of D.C. Official Code § 25-726 should be considered in determining whether licensee is in violation of the D.C. statutes and I believe that the evidence supports a conclusion that the licensee was in violation of D.C. Official Code §25-726(b) on August 19, 2015.

The current governing statute that encompasses the Litter Control Expansion Amendment Act of 1987 is D.C. Municipal Regulations § 21-700 for which the Litter Control Expansion Amendment Act of 1987 is cited as a source. Paragraph § 21-700.3 states the following: 'All solid wastes shall be stored and containerized for collection in a manner that will not provide food, harborage, or breeding places for insects or rodents, or create a nuisance or fire hazard.' The picture of the bin taken by Investigator Jones shows that trash is overflowing to such an extent that it prevents the lid of the bin from closing, even slightly, and exposes the entire contents of the trash bin to insects and rodents. The licensee's lax efforts to properly store trash left the trash exposed and accessible to vermin. I conclude that the licensee is in violation of § 25-726(b) by failing to take proper measures to ensure by taking proper measures to prevent "harborage, or breeding places for insects or rodents" and by creating a nuisance for neighboring residents.



Nick Alberti, Member

Pursuant to D.C. Official Code § 25-433(d)(1), 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, NW, 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, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719..1 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).