

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

In the Matter of:)	
)	
KYW, Inc.)	
t/a Wah Sing Restaurant)	
)	
Holder of a)	Case No. 12-AUD-00067
Retailer's Class CR License)	License No. ABRA-000514
)	Order No. 2013-499
at premises)	
2521 Pennsylvania Avenue, S.E.)	
Washington, D.C. 20020)	

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

ALSO PRESENT: Koi C. Wong, on behalf of KYW, Inc., t/a Wah Sing Restaurant,
Respondent

Christine Gephardt, Assistant Attorney General
Office of Attorney General, District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Alcoholic Beverage Control Board (Board) finds that KYW, Inc., t/a Wah Sing Restaurant, (Respondent), violated District of Columbia (D.C.) Official Code § 25-113(j)(3)(A) on October 25, 2012. The Respondent must pay a \$2,000.00 fine.

On April 23, 2013, the Board served a Notice of Status Hearing and Show Cause Hearing (Notice), dated April 22, 2013, on the Respondent charging the Respondent with the following violation:

Charge I: The Respondent failed to keep and maintain upon the licensed premises for period of three years, records which include invoices and delivery slips which adequately and fully reflect all purchases, sales, and deliveries of all alcoholic beverages, except beer, in violation of D.C. Official Code § 25-113(j)(3)(A) for which the Board may take proposed action pursuant to D.C. Official Code § 25-823 and 23 DCMR § 800 et seq.

The Respondent was personally served with a copy of the Notice on April 23, 2013. The Respondent failed to appear at the Show Cause Status Hearing held on May 22, 2013. On July 17, 2013, a Show Cause Hearing was rescheduled for September 18, 2013.

The Board held a Show Cause Hearing on September 18, 2013.

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

FINDINGS OF FACT

1. The Board issued a Notice of Status Hearing and Show Cause Hearing, dated April 22, 2013. *See* Alcoholic Beverage Regulation Administration Show Cause File No. 12-AUD-00067. The Respondent holds a Retailer's Class CR License and is located at 2521 Pennsylvania Avenue, S.E., Washington, D.C. *See* ABRA Licensing File No. ABRA-000514.
2. The Show Cause Hearing in this matter was held September 18, 2013. The Respondent was charged with one violation, failure to maintain upon the licensed premises for a period of three years, records which include invoices and deliveries of all alcoholic beverages, except beer, in violation of D.C. Official Code § 25-113(j)(e)(A).
3. The Government presented its case through the testimony of ABRA Compliance Analyst, Adeniyi Adejunmobi. *Transcript, 9/18/13* at 8. On October 25, 2012, Mr. Adejunmobi, accompanied by Ms. Monica Clark, and former Investigator Brian Malloy, (the ABRA Audit Team) conducted an audit of the Respondent's 2011 Quarterly Statements. *Tr. 9/18/13* at 10, 24. Mr. Adejunmobi gave the Respondent thirty (30) days written notice of the date and time the audit would be conducted. *Tr. 9/18/13* at 11-12. He arrived at the establishment to review the Respondent's documentation to ensure that the information supported the figures reported by the Respondent in its Quarterly Statements. *Tr. 9/18/13* at 10.

4. The owner, Mr. Wong, was not present at the appointment time and after waiting two hours for the owner's bookkeeper, Mr. Adejunmobi left the establishment. *Tr. 9/18/13* at 11-12, 17, 20-22. This was the second failed visit for the Audit Team. *Tr. 9/18/13* at 14. Notwithstanding the thirty (30) day notice, they were unsuccessful meeting with the Respondent a month earlier because the establishment was locked, and the Respondent did not return phone calls. *Tr. 9/18/13* at 14. The thirty (30) day written notice scheduling the audit meeting also requested that the Respondent contact ABRA if the scheduled date could not be accommodated. *Tr. 9/18/13* at 15. Mr. Adejunmobi left his business card for the Respondent, but there was no further communication. *Tr. 9/18/13* at 23.

5. The Respondent informed Mr. Adejunmobi in the presence of the Audit Team that he did not have three years worth of books and records. *Tr. 9/18/13* at 12, 16. The Respondent does not keep track of sales but rather makes his sales and rings up the amount owed on a cash register. *Tr. 9/18/13* at 13. Mr. Adejunmobi also testified that the Respondent stated that he did keep records but that they were not available at the time of the audit. *Tr. 9/18/13* at 25. The bookkeeper never made herself available to the Audit Team and the records were never produced. *Tr. 9/18/13* at 25-27.

6. Koi C. Wong testified on behalf of the Respondent. *Tr. 9/18/13* at 29. He stated that the bookkeeper arrived before 11:00 A.M., when the establishment opened. *Tr. 9/18/13* at 30. Mr. Wong maintains four to five years of transaction records on premises and he provided one year of records to Mr. Adejunmobi. *Tr. 9/18/13* at 30, 32-33, 35-36, 38. He stated that he keeps records from the cash register but that he could not accommodate Mr. Adejunmobi because Mr. Adejunmobi requested written receipts. *Tr. 9/18/13* at 43. The Respondent does not prepare hand-written, itemized receipts for the patrons. *Tr. 9/18/13* at 30-31. Mr. Wong presented cash register receipts to Mr. Adejunmobi. *Tr. 9/18/13* at 31. Mr. Wong testified that the bookkeeper and Mr. Adejunmobi spoke over the phone because Mr. Adejunmobi had left prior to the bookkeeper's arrival to the establishment. *Tr. 9/18/13* at 35.

CONCLUSIONS OF LAW

7. The Board has the authority to suspend or revoke the license of a licensee who violates any provision(s) of Title 25 of the D.C. 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. D.C. Official Code § 25-830 and 23 D.C.M.R. 800, *et seq.*

8. In order to hold a Licensee liable for a violation of the ABC laws, the Government must show that there is substantial evidence to support the charge. Substantial evidence is defined as evidence that a "reasonable mind might accept as adequate to support the conclusion" and there must be a "rational connection between facts found and the choice made." 2461 Corp. v. D.C. Alcoholic Bev. Control Bd., 950 A.2d 50, 52-53 (D.C. 2008).

9. With regard to Charge I, the Board finds that the Respondent failed to maintain its books and records. Under D.C. Official Code § 25-113(j)(3)(A), a licensee is required to

keep and maintain upon the licensed premises for a period of three years, records which include invoices and delivery slips which adequately and fully reflect all purchases, sales, and deliveries of all alcoholic beverages, except beer. Despite the conflicting testimony regarding what records were available to ABRA at the time of the audit, the Board finds Mr. Adejunmobi's statements more credible. Mr. Adejunmobi testified that the Respondent indicated at one point that he did not have the records, yet later stated that he had the records, but that they were not available. The Board finds incredible that the Respondent would have four to five years worth of records on premises and not produce them for inspection when requested.

10. The Board takes into consideration in formulating its penalty that not only did the Respondent not produce its books and records for inspection by ABRA's Audit Team on October 25, 2012, but it also did not cooperate with ABRA a month earlier when the first inspection was scheduled. The record demonstrates a lack of cooperation on the part of the Respondent by locking its doors on the scheduled audit date, by not returning phone calls, and by not requesting an alternative audit date when there was a scheduling conflict.

11. ABRA relies on the production of these documents in order to determine whether a licensed Class CR establishment is in compliance with the statutory requirements for a restaurant, e.g., the establishment is operating primarily as a food service establishment by showing that at least 45% of its gross receipts is from the sale of food and that it is meeting the minimum food sales requirements for a restaurant. D.C. Official Code § 25-101(43). Without this information, ABRA has no way of knowing whether a restaurant is actually operating in accordance with its license. Therefore, it is incumbent on Respondent to ensure that it cooperates and fully complies with the request for books and records by ABRA auditors.

12. Therefore, based upon the above, the Board finds that the Respondent's violation of D.C. Official Code § 25-113(j)(e)(A), as set forth in Charge I of the Notice to Show Cause, dated April 22, 2013, warrants the imposition of a fine. The Board takes administrative notice that Charge I is the Respondent's first primary tier violation. As such, the Board will impose the fine as set forth below, pursuant to 23 DCMR § 801.1(A).

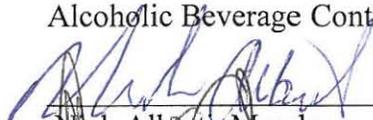
ORDER

Based on the foregoing findings of fact and conclusions of law, the Board, on this 13th day of November, 2013, finds that the Respondent, KYW, Inc., t/a Wah sing Restaurant, holder of a Retailer's Class CR License, violated D.C. Official Code § 25-113(j)(e)(A). Accordingly, the Board imposes the following penalty on the Respondent:

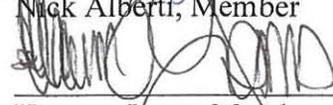
- (1) In total, the Respondent shall pay a fine in the amount of \$2,000.00 by no later than thirty (30) days from the date of this Order. Failure to remit the fine in a timely manner may subject the Respondent to additional sanctions.

Copies of this Order shall be sent to the Respondent and the Government.

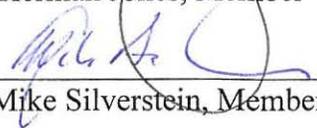
District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Member



Herman Jones, Member

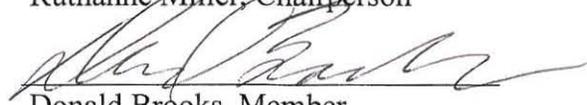


Mike Silverstein, Member

We concur with the decision reached by the majority of the Board as to the violation of D.C. Official Code § 25-113(j)(e)(A). Nevertheless, we dissent from the penalty selected by the majority.



Ruthanne Miller, Chairperson



Donald Brooks, Member

Under 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, NW, 400S, Washington, D.C. 20009.

Also, under 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 under 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).