

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

In the Matter of:)	
)	
Beg Investments, LLC)	License No.: 76366
t/a Twelve Restaurant & Lounge)	Case Nos.: 12-CMP-00431
)	Order No.: 2014-087
)	
Holder of a Retailer's Class CT License)	
at premises)	
1123-1125 H Street, N.E.)	
Washington, D.C. 20002)	

BEFORE: Ruthanne Miller, Chairperson
Donald Brooks, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Beg Investments, LLC, t/a Twelve Restaurant & Lounge, Respondent

Matthew Lefande, Counsel, on behalf of the Respondent

Amy Schmidt, 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

The Alcoholic Beverage Control Board (Board) dismisses the charges against Beg Investments, LLC, t/a Twelve Restaurant & Lounge. Specifically, the Government has not provided substantial evidence that the Respondent violated the noise provision of its settlement agreement or violated a Board Order by failing to hire the Metropolitan Police Department on July 26, 2012.

Procedural Background

On April 3, 2013, the Alcoholic Beverage Regulation Administration (ABRA) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated March 13, 2013, on the Respondent located at premises 1123-1125 H Street, N.E., Washington, D.C. *ABRA Show Cause File No 12-CMP-00431, Notice of Status Hearing and Show Cause* (Mar. 13, 2013), *Service Form* (Mar. 18, 2013). An Amended Notice of Status Hearing and Show Cause (Amended Notice) was subsequently executed by the Board on August 9, 2013. *ABRA Show Cause File No 12-CMP-00431, Amended Notice of Status Hearing and Show Cause* (Aug. 9, 2013) [*Amended Notice*].

The Notice charged the Respondent with two violations, which if proven true, would justify the imposition of a fine, suspension, or revocation of the Respondent's ABC-license. Charge I alleges, "You failed to comply with the provision of the Voluntary Agreement that you are a signatory to and was approved by the Board in violation of D.C. Official Code § 25-446" *Amended Notice, 2*. The Amended Notice then describes Charge I as stemming from a telephone call "complaining of noise coming from [the] establishment." *Id.* The Amended Notice further added, "Investigator Jones then went to your establishment . . . to investigate and could hear noise from your rooftop summer garden while standing at 12th and Linden Street, N.E." *Id.*

In turn, Charge II alleges, "You failed to follow a Board Order in violation of D.C. Official Code § 25-823(6) . . ." *Id.* at 3. The Amended Notice then identifies Board Order No. 2011-289, which requires the Respondent to hire the MPD Reimbursable Detail whenever entertainment is offered. *Id.* The notice then notes that no police detail was observed on July 26, 2012, even though a disc jockey was playing amplified music. *Id.*

The parties came before the Alcoholic Beverage Control Board (Board) for a Show Cause Status Hearing on April 24, 2013. The matter proceeded to a Show Cause Hearing on January 15, 2014. Both parties submitted Proposed Findings of Fact and Conclusions of Law.

RESOLUTION OF PRELIMINARY MATTERS

1. During the Show Cause Hearing, the parties raised a number of issues that the Board addressed before reaching the merits of the present matter.
2. First, the Board notes that during the Show Cause Hearing it denied the Respondent's Motion to Dismiss the case for untimely notice of the investigative report under D.C. Official Code § 25-832, because the provision is directory, and there was no showing of prejudice. *Resp. Mot. to Dismiss, 3-7; Transcript (Tr.)*. January 15, 2014 at 4-6.
3. Second, the Respondent requested that Board Members Brooks, Silverstein, and Miller recuse themselves from the present case, because the Respondent is suing them in their personal capacities in United States District Court in *BEG Investments, LLC, v. Alberti, et. al*, 2013 WL 2357666 (D.D.C., May 28, 2013) (Trial Motion, Complaint) based on the imposition of the MPD

Reimbursable Detail in Board Order No. 2011-289; *Tr.*, 1/15/2014 at.¹ The Board finds that Respondent has failed to raise an appropriate conflict of interest issue that requires the recusal of the named Board Members.

4. As noted in *Liteky*, “judicial rulings alone almost never constitute [a] valid basis for a bias or partiality motion.” *Liteky v. U.S.*, 510 U.S. 540, 555 (1994). Furthermore, the Board finds Judge Larimer’s reasoning persuasive and applicable to this matter. As noted by Judge Larimer,

In my view, this tactic of suing federal judges and then seeking their disqualification is nothing more than a tactic to delay and frustrate the orderly administration of justice. Judges should not be held hostage to this kind of tactic and automatically recuse themselves simply because they or their fellow judges on the court are named defendants in a truly meritless lawsuit [Section 455] has been repeatedly construed by the courts as not requiring automatic disqualification of a judge in circumstances such as this.... Otherwise, § 455 could be used as a vehicle to engage in judge-shopping, and to “manipulate the identity of the decision maker.” To let such a motion succeed absent a legally sufficient basis would allow any litigant to thwart the legal process by merely filing a complaint against the judge hearing the case It is clear that a judge is not disqualified under 28 U.S.C. § 455 merely because a litigant sues him.

Section 455(a) also does not require recusal. That section requires disqualification when the judge's impartiality might “reasonably” be questioned. The inquiry is an objective one. The appropriate test for disqualification is whether a “reasonable person” with knowledge of all the facts would be led to the conclusion that the judge's impartiality might be questioned. In my view, under this test a reasonable person with access to all the relevant facts would not question the Court's impartiality. Courts have an obligation and duty to sit when there is no valid reason not to do so. Reassignment or transfer of a case are serious matters that affect the parties as well as the new judge.

Jones v. City of Buffalo, 867 F. Supp. 1155, 1162-63 (W.D.N.Y. 1994). In this case, the lawsuit before the United States District Court solely stems from administrative orders of the Board that imposed conditions on the Respondent.² See generally *BEG Investments, LLC, v. Alberti, et. al*, 2013 WL 2357666 (D.D.C., May 28, 2013) (Trial Motion, Complaint). As such, the Respondent has not shown a sufficient basis to merit the disqualification of the named Board Members; therefore, the Respondent’s oral motion to disqualify the named Board Members is denied. *Tr.*, 1/15/2014 at 6, 8.³

¹ The Board notes that Board Member Jones was also named in the suit, but was not present in the instant case.

² Thus, there are no claims stemming from the actions of the named Board Members outside of their role as Board Members (e.g., a private tort or contract dispute).

³ Even if disqualification were somehow warranted, the Board must adjudicate the present matter under the rule of necessity. If the Respondent’s disqualification motion were successful, this would result in only Board Members Short and Rodriguez being available to hear the case, which would violate the Board’s three-member quorum requirement. *In re M.C.*, 8 A.3d 1215, 1230 (D.C. 2010); D.C. Official Code § 25-431(b). As noted by the Supreme Court, “the Rule of Necessity, a well-settled principle at common law that, [states], ‘although a judge had better not,

5. Third, the Board denies the Respondent's motion to dismiss the case for allegedly failing to serve the Respondent with the Amended Notice. *Tr.*, 1/15/2014 at 8-9. The Board notes that the failure to serve a party is generally only grounds for delaying a decision, not dismissing a case. As noted in § 1703.8, "Failure to serve all parties of record, or their designated representatives, may result in the Board delaying action on the matter at issue until such time as service is properly accomplished." 23 DCMR § 1703.8 (West Supp. 2014). Here, the Board is not inclined to dismiss the present matter for failure to serve or delay the present show cause matter when the Respondent has had the Amended Notice in its possession since October 2013. *Tr.*, 1/15/2014 at 15. Therefore, because there is no showing of prejudice, the Board denies the Respondent's motion to dismiss the matter for lack of service, and finds no cause to delay a decision of this matter on the merits. *Id.* at 19, 21.

FINDINGS OF FACT

The Board having considered the substantial 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:

6. The Respondent holds a Retailer's Class CT License, ABRA License Number 76366. *See ABRA Licensing File No. 76366.* The establishment's premises are located at 1123-1125 H Street, N.E., Washington, D.C. *Id.*

7. ABRA Investigator Earl Jones went to the Respondent's establishment on July 26, 2012 to investigate a noise complaint. *Tr.*, 1/15/2014, at 25. Investigator Jones visited a residence located near the corner of Linden Place, N.E.,⁴ and 12th Street, N.E. *Id.* at 26. Investigator Jones heard music echoing in the streets from the Respondent's rooftop. *Id.* at 27. He then entered the premises and heard music inside. *Id.* Investigator Jones left the residence and entered the Respondent's establishment. *Id.* at 31. He observed a DJ in the establishment's rooftop seating area. *Id.* at 31-32.

8. During the investigation, the establishment's owner indicated that he had hired the MPD Reimbursable Detail. *Id.* at 40. Investigator Jones did not observe a detail at the establishment on the night of his investigation. *Id.* at 39-40.

if it can be avoided, take part in the decision of a case in which he has any personal interest, *yet he not only may but must do so if the case cannot be heard otherwise.*" *U. S. v. Will*, 449 U.S. 200, 213 (1980) *citing* F. Pollack, *A First Book of Jurisprudence* 270 (6th ed. 1929) (emphasis added). Consequently, because Title 25 of the D.C. Official Code does not provide an alternative means of hearing the present show cause matter, the Board has a duty to adjudicate the present case under the rule of necessity.

⁴ The Board notes that the Investigator identified the location as "Linden Street" during the hearing; however, the street is most likely Linden Place, which abuts the establishment. *Licensee's Proposed Findings of Fact and Conclusions of Law*, at ¶¶ 5-7.

CONCLUSIONS OF LAW

9. The Board has the authority to levy fines, as well as suspend or revoke the license of a licensee who violates any provisions of Title 25 of the District of Columbia (D.C.) Official Code or Title 23 of the D.C. Municipal Regulations (DCMR). D.C. Official Code §§ 25-830, 25-823(1); see also 23 DCMR § 800, *et. seq.* (West Supp. 2014). 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. Official Code §§ 25-830, 25-447.

10. The Board may only find a violation when a charge is supported by “reliable, probative, and substantial evidence.” 23 DCMR § 1718.3 (West Supp. 2014).

I. The Board dismisses Charge I.

11. The Board dismisses Charge I, because noise heard outside the establishment does not constitute a violation of the settlement agreement without a decibel reading.

12. Under D.C. Official Code § 25-446, the Respondent’s Settlement Agreement is enforceable by the Board. D.C. Official Code § 25-446(c). In this case, § 1.3(b) of Twelve’s agreement requires the Respondent to follow § 25-725, which states in pertinent part,

§ 25-725. Noise from licensed premises.

(a) The licensee under an on-premises retailer's license shall not produce any sound, noise, or music of such intensity that it may be heard in any premises other than the licensed establishment by the use of any:

- (1) Mechanical device, machine, apparatus, or instrument for amplification of the human voice or any sound or noise;
- (2) Bell, horn, gong, whistle, drum, or other noise-making article, instrument, or device; or
- (3) Musical instrument

(c) The licensees under this subchapter shall comply with the noise level requirements set forth in Chapter 27 of Title 20 of the District of Columbia Municipal Regulations.

ABRA Licensing File No. 76366; Settlement Agreement, § 1.3(b) [Settlement Agreement]; D.C. Official Code § 25-725. Section 1.3(c) further requires the Respondent to also refrain from having “live bands or musical entertainment on the roof deck, but soft background music will be played for dining subject to the above restrictions.” Settlement Agreement, § 1.3(c). The Board interprets the phrase “subject to the above restrictions” to mean that § 1.3(c) is governed by the same restrictions contained in § 1.3(b). Thus, when Twelve provides prerecorded music on its roof deck, Twelve must merely comply with § 1.3(b), which repeats § 25-725.

13. In order for music heard outside an establishment to constitute a violation of § 25-725(c), it must “comply with the noise level requirements” in “Chapter 27.” § 25-725. The Government did not present evidence that the noise heard by Investigator Jones outside the establishment

violated the noise level requirements of Chapter 27 or present evidence that a noise meter reading was taken; therefore, there is insufficient evidence in the record to sustain Charge I.

14. The Board cannot find the Respondent in violation of § 25-725(a) in this case, because the Government failed to provide notice that it intended to base its charges on the fact that noise was heard inside a premise. According to § 2-509(a), “[t]he notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the Mayor or the agency determines that the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto.” D.C. Official Code § 2-509(a). Further, “an agency may not change theories in midstream without affording reasonable notice of the change” Arthur v. D.C. Nurses' Examining Bd., 459 A.2d 141, 145 (D.C. 1983). Here, neither the Amended Notice or the investigative report mention that Investigator Jones visited a residence; as a result, the Respondent did not have a chance to prepare a defense on the theory that it was in violation of § 25-725(a), which requires noise to be observed inside a premises and is separate from a violation of § 25-725(c). For this reason, sustaining Charge I on this ground would violate § 2-509(a) and permit the Government to “change theories in midstream.” Id. Therefore, the Board finds that Charge I merits dismissal.

II. The Board dismisses Charge II.

15. The Board does not find sufficient evidence in the record to sustain Charge II.

16. The Board initially imposed an MPD Reimbursable Detail requirement on the Respondent in order to resolve a protest filed by Advisory Neighborhood Commission 6A. In re BEG Investments, LLC, t/a Twelve Restaurant & Lounge, Case Number 10-PRO-00138, Board Order No. 2011-289, 1, 5 (D.C.A.B.C.B. Jun. 22, 2011). There, the facts demonstrated that violence occurred at the establishment, the establishment’s patrons disturbed nearby residents, and a police officer was assaulted by one of the establishment’s patrons. Id. at ¶¶ 4, 16. Further, the record demonstrated that the establishment already provided armed security. Id. at ¶ 6. Consequently, in order to justify the renewal of the license and permitting the Respondent to continue operating, the Board required the Respondent to hire the MPD Reimbursable Detail when it provided live entertainment. Id. at 4-5. The Board then modified this Order based on a request from the licensee based on potential financial hardship. BEG Investments, LCC, t/a Twelve Restaurant & Lounge, Case Number 10-PRO-00138, Board Order No. 2011-368, 1-3 (D.C.A.B.C.B. Aug. 10, 2011) modified by Board Order No. 2013-360 (correcting a clerical error).

17. The Board later modified this Order an additional time based on concerns from MPD that the Respondent was becoming a burden to the police due to its frequent last minute requests and cancellations of the MPD Reimbursable Detail. In re BEG Investments, LLC, t/a Twelve Restaurant & Lounge, Board Order No. 2012-496, 2 (D.C.A.B.C.B. Nov. 7, 2012). As such, the current condition imposed on the Respondent reads in pertinent part, “The Licensee shall hire the MPD Reimbursable Detail whenever the establishment provides any DJs or live music as entertainment at the establishment.” Id. at 3.

18. In this case, the Respondent is accused of not following a condition to “hire the MPD Reimbursable Detail whenever” it provides a DJ. Under D.C. Official Code § 25-823(6), the Respondent is obligated to comply with a condition imposed by the Board. D.C. Official Code § 25-823(6). The Board is aware that officers employed on the detail may be required to respond to emergency calls during their deployment. As a result, merely because an MPD Reimbursable Detail is not present, does not mean that the Respondent failed to hire the detail. In this case, Mr. Gibson stated that he hired the MPD Reimbursable Detail; consequently, the Board sees no reason why the Government could not have presented records maintained by MPD either affirming or disputing this statement. Consequently, the Board finds that the Government has failed to provide sufficient evidence to sustain Charge II.

III. The MPD Reimbursable Detail Condition Remains a Lawful Order of the Board.

19. The Board rejects Respondent’s challenge to the MPD Reimbursable condition placed on the Respondent’s license. *Tr.*, 1/15/2014 at 81.⁵ The Board’s power to impose conditions is authorized by D.C. Official Code §§ 25-104(e) and 25-447(f). There is no language (or any legislative history that the Board is aware of) that indicates that D.C. Official Code § 25-798 limits the Board’s authority under § 25-104(e) and 25-447(f).

20. Furthermore, the 23 DCMR §§ 718.1 to 718.5 only describes the procedures for receiving reimbursement under the reimbursable detail subsidy program, it does not limit the Board’s authority to impose a reimbursable detail on a licensee. 23 DCMR § 718 (titled, “Reimbursable Detail Subsidy Program”; 23 DCMR § 718.1 (stating, “This section sets forth the procedures for receiving reimbursement from ABRA under the subsidy program”)

21. 23 DCMR § 718.5 does state that “ABRA shall not be involved in determining the number of MPD officers needed to work a reimbursable detail,” but arguing that this precludes the Board from mandating the presence of the MPD Reimbursable Detail as a condition ignores (1) the aforementioned limitation of § 718, and (2) the fact that Title 25 and Title 23 of the D.C. Municipal Regulations clearly distinguishes ABRA from the Board. *See* D.C. Code §§ D.C. Official Code 25-101(1) (defining “ABRA”); 25-201(a), (c)(1) (establishing the “Alcoholic Beverage Control Board” with the duty to “[o]versee ABRA.”); 25-202 (establishing ABRA to provide assistance to the Board in the performance of its functions”); 25-203 – 25-204 (making separate assignments of employees, property and authority to ABRA and the Board); 23 DCMR § 199.1 (providing separate definitions for the terms “ABRA” and the “Board”); 23 DCMR §§

⁵ Counsel for the Respondent stated on the record, “. . . for the reasons already stated in the civil claim with regards to the unlawful imposition of these details which I incorporate by reference.” *Tr.*, 1/15/2014 at 81. The Board advises counsel against making arguments in this fashion. It is one thing for the Board to take administrative notice of a document in the public record; but asking the Board to parse out the exact nature of the Respondent’s legal position; especially, when mixed with claims and facts that go beyond the matter at hand, goes too far. In order for the Board to consider a legal argument, it must not be perfunctory, and it must appear within the four corners of a brief filed in this forum, or otherwise explained on the record. *Kamit Inst. for Magnificent Achievers v. D.C. Pub. Charter Sch. Bd.*, 81 A.3d 1282, 1289 n. 25 (D.C. 2013) *citing* *Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) (“[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.”)

208.1, 208.19, 700.2, 1208.4, 1601.8(d), 1900.5 (examples of regulations that treat ABRA and the Board as separate entities). Consequently, both a plain and holistic reading of Title 25 and Title 23 supports the conclusion that the Board has the authority to impose an MPD reimbursable detail on a licensee as a condition of licensure.

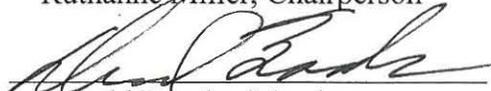
ORDER

Therefore, based on the foregoing findings of fact and conclusions of law, the Board, on this 23rd day of April 2014, hereby **DISMISSES** Charges I and II. The Alcoholic Beverage Regulation Administration shall deliver copies of this Order to the Government and the Respondent.

District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson

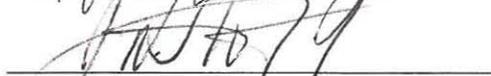


Donald Brooks, Member

Mike Silverstein, Member



Hector Rodriguez, Member



James Short, 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).