

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

In the Matter of:)	
)	
1900 M Street Restaurant Associates)	License No.: 71717
t/a Rumors)	Case No.: 12-CMP-155
)	12-CMP-155(a)
)	12-CMP-155(b)
)	Order No.: 2013-305
)	
)	
Holder of a Retailer's Class CN License)	
at premises)	
1900 M Street, N.W.)	
Washington, D.C. 20036)	

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

ALSO PRESENT: 1900 M Street Restaurant Associates, t/a Rumors, Respondent

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

Walter Adams, 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**

INTRODUCTION

The Government charges 1900 M Street Restaurant Associates, t/a Rumors, (Respondent) of violating District of Columbia (D.C.) Official Code § 25-762(b)(1). According to the Government, the Respondent engaged in a substantial change by increasing the number of seats on the unenclosed portion of the Respondent's sidewalk café on April 10, 2012, without the

approval of the Board. This increase exceeded the number of seats the Respondent requested in its initial application, as amended by the 1994 Certificate of Use for Sidewalk Café in Public Space submitted to the Board. Because we find that the Government has proven the charge, we order the Respondent to pay a \$500 fine.

Procedural Background

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on November 15, 2012. *ABRA Show Cause File No.*, 12-CMP-155, 12-CMP-155(a), 12-CMP-155(b), Notice of Status Hearing and Show Cause Hearing, 2-3 (Nov. 15, 2012). The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 1900 M Street, N.W., Washington, D.C., on November 24, 2012. *ABRA Show Cause File No.*, 12-CMP-155, 12-CMP-155(a), 12-CMP-155(b), Service Form.

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 10, 2012,] [y]ou failed to obtain approval from the Board before making a substantial change in operation, in violation of D.C. Official Code § 25-762

Notice of Status Hearing and Show Cause Hearing, 2-3.

Both the Government and Respondent appeared at the Show Cause Status Hearings on January 16, 2012. The parties then appeared at the Show Cause Hearing to argue their respective cases on March 20, 2013.

FINDINGS OF FACT

The Board having considered the evidence contained in the record, the testimony of witnesses, and the documents comprising the Board's official file, makes the following findings:

1. The Respondent holds a Retailer's Class CN License, ABRA License Number 71717. See ABRA Licensing File No. 71717. The Respondent's address is 1900 M Street, N.W., Washington, D.C. Id.
2. On April 10, 2012, ABRA Investigator Felicia Martin was conducting sidewalk café inspections on M Street, N.W. *Transcript (Tr.)*, March 20, 2013 at 9. During her investigation, she visited the Respondent's establishment, because it is located on M Street, N.W., and has a sidewalk café. Id. at 9-10.
3. At approximately 11:50 a.m., Investigator Martin entered the establishment, and requested that an employee provide her with the establishment's outdoor seating permit. Id. at 11-12. An employee obtained a large board that contained the establishment's certificates and

permits. Id. at 12. Nevertheless, the board did not contain any of the permits related to the establishment's outdoor seating. Id. at 12-13.

4. Before leaving the establishment, she counted the number of seats in the establishment's sidewalk café area. Id. at 14, 114-15. According to Investigator Martin's count, the unenclosed sidewalk café contained thirty-eight seats. Id. at 40, 119-20.

5. Upon returning to ABRA's offices, Investigator Martin checked the Respondent's licensing files. Id. at 16. According to the Certificate of Use for Sidewalk Café in Public Space, dated March 28, 1994, the Respondent is entitled to have twenty-four seats in an unenclosed sidewalk café. *ABRA Licensing File No. 71717, Certificate of Use for Sidewalk Café in Public Space, 1 (Mar. 28, 1994)*. We note that the certificate was issued to R.H.T., Inc., t/a Rumors, at premises 1900 M Street, N.W., and is the last certificate that the agency has a record of receiving from the license holder, or its predecessors. *Tr.*, 3/20/13 at 55, 125-26.

6. Richard Tolbert serves as the asset manager of the trust that owns the Respondent's business. Id. at 195. Mr. Tolbert has been involved in the business since 1977. Id. at 197. The establishment changed ownership in 1998, but Mr. Tolbert has remained involved in the business. Id. The current corporate owner of the Respondent was formed in the latter part of 1997. Id. at 221.

7. According to Mr. Tolbert, the establishment's sidewalk café has had the same square footage and configuration since 1977. Id. at 204. The original enclosed and unenclosed sidewalk café was constructed by the former owners of the establishment before 1977. Id. at 199. Under the corporate entity, RHT, Inc., the establishment conducted a renovation of the sidewalk café in 1998. Id. at 202. In addition, the establishment has applied for multiple Certificates of Use for the sidewalk café area. Id. at 208. Nevertheless, Mr. Tolbert did not know whether the additional Certificates of Use obtained by the establishment have ever been submitted to ABRA. Id. at 238.

8. During the hearing, the Licensee presented the following exhibits: First, a Certificate of Use for Sidewalk Café in Public Space, dated May 2, 2012, issued to the Respondent that is blank in the box titled: "Seating Capacity," Respondent's Exhibit No. 2. Second, a Certificate of Use for Sidewalk Café in Public Space, dated May 6, 2011, issued to the Respondent, which lists the sidewalk café seating capacity as fifty-six enclosed seats and thirty-four unenclosed seats. Respondent's Exhibit No. 4. Third, a Certificate of Use for Sidewalk Café in Public Space, dated August 19, 1996, issued to RHT, Inc., which lists the sidewalk café as having a seating capacity of 114 seats. Respondent's Exhibit No. 5. Fourth, a letter from the Department of Public Works, dated March 19, 1998, approving the reconstruction of the sidewalk café. Respondent's Exhibit No. 6. Fifth, a memo from the D.C. Public Space Committee, dated February 23, 1998, approving a sidewalk café with thirty-two tables for 101 people. Respondent's Exhibit No. 7. Sixth, the Respondent's lease agreement, dated July 15, 1997,

contains a picture of the sidewalk café area with thirty-four seats in the unenclosed area.¹ Respondent's Exhibit No. 8,

9. Wilfredo Paz serves as the Respondent's manager. *Id.* at 274. Mr. Paz has worked at the establishment since 1982. *Id.* According to Mr. Paz, the establishment has consistently set up its sidewalk café the same way for the past twenty-years. *Id.* at 275, 278.

CONCLUSIONS OF LAW

10. We conclude that the Respondent engaged in a substantial change by having more than twenty-four seats on the unenclosed portion of its sidewalk café on April 10, 2012. This is a violation, because the Respondent changed its outdoor seating without Board approval and exceeded the number of seats that it requested in its initial application, as amended by the 1994 Certificate of Use for Sidewalk Café in Public Space.

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(1). D.C. Code § 25-830 (West Supp. 2013); 23 DCMR § 800, *et seq.* (West Supp. 2013). 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. 2013).

12. Under § 25-762, "Before a licensee may make a change [that] . . . would substantially change the nature of the operation of the licensed establishment as set forth in the initial application for the license, the licensee shall obtain the approval of the Board in accordance with § 25-404." D.C. Code § 25-762(a) (West Supp. 2013). According to § 25-404, in order to obtain approval for a substantial change, the "applicant shall file with the Board an amendment to its application or last application, providing the information required on an application under § 25-402(a). D.C. Code § 25-402(a) (West Supp. 2013). Under § 25-402(a)(5), the applicant must provide information regarding "The size and design of the establishment, which shall include both the number of seats (occupants) and the number of patrons permitted to be standing, both inside and on any sidewalk café or summer garden. D.C. Code § 25-402(a), (a)(5) (West Supp. 2013). Finally, under § 25-762(b)(1),

In determining whether the proposed changes are substantial, the Board shall consider whether they are potentially of concern to the residents of the area surrounding the establishment, including changes which would . . . [i]ncrease the occupancy of the licensed establishment

§ 25-762(b), (b)(1) (West Supp. 2013).

¹ The diagram labeled 01-A8 shown to the Board during the hearing does not match sketch 01-A8 contained in the lease agreement; specifically, the diagram in the lease does not state in writing how many seats are in the sidewalk café. *Tr.*, 3/20/13 at 233-34.

13. The only Certificate of Use in ABRA's files is the certificate, dated March 28, 1994, which indicates the Respondent is authorized to have twenty-four seats in the unenclosed sidewalk café. Supra, at ¶ 5. We consider this certificate part of the applicant's "initial application," because § 25-402(a) treats all substantial changes to an application as "amendment[s]" to the initial application. §§ 25-402(a), 25-762(a). Because we find that the 1994 Certificate of Use is part of the initial application, we deem the Respondent's argument that we cannot look beyond the initial application unsupported by §§ 25-404 and 25-762. *Tr.*, 3/20/13 at 150-51. Therefore, we find that the Respondent's occupancy in its unenclosed sidewalk café is limited to twenty-four seats, as it indicated in its amended initial application.

14. We further determine that the thirty-eight seats observed by Investigator Martin in the establishment's unenclosed sidewalk café constitute a substantial change from the Respondent's amended initial application. Supra, at ¶ 4. Under the law, a substantial change is any change that would constitute a potential concern to residents. § 25-762(b). It is the view of the Board, that the increase in occupancy of the establishment's unenclosed seating area creates a potential concern to residents, because an increase in occupancy raises issues regarding public safety and noise. We note that this concern is reflected in the law. First, § 25-402(a)(5) requires applicants to provide the Board with the number of seats it intends to have in its sidewalk café. § 25-402(a)(5). Second, § 25-762 states that an increase in an establishment's occupancy should be considered when determining whether a change is substantial. § 25-762(b), (b)(1). Finally, we emphasize that the determination of whether a change is substantial does not depend on whether a resident has filed a complaint against the establishment.² See Tr. 3/20/13 at 154. For these reasons, we deem the change observed by Investigator Martin to be a substantial change under § 25-762.

15. We also note that the Respondent has never applied to increase the occupancy of its sidewalk café. The Respondent presented numerous certificates showing different occupancies for the sidewalk café and a lease agreement with a drawing with more than twenty-four seats. Supra, at ¶ 8. Nevertheless, none of these new certificates or the lease were ever presented to ABRA or the Board as part of a substantial change application as required by §§ 25-404 and 25-762. As a result, before the Respondent took advantage of the new occupancy limits in its Certificates of Use or its lease, it should have sought approval for a substantial change from the Board.

16. Therefore, for the above mentioned reasons, we find the Respondent in violation of 25-762(b)(1). "We determine the appropriate penalty by counting the number of [secondary tier violations] committed by the Respondent by 'looking to the date of the incident in the current matter,' and then determining the number of violations the licensee has committed within the requisite time period." In re LCRL, Inc., t/a The Islander Caribbean Restaurant & Lounge, Case No. 12-CMP-00407, Board Order No. 2013-184, ¶ 8 (D.C.A.B.C.B. May 15, 2013) citing In re Vertigo, Inc. t/a Sultra Lounge/Viet-Thai, Case Number 12-CMP-00105, Board Order No. 2013-114, ¶ 21 (D.C.A.B.C.B. May 8, 2013). "We determine the number of violations committed by the Respondent by looking to the dates we convicted the Respondent of any prior violations within the time period under review." Id. "Furthermore, in the case of a . . . staff settlement, the

² It could also be argued that the Notice filed by the Government in this matter represents the "complaint" of the people of the District of Columbia.

date the licensee paid the [fine] is the date of conviction, because that is the day the Respondent admitted its guilt.” *Id.* Here, § 25-762(b)(1) is listed as a secondary tier violation in our schedule of civil penalties. 23 DCMR § 800 (West Supp. 2013). The Respondent committed the current violation on April 10, 2012. *Supra*, at ¶ 2. The Respondent’s investigative history shows that the Respondent previously reached a staff settlement with ABRA and paid a \$250 fine for a secondary tier violation on October 20, 2011. *See ABRA Show Cause File No. 12-CMP-155, 12-CMP-155(a), 12-CMP-155(b), Investigative History.* This means that the current violation is the Respondent’s second secondary tier violation in a two-year period. Therefore, the fine range for this offense is \$500 to \$750. 23 DCMR § 802.1(B) (West Supp. 2013).

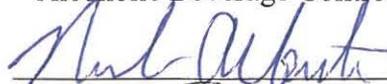
ORDER

Therefore, based on the foregoing findings of fact and conclusions of law, the Board, on this 17th day of July 2013, finds that 1900 M Street Restaurant Associates, t/a Rumors, violated §25-761(b)(1). Accordingly, the Board imposes a \$500 fine on the Respondent, which shall be paid within thirty (30) days from the date of this Order. Furthermore, the Respondent’s failure to pay this fine shall result in the suspension of the Respondent’s license until the fine is paid.

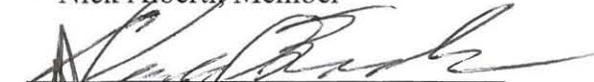
IT IS FURTHER ORDERED that the Respondent’s investigative history shall indicate that it has been convicted of one (1) secondary tier violation as of the date of this Order.

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



Mike Silverstein, Member

I dissent. In my view, the government failed to meet its burden of proving that Rumors made a substantial change in increasing its seats in the unenclosed portion of its sidewalk café. To the contrary, I find that the evidence in the record supports the opposite conclusion.

The Government charged the Licensee with making a substantial change without the approval from the Board, that being that it increased its seating to 38 seats, the number of seats the ABRA investigator counted, from the 24 seats authorized in the 1994 certificate of occupancy in the Rumors file at ABRA. The majority finds that the Government meets its burden of proof with those facts. I find the following evidence more persuasive:

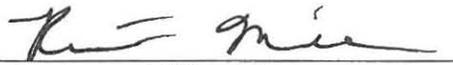
The 1994 certificate of occupancy states that it expires April 1, 1995. The current owners purchased Rumors in 1998 and have since had issued to them several certificates of occupancy with a range of seating authorized, including one in 2001 that authorized 34 unenclosed seats. Licensee's witnesses testified that the sidewalk café had the same configuration in 1977 and had always had the same number of seats. Licensee presented the layout in a lease application that is part of the Rumors file at ABRA. That lease application was dated 1997 prior to the Licensee's purchase of Rumors in 1998. That layout shows 34 seats that comfortably fill the area. Licensee also produced drawings approved by the District of Columbia Department of Transportation showing 34 seats. ABRA's investigator testified that she counted 32 seats and changed her testimony to 38 seats upon further questioning by the government's attorney. Accordingly, based on these facts, I find it credible that Rumors has 34 seats on its unenclosed part of its sidewalk café and has had that number at least since its initial application in 1998, and most likely since 1977.

I do not find the 1994 certificate of occupancy controlling as the threshold from which to determine any change from the Licensee's initial application because the evidence shows that there were several certificates of occupancy issued thereafter and there is no regulation that requires a Licensee to update its ABRA files with current certificates of occupancy.

D.C. Official Code 25-762 defines substantial change, in relevant part, as "a change in the interior or exterior...which would substantially change the nature of the operation of the licensed

establishment as set forth in the initial application.” The Government has failed to establish what the initial application provided and that the Licensee deviated from it. Moreover, there was no evidence that if there was an increase in seats, that such increase substantially changed the nature of the operation.

D.C. Official Code 25-762 (b) provides that “In determining whether the proposed changes are substantial, the Board shall consider whether they are potentially of concern to the residents of the area surrounding the establishment.” There is no evidence of any concern by residents to the number of seats at Rumors.



Ruthanne Miller, Chairperson

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).