

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

In the Matter of:)	
Spike Club, LLC)	License Number: 771
t/a Macombo Lounge)	Case Number: 12-251-00046
Holder of a Retailer's Class CN License)	Order Number: 2013-012
at premises)	
5335 Georgia Avenue, N.W.)	
Washington, D.C. 20011)	

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

ALSO PRESENT: Christine Gephardt, Assistant Attorney General, on behalf of the District of Columbia

Michael Woodfolk, on behalf of the Respondent

Robert Clayton, Esq., on behalf of the Respondent

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

PROCEDURAL BACKGROUND

On June 14, 2012, the Alcoholic Beverage Control Board (Board) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated June 6, 2012, on Spike Club, LLC, t/a

Macombo Lounge (Respondent), at premises 5335 Georgia Avenue, N.W., Washington, D.C. 20011, charging the Respondent with the following violations:

- Charge I: The Respondent used the establishment for an unlawful or disorderly purpose in violation of D.C. Code § 25-823(2). The date of this alleged incident was January 28, 2012.
- Charge II: The Respondent failed to take follow its security plan in violation of D.C. Code §§ 25-446(e) and 25-823(6). The date of this alleged violation was January 28, 2012.

The matter proceeded to a Show Cause Hearing and both the Government and the Respondent presented evidence through the testimony of witnesses and the submission of documentary evidence.

FINDINGS OF FACT

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:

1. The Board issued a Notice of Status Hearing and Show Cause Hearing, dated June 6, 2012. (*See* Alcoholic Beverage Regulation Administration Show Cause File Number 12-251-00046). The Respondent holds a Retailer's Class CN License and is located at 5335 Georgia Avenue, N.W., Washington D.C. 20011.
2. The Show Cause Hearing in this matter was held October 10, 2012. The Respondent was charged with two violations. Charge I alleges that the Respondent used the establishment for an unlawful or disorderly purpose in violation of D.C. Code § 25-823(2) and Charge II alleges that the Respondent failed to take follow its security plan in violation of D.C. Code §§ 25-446(e) and 25-823(6).
3. The Government presented its case through the testimony of several witnesses, the first of which was Metropolitan Police Department (MPD) Officer Paul Hrebenak. *Transcript*, 10/10/12 at 12.
4. Officer Hrebenak testified that he was working his regular beat on January 28, 2012 when he received a call from MPD to respond to a possible assault where the suspect could still be present. *Tr.* at 14-15. He further testified that when he arrived at the establishment he was met by the complainant and a friend, who stated that they were denied entrance to the establishment and that when they asked the security guard on duty outside of the establishment why they were denied entrance the security guard kicked the complainant in the abdomen. *Tr.* at 16-17. The complainant complained of pain in the abdomen but did not seek medical treatment other than from the ambulance crew that arrived at the scene. *Tr.* at 19, 44. Officer Hrebenak then interviewed the security guard, who stated to him that the complainant and his friend were denied entry because they appeared intoxicated and

that he was protecting himself when the complainant and his friend attempted to assault him. *Tr.* at 21. Neither the complainant nor the security guard were able to identify other witnesses to the incident. *Tr.* at 21-22. Based upon his interviews and the fact that the complainant had a corroborating witness, Officer Hrebenak arrested the security guard on a simple assault charge. *Tr.* at 24. The U.S. Attorney's office declined to prosecute the assault charge against the security guard. *Tr.* at 24. The establishment's owner informed Officer Hrebenak that there was no available security footage as the cameras were not working on the morning of the incident. *Tr.* at 28.

5. The Government called as its next witness, ABRA Investigator Earl Jones. Investigator Jones testified that, on the morning of January 28, 2012, he had received a request from ABRA Supervisory Investigator Stewart to respond to a call to the ABRA hotline concerning a simple assault at the establishment. *Tr.* at 92. He further testified that, when he arrived approximately 10 minutes later, he had observed approximately four police cars blocking Georgia Avenue and an EMT vehicle. *Id.* Investigator Jones stated that he had interviewed three MPD officers; including Officer Hrebenak and that he had prepared the ABRA Case Report regarding the incident. *Tr.* at 94. He first interviewed MPD Officer Hector, who told him that the incident involved two males who made several attempts to enter the establishment and that, during the second attempt, one of the males was kicked in the stomach by a security guard in front of the establishment. *Tr.* at 95. Officer Hector stated that he had interviewed the complainant, the complainant's friend and the security guard, who was subsequently arrested on an assault charge. *Tr.* at 96. Investigator Jones stated that he interviewed the complainant approximately three or four days later and that the complainant corroborated Officer Hector's version of events. *Tr.* at 97-98. Investigator Jones testified that he attempted unsuccessfully to contact the complainant's friend and that the complainant had decided not to further involve himself in the investigation or in any proceeding before the Board. *Tr.* at 99-100. Investigator Jones further testified that he interviewed the owner of the establishment, Michael Woodfolk, who stated that he was inside when the incident occurred and learned the details from his security guard. *Tr.* at 100. During examination by Counsel for Respondent, Investigator Jones stated that Mr. Woodfolk had told him that the establishment's security guard had stated that he had pushed, not kicked the complainant in response to an attempted punch by the complainant. *Tr.* at 119. Mr. Woodfolk had stated to Investigator Jones that he was unable to provide security footage because he did not have his laptop, which he utilized to access the tape. *Tr.* at 101. Investigator Jones attempted several weeks later to obtain the security footage but testified he was told by Mr. Woodfolk that he did not have a zip drive on which to download the tape. *Tr.* at 102. He further testified that he had still not obtained the security footage on the date of the hearing. *Id.* Investigator Jones further testified that the establishment has security cameras located over the front door and in the front vestibule, both of which would have been capable of recording the incident. *Tr.* at 103-104. Investigator Jones also testified that he had requested a copy of the establishment's incident report, also required by the security plan but had not received a copy on the date of the hearing. *Tr.* at 142. Finally, Investigator Jones testified that he had reviewed the security plan, which specifically prohibited any use of force to eject patrons and any physical force except where necessary for defensive purposes to detain a patron for police. *Tr.* at 107-108.

6. The Respondent called as its witness Michael Woodfolk. Mr. Woodfolk testified that he was in the establishment at the time of the incident but that he had not personally witnessed the incident. *Tr.* at 150. He stated that he came from the upstairs portion of the establishment when notified by his staff that MPD was outside of the establishment. *Tr.* at 151. He further testified that he had spoken with the establishment's security guard about the incident and was told that the complainant had been refused admittance because he appeared to the security guard to be intoxicated. *Tr.* at 152. The security guard further told him that, after being refused admittance, the complainant and his friend left the front of the establishment but later returned, again seeking admittance. *Tr.* at 153. The security guard again refused to admit the complainant, whereupon the complainant swung at the security guard, missed, and was pushed out of the vestibule of the establishment by the security officer. *Id.* Mr. Woodfolk further testified that all security cameras were operational the morning of the incident and that the police never asked him to review the security footage. *Tr.* at 154. He stated that he had reviewed the security footage and that at based upon his review of the footage at no time did the security guard kick the complainant. *Tr.* at 155. He further stated that he told Investigator Jones of his finding. *Id.* However, when Mr. Woodfolk attempted to copy the footage after learning how to do so the footage had disappeared. *Id.* Later on he learned from the security system installer that the system only saved between 10 days and two weeks' worth of footage before recording over the previous footage. *Tr.* at 159. Furthermore, he testified that in a conversation with Investigator Jones he was told that the complainant had told Investigator Jones that the complainant had made up the story about being kicked because he had been denied entrance into the establishment. *Tr.* at 161-162. Mr. Woodfolk further testified that he generally had instructed his security personnel not to use force except where necessary to defend themselves or to detain a patron for police. *Tr.* at 162-164. Mr. Woodfolk then read from the security plan, which only allows for use of force when detaining a patron for police and admitted that this did not happen in this instance. *Tr.* at 166. Further, he testified that the security plan also stated that, as a rule of thumb, when escorting a person from the establishment, another security officer should be called to assist. *Id.* Mr. Woodfolk also stated that this did not happen. *Id.* Finally, Mr. Woodfolk admitted that neither he nor his security staff had called the MPD. *Tr.* at 172.

CONCLUSIONS OF LAW

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. Code § 25-830 and 23 D.C.M.R. 800, *et seq.* However, the District of Columbia Court of Appeals has recently determined that, in order for the Board to determine that a licensee allowed unlawful and disorderly conduct to occur in its establishment or that it violated its security plan, the Government must show that the "incidents in question have a demonstrable connection to the operation of the establishment. *1900 M Restaurant Association, Inc., t/a Rumors Restaurant v. District of Columbia Alcoholic Beverage Control Bd.*, 2012 WL 5950582 at 6 (D.C. 2012). Moreover, in order to show such a connection, the substantial evidence in the

record must demonstrate that the licensee engaged in “a continuous course of conduct” that encourages, causes, or contributes “to the unlawful or disorderly conduct at issue.” *Id.* In the absence of such evidence, the Government must show that “the licensee’s method of operation created an environment that fostered or was conducive to the unlawful or disorderly conduct that inevitably took place.” *Id.*

The Board finds that the Government has not proven that the Respondent violated D.C. Code § 25-823(2), allowing the premises to be used for an unlawful purpose in the alleged actions taken by the security guard in removing a patron from the premises. The Board credits the testimony of Mr. Woodfolk that the video that he reviewed did not show that the patron had been kicked by the security guard stationed in the vestibule of the establishment to guard against unruly or under aged patrons from entering the establishment. Mr. Woodfolk did acknowledge that he was told by the security guard that the guard had pushed the patron away from the establishment in self-defense after the patron had swung at the security guard, which clearly was a violation of the establishment’s security plan, but there is no evidence that the incident rose to the level of an unlawful act. Moreover, both the Government and the Respondent acknowledged that there were no known impartial witnesses to the alleged incident, making this a “he said, she said” type of incident with no clear evidence on which to reach a conclusion that District law was breached. Further, the testimony that the complainant did not seek medical treatment, did not appear to be in obvious pain or display obvious signs of trauma and did not wish to be involved in these proceedings further make it difficult, if not impossible, for the Board to establish that a violation occurred. Moreover, the fact that the U.S. Attorney decided not to prosecute the assault charge weighs against a finding that such a violation did in fact occur. Therefore, the Board dismisses Charge I as being unsubstantiated. However, the Board notes that, even if the facts presented by the Government were true, an isolated incident of unlawful and disorderly conduct does not demonstrate a “continuous course of conduct” or a “method of operation” conducive to violence.

As to Charge II, the Board finds that there is sufficient credible evidence to establish that the Respondent failed to abide by its Security Plan in violation of D.C. Code §§ 25-446(e) and 25-823(6). Testimony indicates that, at a minimum, Respondent’s security guard shoved the complainant out of the vestibule through the front door, which the Board believes to be excessive for the situation. While the Security Plan does allow for security to protect themselves in the event of an attack by a patron, which has been alleged but not established by Respondent, protection does not extend to a violent shove by security, which has been admitted to by Respondent. As called for in the Security Plan, force should only be resorted to when detaining a patron for arrest by MPD. Moreover, the record establishes that Respondent violated the Security Plan by not calling for assistance in removing the patron from the premises.

The Government asked that the Board impose, in total, a fine of \$3,500 and a suspension of five days, three served and two stayed for one year. Counsel for the Respondent requested that the Board dismiss both Claims. The Board does not find that the incident warrants the penalties requested by the Government. Indeed, the Board does not agree that the incident rises to the level of a violation of D.C. Official Code § 25-

823(2), as no credible evidence has been provided that an assault actually occurred at the establishment. However, the Board does find credible evidence that Respondent violated its Security Plan in violation of D.C. Code §§ 25-446(e) and 25-823(6). Because this constituted an isolated incident of unlawful and disorderly conduct and does not demonstrate a “continuous course of conduct” or a “method of operation,” the Board is without authority to impose a penalty for this violation. In lieu of ordering a monetary penalty, the Board warns Respondent that a deviation from its Security Plan in the manner admitted to by Respondent is not acceptable behavior and will not be tolerated in the future. The express purpose of this warning is to put the Respondent on notice that the Board would have sufficient evidence to find a “continuous course of conduct” or “method of operation” should the behavior highlighted in this Order continue or repeat in any fashion in the future.

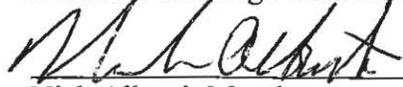
ORDER

Based on the foregoing findings of fact and conclusions of law, the Board, on this 9th day of January, 2013, finds that the Respondent, Spike Club, LLC, t/a Macombo Lounge, holder of a Retailer’s Class CN License, did not violate D.C. Code § 25-823(2). However, the Board does find that Respondent violated D.C. Code §§ 25-446(e) and 25-823(6). The Board hereby **ORDERS** that:

1. Charge I: Dismissed
2. Charge II: Respondent is warned not to violate its Security Plan in the manner established herein. Further, the Respondent is requested to retrain its security force on dealing with unruly patrons in accordance with the requirements of the Security Plan.

The Alcoholic Beverage Regulation Administration shall distribute copies of this Order to the Government and to the Respondent.

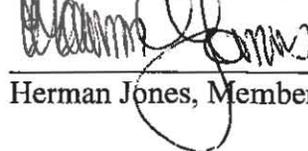
District of Columbia
Alcoholic Beverage Control Board



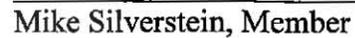
Nick Alberti, Member



Donald Brooks, Member



Herman Jones, Member



Mike Silverstein, Member

I concur on the position taken by the Board on Charge I and dissent from the position taken by a majority of the Board on Charge II on the basis that there is insufficient evidence in the record that Respondent assaulted the Complainant in violation of the licensee's security plan.



Ruthanne Miller, Chairperson

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).