GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Legal Counsel Division

MEMORANDUM

TO: **Fred P. Moosally**
General Counsel
Alcoholic Beverage Regulation Administration

FROM: **Wayne C. Witkowski**
Deputy Attorney General
Legal Counsel Division

DATE: **May 9, 2008**

SUBJECT: **Can D.C. Nightclubs Use Different Minimum Age Entry Requirements Based on Gender?**
(AL-08-191 B)

This responds to your March 11, 2008 memorandum, by which you request advice from this Office on "whether the practice of several licensed nightclubs and taverns to have different age restrictions for entry based upon gender constitutes age and/or gender discrimination" under both the Human Rights Act of 1977 (HRA), effective December 13, 1977, D.C. Law 2-38, D.C. Official Code § 2-1401.01 *et seq.* (2007 Repl.), and 23 DCMR § 905.1.

By way of background, you state the following in your memorandum:

> There are generally two practices utilized by nightclubs and taverns in their admission policy that are at issue. The first practice is to allow females 18 and over to enter the licensed establishment but only allow males 21 and older to enter the establishment. The second practice is to allow females 18 and over to enter the licensed establishment but only allow males 21 and older to enter the establishment provided that the males purchase their tickets in advance. Otherwise, the age requirement is 21 for males to enter.[1]

[1] In a follow-up April 17, 2008 e-mail to Assistant Attorney General John J. Grimaldi, II, Legal Counsel Division, you stated with respect to the second practice that "females 18 and over would be able to attend the event regardless of whether or not they bought their tickets in advance. Thus, they could buy them at the door while the event was occurring and walk right into the establishment. On the other hand, males under 21 would not be able to buy tickets while the event was occurring and would be prohibited from attending the event. Males between 18 and 20 would need to purchase their tickets one or more days in advance of the event to be allowed to attend."

CONCLUSION

Having reviewed the applicable law, and for the reasons that follow, this Office concludes that the practices described in your memorandum constitute violations of 23 DCMR § 905.1.

DISCUSSION

Section 905.1, Title 23 DCMR, does not prohibit nightclubs and taverns from imposing age-based entry restrictions *per se*.[2] The regulation provides as follows:

> The admittance requirement of those persons displaying a valid identification as set forth in D.C. Official Code § 25-782(d)[3] shall not preclude establishments from enforcing a dress code or an age restriction, *provided those establishments do not discriminate on any basis prohibited by [the HRA]*. (Emphasis added.)

Clearly, given the highlighted proviso language in the section, the HRA warrants some brief preliminary discussion.

The HRA is intended "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of...sex [and] age...."[4] Section 101 of the HRA (D.C. Official Code § 2-1401.01); *see also Howard Univ. v. Green*, 652 A.2d 41, 49 n.12 (D.C. 1994) (HRA "primarily designed to protect from invidious discrimination those persons or groups who have traditionally been subjected to unfair treatment").

To give effect to that purpose, the courts view the HRA as "a broad remedial statute...to be generously construed." *George Washington Univ. v. D.C. Bd. of Zoning Adjustment*, 831 A.2d 921, 939 (D.C. 2003) (citing *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991)); *see also Dean v. D.C.*, 653 A.2d 307, 319 (D.C. 1995) (*per curiam*) ("The Council undoubtedly intended the Human Rights Act to be a powerful, flexible, and far-reaching prohibition against discrimination of many kinds.").[5]

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[2] *Cf. City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (upholding against First and Fourteenth Amendment challenge an ordinance imposing age restrictions on admission to certain dance halls).

[3] D.C. Official Code § 25-782(d) (2001) provides that "[e]xcept as otherwise permitted, a licensee shall not deny admittance to a person displaying a valid identification document displaying proof of legal drinking age." The term "legal drinking age" is defined by D.C. Official Code § 25-101(29) (2007 Supp.) as meaning "21 years of age."

[4] Section 102(2) of the HRA (D.C. Official Code § 2-1401.02(2)) defines "age" to mean "18 years of age or older."

[5] *See also Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (public accommodations laws "plainly serv[e] compelling state interests of the highest order") (upholding Minnesota human rights statute that made it illegal to discriminate on the basis of, among other things, sex in places of public accommodation); *see also Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (following *Roberts*; upholding California public accommodations law that prohibited gender discrimination).

While you do not describe the operations of the nightclubs and taverns noted in your memorandum, the HRA defines places of public accommodation broadly enough, it appears, to encompass them. Under section 102(24) (D.C. Official Code § 2-1401.02(24)), a "place of public accommodation" is, among other things, a place

> included in the meaning of such terms as inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises....[6]

One form of discrimination prohibited by the HRA is that with respect to places of public accommodation. *See* section 231(a)(1) (D.C. Official Code § 2-1402.31(a)(1)) (prohibiting discriminatory practices based on, among other things, the actual or perceived sex and age of a person so as "[t]o deny, directly or indirectly,...the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations"); *see also, generally,* section 201 (D.C. Official Code § 2-1402.01) ("Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to,...in places of public accommodation....").

Against this background, the threshold question becomes whether, for purposes of 23 DCMR § 905.1, the practices of the nightclubs and taverns "discriminate on any basis prohibited by [the HRA]."

The HRA does not prohibit every discriminatory practice. *See Dean*, 653 A.2d at 319 (citing *NOW v. Mut. of Omaha Ins. Co.*, 531 A.2d 274, 279 (D.C. 1987) ("Based upon the language of the Human Rights Act and related legislation, and upon legislative history we conclude that the Council has not proscribed the use of gender-based categories in setting insurance rates.")); *see also, e.g.,* the explicit "exception" provisions contained in HRA section 212 (D.C. Official Code § 2-1402.12) (employment), section 224 (D.C. Official Code § 2-1402.24) (housing and commercial space), and section 272 (D.C. Official Code § 2-1402.72) (motor vehicle rentals). Nevertheless, however one may define invidious discrimination,[7] both the practices described in

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[6] Nothing in your memorandum suggests that the nightclubs and taverns would include "any institution, club, or place of accommodation which is in its nature distinctly private." Such places do not come within the HRA definition of "place of public accommodation". *See* section 102(24) (D.C. Official Code § 2-1401.02(24)).

[7] The HRA does not define invidious discrimination, nor has any local court in an opinion that this Division could find. However, other courts have. *See, for example, Chicagoland Chamber of Commerce v. Pappas*, 317 Ill. Dec. 113, 142 (Ill. App. Ct. 2007) ("Invidious discrimination is defined as a classification which is arbitrary, irrational, and not reasonably related to a legitimate purpose.") (quoted authority omitted)); *see also Black's Law Dictionary* 480 (7th ed. 1999) (Invidious discrimination is "[d]iscrimination that is offensive or objectionable, esp. [sic] because it involves prejudice or stereotyping.").

your memorandum have discriminatory effects prohibited by the HRA. Under the first practice, 18- to 20-year-old males are not allowed into the nightclubs and taverns at all, while females of the same age can enter. The second practice allows for 18- to 20-year-old males to enter only with tickets purchased one or more days in advance, whereas females of the same age can enter with tickets purchased even while an event is occuring. On the face of things, in short, a segment of the young adult male population is prevented from, or restricted in, enjoying the services and other accommodations offered by the establishments.

In a March 17, 2008 e-mail to Mr. Grimaldi, Assistant Attorney General Jennifer L. Johnson, Alcohol Beverage Regulation Administration, stated that the putative reason for the admission practices is "to attract more women." Assuming that to be correct, a nightclub or tavern could still run afoul of the HRA even if it were to provide some reasonable economic basis for its admission practice. Substantially more of a showing would be required to stay on the right side of the law.

Section 103(a) of the HRA (D.C. Official Code § 2-1401.03(a)) provides, in pertinent part, as follows:

> (a) Any practice which has a discriminatory effect and which would otherwise be prohibited by this chapter shall not be deemed unlawful *if it can be established that such practice is not intentionally devised or operated to contravene the prohibitions of this chapter and can be justified by business necessity.* Under this chapter, a "business necessity" exception is applicable only in each individual case where it can be proved by a respondent that, without such exception, such business cannot be conducted; a "business necessity" exception cannot be justified by the facts of increased cost to business, business efficiency, the comparative characteristics of one group as opposed to another, the stereotyped characterization of one group as opposed to another, and the preferences of co-workers, employers, customers or any other person. (Emphasis added.)

It is beyond the scope of this memorandum to speculate on what a nightclub or tavern would have to show in order to prove that it is not trying to contravene the HRA by maintaining one or the other of the admission practices. However, assuming that such a case can be made, the establishment would also have to demonstrate that, without the business necessity exception, its business cannot be conducted. That, to turn a phrase, is a tough nut to crack, especially given the nature of the admission practices themselves and what HRA section 103(a) explicitly provides in terms of reasons that cannot be used to justify them, *e.g.*, increased costs and business efficiency. Indeed, such a showing may well be impossible. *Cf. Koire v. Metro Car Wash*, 40 Cal. 3d 24, 32, 707 P.2d 195, 199 (Cal. 1985) ("It would be no less a violation of the [Unruh Civil Rights] Act for an entrepreneur to charge all homosexuals, or all nonhomosexuals, reduced rates in his or her restaurant or hotel in order to encourage one group's patronage and, thereby, increase profits. The same reasoning is applicable here, where reduced rates were offered to women and not men."); *City of Clearwater v. Studebaker's Dance Club*, 516 So.2d 1106 (Fla. Dist. Ct. App. 1987) (finding that a promotional membership offering discounted drink prices to women violated the city's anti-discrimination ordinances); *see also Roberts*, 468 U.S. at 625, where the Court equated the injuries of gender discrimination to race, stating that the "stigmatizing injury

[of discrimination], and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[8]

In short, the admission practices of the nightclubs and taverns constitute violations of sections 201 and 231(a)(1) of the HRA in that they discriminate between certain patrons on the basis of gender and age. As such, the practices also violate 23 DCMR § 905.1.

If you have any questions about this memorandum, please contact either Mr. Grimaldi at 724-5198, or me at 724-5524.

WCW/jjg

[8] For a contrary view, *see* Comment, *Is Ladies' Night Really Sex Discrimination?: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury*, 36 Seton Hall L. Rev. 223 (2005).