THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)		
	)		
Lemma Holdings, LLC	)	Case No.:	18-251-00067
t/a Bliss	)	License No.:	ABRA-95711
	)	Order No.:	2019-142
Holder of a	)		
Retailer's Class CT License	)		
	)		
at premises	)		
2122 24th Place, N.E.	)		
Washington, D.C. 20018	)		

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
James Short, Member
Bobby Cato, Member

ALSO PRESENT: Lemma Holdings, LLC, t/a Bliss, Respondent

Makan Shirafkan, Counsel, on behalf of the Respondent

Rebecca Barnes, Assistant Attorneys General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING MOTION FOR RECONSIDERATION, GRANTING STAY, AND AMENDING BOARD ORDER NO. 2019-039

INTRODUCTION

The Alcoholic Beverage Control Board (Board) found that Lemma Holdings, LLC, t/a Bliss, (hereinafter "Respondent" or "Bliss") violated D.C. Official Code §§ 25-823(a)(2) and 25-823(a)(6) on January 15, 2018, when a security member pushed a female patron to the ground without justification and in violation of the Respondent's security plan, which started a fight within the establishment between security and a number of female patrons. *In re Lemma Holdings, LLC, t/a Bliss*, Case No. 18-251-00067, Board Order No. 2019-039, 1 (D.C.A.B.C.B.

Jan. 30, 2019). Furthermore, the Board found that the establishment's management was complicit in this incident by failing to follow its security procedures and properly documenting and reporting what had transpired. *Id.* at 1-2. In light of these failures by the establishment's employees and management, the Board fined Bliss $8,000 and required the establishment to comply with various conditions. *Id.* at 3. Subsequently, the Respondent filed a motion for reconsideration and request for a partial stay, which was opposed by the Government.

The Board grants the request for a stay, but denies the motion for reconsideration for the reasons stated by the Government in its response. The Board further denies the request for reconsideration for the reasons described below.

I. THE BOARD AFFIRMS ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. The Board rejects Bliss' various challenges to the Board's findings of fact.

a. Bliss was not entitled to any inferences in its favor when its key witness was impeached and its case-in-chief was not persuasive.

2. Bliss argues that the Board should make all factual inferences in favor of Bliss. *Mot. for Recon.*, at 22. The Board reminds Bliss that Mr. Deen claimed on the record that the men seen on the video were not associated with Bliss when in fact they were security. *In re Lemma Holdings, LLC, t/a Bliss*, Board Order No. 2019-038, at ¶ 16, *Tr.*, 11/7/18 at 216-17, 242-43, *Mot. for Recon.* at 20.[1] This renders the information provided by Mr. Deen, the licensee's major witness, as highly suspect.[2] In light of the impeachment of this witness, Bliss should not be shocked that it lost the benefit of the doubt and the Government's version of events was more persuasive and reasonable.

b. The Board's decision is based solely on the testimony and evidence contained in the record, which includes the footage observed by Camera 10.

3. Bliss accuses the Board of reviewing footage outside of the record. *Mot. for Recon.*, at 6. This accusation is unfounded and fails to cite any specific fact that came from outside the record.

[1] Counsel stated during closing arguments that "I would put it to the Board that he is mistaken that those are not security. But that's just my position." *Tr.*, 11/7/18 at 243. This was not a clear repudiation, stipulation or correction of the record; as a result, the Board felt it necessary to address the reasons it rejected Mr. Deen's statement on the record in paragraph 40 and make a specific finding that the men were employees of the establishment. However, in light of Bliss' admission on page 20 of its motion that the men were security contractors, it is uncontroverted that the men in the video were, at a minimum, agents of the establishment. *Mot. for Recon.*, at 20. Therefore, as the distinction between employees and agents of the establishment under § 25-823(a)(2) is irrelevant, the Board finds no need to disturb its prior findings.

[2] For example, in light of counsel's revelation that the two males were security, Mr. Deen's statement that security asked the two males seen on camera to leave is troubling and raises more questions about the incident. *Tr.*, 11/7/18 at 222-23. If untrue, it further impeaches the testimony of Mr. Deen. If true, it further supports the Government's position that Bliss security acted inappropriately, as an establishment would not likely ask its own security to vacate the premises unless the ejected security did something wrong.

The Board notes that its findings of fact and conclusions of law provide pin cites as to the source of all material findings of fact and conclusions of law in this matter. Therefore, the Board properly considered the substantial evidence contained in the record in accordance with § 1718.3. 23 DCMR § 1718.3 (West Supp. 2019).

4. Furthermore, Bliss' more specific accusation that the Board improperly considered footage from Camera 10 is without merit. *Mot. for Recon.*, at 5. As noted by the Government, § 1713.10 states that "The investigative report and attachments shall be part of the Board's record and it shall not be necessary for the parties to formally move for admission of the investigative report or portions of it into the evidentiary record." 23 DCMR § 1713.10 (West Supp. 2019); *Opposition*, at 7. The case report in this case described "Camera #10 and described it as Exhibit No. 4. *Case Report No. 18-251-00067*, 2-3, 5 (Jan. 15, 2018). Moreover, it is difficult for Bliss to claim any prejudice when the Government relied upon Bliss' own security footage and the footage is not necessary to support the decision. *Opposition*, at 8. Therefore, Bliss had adequate notice that the Board could rely upon Camera 10 and such use was appropriate.

c. The Board reasonably inferred that Bliss security unjustifiably pushed a female patron.

5. Bliss argues that the push inferred by the Board in paragraph 22, which the Board relied upon in sustaining Charges I and II, is unreasonable because it only shows a female patron falling and "security . . . standing . . . with his hands to his side." *Mot. for Recon.*, at 6, *In re Lemma Holdings, LLC, t/a Bliss*, Board Order No. 2019-038, at ¶ 22. In paragraph 22, the Board indicated that it made its inference based on the direction the patron fell, the direction security was facing, his proximity to the patron, and the absence of other people nearby. *In re Lemma Holdings, LLC, t/a Bliss*, Board Order No. 2019-038, at ¶ 22. Bliss does not address why these specific factors relied upon by the Board are unreasonable or insufficient; therefore, the Board finds no compelling reason to abandon its original conclusion. Moreover, if Bliss wants to argue that the patron fell for another reason, nothing prevented Bliss from rebutting the Government's presentation with eye witness testimony of the moments before the patron fell. *Mot. for Recon.*, at 6-7. Therefore, for the above stated reasons, the Board affirms its decision to hold Bliss liable for the offenses described by Charges I and II.

II. BLISS HAD SUFFICIENT NOTICE OF THE FACTS AT ISSUE.

6. Bliss argues that the fight between the patrons and security and the finding of the intoxicated female patron amount to separate incidents, which involved different Bliss staff. *Mot. for Recon.*, at 2-3. Bliss also argues that the notice did not mention the intoxicated patron. *Id.* In addition to being incorrect, Bliss' attempt to separate the incidents is artificial, unreasonable, and self-serving. *Opposition*, at 7.

7. First and foremost, the notice in this matter references the intoxicated patron. As stated in the notice as part of Charge I, Bliss was advised that

> A group of four women were at the establishment when they observed a young woman who appeared to be overly intoxicated. As they stopped to assist her, the owner and two

> male security officers arrived to assist. As the security staff attempted to intervene, a dispute arose between them . . . resulting in one or more [assaults]."

Notice of Status and Show Cause Hearings, Case No. 18-251-00067, 2 (Aug. 17, 2018). Moreover, the investigative report provided to Bliss on July 12, 2018, explicitly discusses the presence of the intoxicated female patron. *ABRA/ABC Board Personal Service Form*, 1 (Jul. 12, 2018) (noting service of investigative report); *Case Report No. 18-251-00067*, 2 (female patron noted a woman on the floor and she "encouraged her friends to allow the establishment's staff to assist the intoxicated young lady"), 3 (another female patron noticed a woman passed out on the floor of the bathroom). The Government further referenced the intoxicated female patron in its closing argument. *Tr.*, 11/7/18 at 234-35. As a result, Bliss had adequate notice that the intoxicated female on the bathroom floor and the establishment's reaction was relevant to the incident underlying Charge I.

8. Furthermore, Bliss' claim that the establishment actually filled out a second incident report is out of order. *Mot. for Recon.*, at 3. In addition to being on notice of the relevance of the matter, Board Member Alberti asked Mr. Deen to confirm that the

> MEMBER ALBERTI: . . . incident report doesn't say that staff notified MPD or that there was a sick woman carried out, none of that is in your incident report. Is that correct?
>
> [MR. DEEN]: Yes, sir.

Transcript (Tr.), November 7, 2018, 218-19. This exchange between Board Member Alberti and Mr. Deen alone is sufficient to justify a finding that the establishment did not properly document finding an intoxicated person in the bathroom, as the Board did in paragraphs 20 and 48 of the Order. *In re Lemma Holdings, LLC, t/a Bliss*, Case No. 18-251-00067, Board Order No. 2019-038, ¶ 48 (D.C.A.B.C.B. Jan. 30, 2019).

9. In response to this question, Bliss could have had a witness testify to the writing of a second report, sought to introduce it into evidence during the hearing, or even attempted to introduce it through its motion for reconsideration. Bliss' excuse that the second incident report documenting the intoxicated patron was not relevant is further unavailing when the notice and ABRA's case report discuss the presence of the intoxicated female patron as the beginning of the incident. Moreover, Bliss does not explain why the report was not given to the investigator during the initial investigation of the incident. As a result, Bliss' attempt to bring in the second alleged incident report must be rejected because it assumes facts not in evidence (i.e., counsel is testifying), which the Board cannot consider. 23 DCMR § 1611.4 (West Supp. 2019).[3]

10. Finally, Bliss has not identified any facts in the record that support its contention that separate Bliss staff dealt with the intoxicated female and the group of female patrons. *Mot. for Recon.*, at 2. Bliss could have identified the names and number of security that participated in

[3] "The Board shall make its findings of fact based upon the evidence which has been presented to it." 23 DCMR § 1611.4 (West Supp. 2019).

the incident and their specific actions during its case-in-chief, but did not take advantage of this opportunity. As a result, there is no justification in the record for adopting Bliss' version of events.

III. THE BOARD AFFIRMS ITS FINDINGS REGARDING BLISS' CAMERAS.

11. Bliss argues that it did not withhold relevant camera footage from ABRA and that it lacked proper notice of the footage it was required to submit. *Mot. for Recon.*, at 3. This argument misstates the Board's conclusion and is incorrect.

12. D.C. Official Code §§ 25-402(d)(A)(ii), 25-823(a)(6) and 25-823(c) requires licensees to comply with the terms of their security plan.[4] In Board Order No. 2019-039, the Board noted that Bliss stated in its security plan that its security cameras would "cover every portion of Bliss." *In re Lemma Holdings, LLC, t/a Bliss*, Board Order No. 2019-038, at ¶¶ 9, 48. If Bliss had adequate or complete camera coverage, the cameras should have clearly shown the patrons interacting with security and the movement of security and the patrons from the bathroom to the exit. Instead, despite occurring in parts of the establishment accessible to the public and near security cameras, the beginning of the altercation, the movement of the altercation from near the bathroom to the back doors, and the alleged exit of the two males are not seen on the footage. *Id.* at ¶¶ 12, 20-21, 40. Moreover, as the diagram of the establishment shows, the absence of footage that should exist runs from the entrance of the bathroom, down two hallways, and part of the area leading to the backdoor. *Id.* at ¶ 2. In the face of this unexplained, giant, and illegal blind spot, the Board is entitled to infer that vital evidence was improperly withheld.

13. Nevertheless, even if Bliss is correct that the video is nonexistent, the establishment fares no better. *Mot. for Recon.*, at 4 ("Nonexistence of a video is not the same as not providing"). As Bliss has not provided a convincing explanation as to why its security cameras failed to pick up such a large part of the incident, it is fair and reasonable for the Board to conclude that Bliss "failed to install its security cameras in a manner that complies with the security plan . . . ." *Id.* at ¶ 48. The Board noted in paragraph 48 that the failure to properly install cameras in a manner that complies with the security plan is sufficient to support the findings required by § 25-823(a)(2) and (b). *In re Lemma Holdings, LLC, t/a Bliss*, Board Order No. 2019-038, at ¶ 48. As a result, a finding that the establishment withheld video footage is supported by the record; nevertheless, even if this is not the case, such a finding is not required to sustain the decision in light of the failure to comply with the security plan.

14. Moreover, Bliss' complaints regarding the prosecution only showing a portion of the video footage or that it was somehow surprised is not well taken. *Mot. for Recon.*, at 4-5 Once the Government made its prima facie case and the investigator challenged the adequacy of the evidence production on the record, nothing prevented Bliss from submitting additional footage to rebut the Government's presentation or calling additional witnesses who had observed the fight

[4] Under § 25-402(d)(2), the holder of a tavern license, such as Bliss, may be obligated to file and comply with the terms of a security plan. D.C. Code § 25-823(d)(2). A licensee governed by a security plan may be found in violation when it "fails to follow its . . . security plan." D.C. Code § 25-823(a)(6).

(e.g., Bliss security).[5] As a result, the prosecution's decision to only show evidence it thought relevant to its case does not invalidate the decision; especially when Bliss had an opportunity to respond. *Mot. for Recon.*, at 5 (saying counsel notified of five videos being submitted).[6] Therefore, Bliss' arguments regarding the withholding of camera footage and adequate notice related to the use of the footage at trial are unpersuasive.

IV. BLISS HAS NOT SHOWN THAT SECURITY ACTED IN SELF-DEFENSE.

15. Bliss' argument that security should not be deemed to have committed an assault because security acted in self-defense is not persuasive. *Mot. for Recon.*, at 8. Bliss cannot claim that security believed they were in danger of imminent harm when Mr. Deen testified that the patrons were not violent and were solely arguing. *In re Lemma Holdings, LLC, t/a Bliss*, Board Order No. 2019-038, at ¶¶ 15, 15 n. 3.

16. Bliss argues that the Board should rely on the incident report's written statement that the patrons "became aggressive towards employees" to support a finding that the patrons initiated the violence. *Mot. for Recon.*, at 10. First, the phrase "became aggressive" on its own may or may not imply violence, as aggressive behavior may include physical abuse, which may justify the use of self-defense, or arguing, failing to follow commands, or verbal abuse, which would not. It is also too general to explain the nature of the aggression or how, when, and where any such aggression occurred. Second, if Bliss argues that the phrase in the report is meant to imply that the patrons became physically hostile, this hearsay statement is not credible or corroborated in light of Mr. Deen's testimony. *Mot. for Recon.*, at 10. Third, the incident report may be inaccurate or untrue. Indeed, Mr. Deen told the Board that the patrons were solely arguing with security. *Tr.*, 11/7/18 at 226. It should be noted that Bliss could have followed Mr. Deen's testimony with the testimony of security members indicating that the patrons initiated the assault in some fashion; instead, Bliss left Mr. Deen's statement regarding the peacefulness of the patrons unexplained in the record. For these reasons, and the reasons stated in paragraph 41, Bliss' self-defense claim is without merit and the Board affirms its findings. *In re Lemma Holdings, LLC, t/a Bliss*, Board Order No. 2019-038, at ¶ 41.

V. THE ISSUE OF WHETHER BLISS CONTACTED THE POLICE IS IRRELEVANT.

17. Bliss argues that it did not have to contact the Metropolitan Police Department (MPD) and the Board should not have relied on the failure to create a proper incident report in

[5] The investigator made various statements alleging deficiencies in the production of video to ABRA. *Tr.*, 11/7/18 at 24 ("I did not receive the video of the bathroom interaction . . . ."); 32-33 (In responding to the question as to whether the investigator "got all the footage" from Bliss, the investigator answered "No" and noted that parts of the incident were obviously missing).

[6] *See e.g., Cox v. United States*, 898 A.2d 376, 381 (D.C. 2006) (Under the rule of completeness, "When part of a statement has been admitted in evidence, the rule of completeness allows a party to seek admission of the other parts or the remainder as a matter of fairness"); *State v. Steinle in & for the County of Maricopa*, 372 P.3d 939, 942 (2016) (saying the rule of completeness applies to electronic recordings, such as "cell-phone video").

compliance with its security plan. *Mot. for Recon.*, at 11.[7] This argument is irrelevant and misstates the Order.

18. Charge I identified the use of excessive force and the assault against the female patrons and the failure to call the police as the basis for a violation of D.C. Official Code §§ 25-823(a)(2). *Notice,* at 2. The use of excessive force or assault and the failure to contact the police are two separate grounds for finding a violation of § 25-823(a)(2). *Levelle, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 924 A.2d 1030, 1037 (D.C. 2007) (The "failure to properly communicate with police about incidents" is ". . . the type[] of omission[] that [is] conducive to an unlawful and disorderly environment . . . ."); *In re Kabin Group, LLC, t/a Kabin,* Case No. 17-251-00134, Board Order No. 2018-247, 12-13 (D.C.A.B.C.B. Apr. 25, 2018) (finding that the use of excessive force and an assault by an agent of the licensee satisfies § 25-823(a)(2)). In this case, the Board solely relied on the use of excess force and assault by the licensee's security to sustain Charge I, and that failure to comply with its incident report requirements helped satisfy the "method of operation" and "demonstrable connection" part of the analysis under § 25-823(a)(2). *In re Lemma Holdings, LLC, t/a Bliss*, Board Order No. 2019-038, at ¶¶ 44. As a result, Bliss's argument that it did not have to call MPD is irrelevant to the Board sustaining Charge I. *Mot. for Recon.*, at 11.

VI. THE BOARD AFFIRMS ITS INTERPRETATION OF § 25-823(a)(2) AND (b).

19. Bliss disagrees with the Board's interpretation of § 25-823(a)(2) and (b). *Mot. for Recon.*, at 18. Bliss provides no compelling argument persuading the Board to depart from its interpretation of the statutes, as the Board expounded in *In re Kabin Group, LLC, t/a Kabin,* Case No. 17-251-00134, Board Order No. 2018-247, 12-13 (D.C.A.B.C.B. Apr. 25, 2018); *Opposition*, at 4-5. Furthermore, to the extent Bliss argues that the Board did not satisfy the method of operation requirement, the Board expressly did so in paragraphs 42 and 43 of the prior Order. *Mot. for Recon.*, at 19. Therefore, for these reasons, and the reasons expressed above, the Board affirms its decision regarding Charge I.

ORDER

Therefore, the Board, on this 20th day of March 2019, hereby **DENIES** the motion for reconsideration filed by the Respondent.

IT IS FURTHER ORDERED that the Board **GRANTS** the requested stay of the fine payment so long as the Respondent files an appeal within thirty (30) days of the date of issuance

[7] Bliss further argues that it should not have to call the police when there was detail outside because this is a waste of police resources. *Mot. for Recon.*, at 11. This argument misses the point. The Board notes that nothing prevents staff from reporting incidents or ejections directly to the police detail and providing information as to whom may have instigated violence. Moreover, it seems highly dangerous and irresponsible on the part of a licensee to dump ejected patrons on the public street without giving police officers notice that they may have to deal with a potentially violent situation. *Levelle, Inc. v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 924 A.2d 1030, 1035-36, 1038 (D.C. 2007) (Court sustained charge based on finding that the "the club[] had an ill-advised practice of ejecting the participants of an altercation without notifying the police").

of this Order. As a further condition of the stay, the stay shall be automatically lifted should the Respondent fail to file a timely appeal. Unless otherwise ordered, the stay shall be lifted and payment shall be made within (30) days should the Respondent withdraw its appeal, the appeal is dismissed, or a final order is issued.

IT IS FURTHER ORDERED that Board Order No. 2019-039 is **AMENDED** as follows:

1. The Board makes the following clerical correction by striking paragraph 2, and replacing it with the following:

> Pertinent to this matter, according to the security plan, the door to the women's bathroom leads to a hallway connecting to "ROOM 2." *Id.* Starting at the part of the hallway outside the bathroom and going right, the hallway continues until it reaches stairs leading to the "VIP AREA." *Bliss Security Plan*, at 19, (Oct. 5, 2015). On the map, headed towards the bottom of the page, the hallway leads to an entrance area with double doors leading to the outside, which is designated the "VIP ENTRANCE." *Id.* If instead of proceeding to the "VIP AREA", one proceeds to the left, another hallway leads to an entrance area with double doors leading to the outside, which is designated as the "VIP ENTRANCE." *Id.* [8]

IT IS FURTHER ORDERED that all other terms and conditions of the prior Order shall remain in full force and effect.

The ABRA shall deliver copies of this Order to the Government and the Respondent.

[8] Bliss also believes that the footnote's reference to the exterior smoking area is incorrect; however, the reference to that portion of the diagram was to help ensure the reader is looking at the correct area of the drawing. *Mot. for Recon.*, at 2. Therefore, the footnote is correct and does not require revision.

District of Columbia
Alcoholic Beverage Control Board

Donovan Anderson, Chairperson

Nick Alberti, Member

Mike Silverstein, Member

James Short, Member

Bobby Cato, Member

Pursuant to D.C. Official Code § 25-433(d)(1), 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, pursuant to 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, 430 E Street, N.W., Washington, D.C. 20001; (202-879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 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).