THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of: Kabin Group, LLC t/a Kabin Holder of a Retailer's Class CT License at premises 1337 Connecticut Avenue, N.W. Washington, D.C. 20036	Case No.: 17-251-00134 License No.: 91276 Order No.: 2018-247

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
James Short, Member
Donald Isaac, Sr., Member
Bobby Cato, Member
Rema Wahabzadah, Member

ALSO PRESENT: Kabin Group, LLC, t/a Kabin, Respondent

Andrew J. Kline, Counsel, on behalf of the Respondent

Amy Schmidt, Assistant Attorney General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

INTRODUCTION

For the benefit of the public, in addition to addressing the underlying motion for reconsideration, the following Order summarizes and provides guidance on the current state of the law regarding D.C. Official Code §§ 25-823(a)(2) and 25-823(b), which makes it generally an offense for a licensee to allow or permit unlawful or disorderly conduct on its premises.

This matter stems from the decision of the Alcoholic Beverage Control Board that on July 2, 2017, the security manager of Kabin Group, LLC, t/a Kabin, (hereinafter "Respondent" or "Kabin") committed an assault during an ejection by throwing a patron to the ground, dragging him out of the establishment, pulling him down the stairs, and punching him, which likely resulted in the patron having his leg broken. *In re Kabin Group, LLC, t/a Kabin*, Case No. 17251-00134, Board Order No. 2018-094, ¶¶ 8, 21-23 (D.C.A.B.C.B. Mar. 14, 2018). The record further revealed no evidence that Kabin or any of Kabin's agents that witnessed the altercation contacted the police or that the security manager instructed staff to call the police. *Id.* at ¶¶ 7-8, 14. During the hearing, Kabin's security manager further admitted that in situations where he forces a patron to the ground he would not always contact the police. *Transcript (Tr)*, February 7, 2018 at 80-81. In penalizing Kabin for violating D.C. Official Code § 25-823(a)(2), the Board imposed a $2,000 fine and imposed five stayed suspension days. *Id.* at 6-7.

Arguments of the Parties

On April 4, 2018, Kabin filed a motion for reconsideration asking the Board to reverse the conviction. *Mot. for Recon.*, at 1-6. Kabin argues that the Board's decision is contrary to the court's decision in *1900 M Restaurant Associations, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 56 A.3d 486 (D.C. 2012), and, *without citation to any legislative history*, that changes to the underlying law since the issuance of the decision amounts solely to "codifying" that decision. *Id.* at 3. Specifically, under Kabin's interpretation of the case law, (which makes no mention of *Am-Chi Restaurant, Inc. v. Simonson*, 396 F.2d 686 (D.C. Cir. 1968)), and the new language inserted into § 25-823, all convictions under § 25-823(a)(2) require a showing of a method of operation, which requires a proof of a "continuous course of conduct," "pattern," or "various incidents," and prohibits the Board from relying on a single incident. *Id.* at 4, 6. Kabin further argues that the conviction should be overturned because the record lacks substantial evidence "that Kabin engaged in a method of operation that is conducive to unlawful or disorderly conduct" because there are no facts showing prior incidents involving the use of "excessive force without contact to law enforcement" or a similar "course of conduct" or method of operation. *Id.* at 1-2. The Board notes that Kabin does not appear to argue that any individual finding of fact made by the Board was incorrect or unsupported by the record, only that in their totality they do not satisfy the minimum legal requirements for finding a violation of § 25-823(a)(2).

The Government contends that the plain language of § 25-823(b), which applies to this case, no longer requires proof of a prior history or a continuous course of conduct in cases of assault, sexual assault or violence. *Response,* at 2. Moreover, the Government further contends that the Order identified the failure to call the police and the use of excessive force as the "method of operation," and sufficient facts support the conclusion reached by the Board. *Id.* at 2-3.

The Board denies the motion and affirms its prior order for the following reasons: (1) based on both the text and legislative history, the enactment of § 25-823(b) eliminates the need to prove a continuous course of conduct in the case of an assault, sexual assault or violence; therefore, Kabin's argument rests on an incorrect interpretation of the law; (2) Kabin's argument fails to properly recognize the existence of the single instance test described in *Am-Chi*; (3) there

is sufficient evidence in the record to support the conviction; (4) even if a continuous course of conduct were required, there exists sufficient evidence to find a continuous course of conduct regarding the failure to contact the police; and (5) even if *1900 M Restaurant Associations*, on which Kabin relies, controlled in this case, the present case is sufficiently distinguishable from *1900 M Restaurant Associations* to merit affirming the Board's prior Order.

Therefore, for these reasons, and the reasons stated below, Kabin's motion for reconsideration is denied.

LEGAL BACKGROUND

Section 25-823(a)(2) makes it a violation for the "licensee [to] allow[] the licensed establishment to be used for any unlawful or disorderly purpose." D.C. Code § 25-823(a), (a)(2). Section 25-823(b), added in 2015 by Omnibus Alcoholic Beverage Regulation Amendment Act of 2014 (Omnibus), further adds that "A single incident of assault, sexual assault, or violence shall be sufficient to prove a violation of subsection (a)(2) of this section; provided, that the licensee has engaged in a method of operation that is conducive to unlawful or disorderly conduct." D.C. Code § 25-823(b). *Omnibus Alcoholic Beverage Regulation Amendment Act of 2014*, 2014 District of Columbia Laws 20-270, § 2 (Act 20-609) (West Supp. 2018) (effective May 2, 2015).

I. Case Law Interpreting § 25-823(a)(2) Before the Enactment of the Omnibus.

Before the enactment of the Omnibus, § 25-823(a)(2) had been interpreted by various court decisions. The Board recounts these decisions and outlines the legal tests created by the case law because they remain in effect, except for the changes made by § 25-823(b).

a. *Am-Chi Restaurant, Inc. v. Simonson.*

In *Am-Chi*, under a prior version of the current law, the licensee was charged and convicted of allowing its premises "to be used for an unlawful purpose." *Am-Chi Restaurant, Inc. v. Simonson*, 396 F.2d 686, 686 (D.C. Cir. 1968). The charge described a single incident where an exotic dancer employed by the licensee approached an undercover police officer inside the establishment. *Id.* at 687. In the darkened rear of the premises, the dancer urged the officer to buy her a drink and told him to tip Nick, employed as the licensee's "maitre d'hotel." *Id.* The exotic dancer told the undercover officer "that for $75.00 she would meet him the next day to have sexual relations." *Id.* The following day the dancer was arrested for soliciting prostitution when she appeared at the prearranged hotel. *Id.* at 686-87. The licensee later fired the dancer as soon as the licensee became aware of the conduct. *Id.* at 687. There is also no indication that the Board relied on prior incidents or prior conduct in finding the licensee liable.

In challenging the conviction, the licensee argued that it had no "knowledge of the act of its employee" and that the violation "shows merely an isolated instance of solicitation for prostitution." *Id.* The court indicated that, at the time, it had never settled whether a violation could be sustained under the law "if the record were totally devoid of circumstances implicating the licensee, on a theory . . . of absolute liability, or imputed liability for the fault of an

employee, even though the licensee had no reason . . . for supposing that such fault might exist." *Id.* (footnote removed).

The court affirmed the conviction "not for intention or complicity on any particular occasion, but because his method of operation, continued over time, harbored sufficient danger of mischievous consequences sooner or later to permit such assignment of responsibility for the tawdry incidents when and if they take place." *Id.* at 688. According to the court, the licensee's method of operation was conducive to encouraging prostitution because "female employees were permitted to 'proposition' customers at least to the extent of proposing [the] purchase of drinks at inflated prices, and the maitre d'hotel was an open part of that operation." *Id.* at 688. Under these facts, the court indicated that the Board "need not have before it evidence to show that there were prior solicitations, or that the appellant had specific knowledge . . . ." *Id.*

b. *James Bakalis & Nickie Bakalis, Inc. v. Simonson.*

In *Bakalis*, under a prior version of the current law, the Board found the licensee liable for using the premises for an "unlawful, disorderly or immoral purpose" in two separate cases. *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d 515, 518 (D.C. Cir. 1970). In the first case, the licensee engaged in a "clear pattern of operation which [illegally] solicited [its] customers into entertaining fancy ladies with liquor purchased at fancy prices;" whereby, the licensee's exotic dancers had "instructions not to socialize with patrons unless there were bought drinks." *Id.* at 516-517. According to the court, these acts demonstrated "a standard mode of operation of which the management had to be well aware." *Id.* at 517. In the second case, similar incidents related to the illegal solicitation of drinks occurred, which supported a similar finding. *Id.* at 518. Moreover, under the same charge, a violation was found when on "March 15, 1969 . . . one of the employees solicited for the purposes of prostitution." *Id.* According to the court,

> The liability here imposed on the licensee is not strictly for separate acts constituting violations by individuals on separate days. Rather, it is also for a continuous 'course of conduct' of which the licensee is deemed to have actual and imputed knowledge and to be held to a vicarious responsibility. *This results from direct evidence of certain improper acts of his employees, agents and others on the premises, and also from the fact that such acts continued over a period of time and partly because of the duration of these improper acts the licensee is deemed to have allowed and suffered them.* Thus because the responsibility of the licensee is based partly on the continuance of the acts over a period of time it would have been proper, and in fact preferable, to join the two cases together and thereby strengthen the case against the licensee by covering a longer period.

Id. at 519 (footnote removed) (emphasis added). In light of this reasoning, the court remanded because the cases should have been addressed as one case. *Id.*

c. *4934, Inc. v. Washington.*

In *4934, Inc.*, under a prior version of the current law, the Board found the licensee liable for allowing the premises to be used for an unlawful, disorderly, and immoral purpose. *4934, Inc.*

v. Washington, 375 A.2d 20, 22 (D.C. 1977). There, the charge was based on the observations of undercover police officers observing an obscene performance by a dancer. *Id.* at 21. While overturning the decision on First Amendment grounds, the court distinguished the case from *Am-Chi. Id.* at 22-23. Although not stated explicitly, it appears that the court was persuaded against a finding of a method of operation that led to the violation where prior visits by police did not result in the observation of violations, management may have warned their employees to avoid "complete bodily exposure or physical contact," and the employee engaging in the alleged behavior was "subsequently reprimanded for deviating from [management's] instructions." *Id.* at 22. Likely, in light of the doubt created by this evidence, the court found that the government had to make a showing of a "continuous course of conduct" to show a "method of operation" that encouraged the alleged illegal behavior. *Id.* at 22-23.

d. *Levelle, Inc. v. Dist. of Columbia Alcoholic Beverage Control Bd.*

In *Levelle*, the Board convicted the licensee of a number of offenses, including allowing "the licensed establishment to be used for any unlawful or disorderly purpose" in violation of a prior version of § 25-823. *Levelle, Inc. v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 924 A.2d 1030, 1032 (D.C. 2007). The Board made multiple findings in support of the conviction under § 25-823. In regard to an incident where one patron assaulted another with a bottle, the Board found "that the incident was the result of the security staff's ineffective handling of a relatively-minor altercation and the club's ill-advised practice of ejecting the participants of an altercation without notifying the police." *Id.* at 1036. Furthermore, there were several incidents of violence inside or near the establishment, including altercations, a shooting, a stabbing, and crowd control issues. *Id.* In upholding the conviction, the court found that the Board relied "only on incidents that had a demonstrable connection to the operation of the establishment" including findings about "what occurred but also . . . the club's regular method of operating" and how that contributed to the incident. *Id.* at 1037. According to the court, among other failures, the licensee's "failure to properly communicate with police about incidents," which "are the types of omissions that are conducive to an unlawful and disorderly environment, and were indeed found to have caused or aggravated the disorderly conduct for which the club was cited." *Id.*

e. *1900 M Rest. Associations, Inc. v. D.C. Alcoholic Beverage Control Bd.*

In *1900 M Restaurant Associations*, under the prior version of the current law, the Board found the licensee liable for multiple charges of allowing the premises to be used for an unlawful and disorderly purpose. *1900 M Rest. Associations, Inc. v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 56 A.3d 486, 488, 490-91 (D.C. 2012). The Board's findings were based on two incidents involving the licensee's employees. *Id.* at 490-91. In the January 2009 incident, a security member ejected two patrons that resulted in one patron suffering a "broken or fractured nose." *Id.* at 489. The security member responsible for the ejection was found to be acting in self-defense in a related criminal case. *Id.* In an August 2009 incident, a bartender pushed a patron and put another in a chokehold after they complained about their tab to a manager. *Id.* at 490. Later, management reprimanded the bartender for the incident and allowed him to continue working at the premises. *Id.* The Board convicted the licensee of the charges on the theory that

the licensee had inadequate security practices and training based on the failure to issue security uniforms and permitting employees to be overly aggressive with patrons. *Id.*

In interpreting the prior version of § 25-823, the court noted that Congress, and later the D.C. Council, sought to prevent the "return of the saloon" and encourage temperance by allowing the Board to sanction licensees. *Id.* at 492. Nevertheless, the court found persuasive, that it was not the Council's intent "to allow suspensions or revocations in the case of occasional, minor code violations. But a consistent pattern of violations, demonstrating a flagrant disregard for the public safety and welfare, would justify the initiation of suspension or revocation proceedings." *Id.*

· In light of the legislative history, the court described two means of establishing a violation under the prior version of § 25-823(a)(2). *Id.* at 493-94. First, under the continuous course of conduct test, a violation may be found when ". . . there is substantial evidence of a course of conduct, continued over time, that reflects the licensee's adoption of a pattern or regular method of operation that encouraged, caused, or contributed to the unlawful or disorderly conduct at issue. *Id.* at 493. Under this test, "[t]he evidence upon which the Board rests its conclusion must have a 'demonstrable connection' to the establishment's operation." *Id.* Second, citing *Am-Chi,* under the single instance test, "under some circumstances, absent evidence of a continuous course of conduct . . . evidence of a single incident may be sufficient . . . ." *Id.* at 495.

In overturning the Board, the court found that there was no evidence of additional incidents where security failed to wear their uniform and patrons were injured. *Id.* at 494. Moreover, regarding the second incident, no additional evidence regarding the licensee's "employee disciplinary measures was introduced." *Id.* Finding that the method of operation at issue in the case was the failure to issue proper security uniforms, the court stated that "Standing alone, evidence of a single instance in which a member of the security staff became physical with a patron and another where petitioner retained an employee who allegedly assaulted two patrons fails to establish petitioner's adoption of a method of operation that encouraged . . . the disorderly conduct at issue." *Id.* While the court indicated that not all cases required a continuous course of conduct, the single instance test did not apply because "there was no evidence presented that [the] petitioner's method of operation created an environment that fostered or was conducive to the endangerment of Rumors' employees and patrons or to the initiation of violence by employees against patrons." *Id.* at 495.

II. The Pre-Omnibus Legal Test Required to Find a Violation of § 25-823(a)(2).

Section 25-823(a)(2) provides that it is a violation when a "licensee allows the licensed establishment to be used for any unlawful or disorderly purpose." § 25-823(a)(2). Before the enactment of the Omnibus, the legal test for finding a violation under § 25-823(a)(2), in conjunction with the case law represented by *Am-Chi* and its progeny, could be broken down into three elements. Namely, (1) it is a violation for a licensee or their agents to cause, contribute, encourage, or participate (*demonstrable connection*) (2) in an unlawful or disorderly incident that occurs within or around the licensee's premises (*unlawful or disorderly purpose*) (3) through a method of operation (*method of operation*).

a. Describing the Demonstrable Connection Element.

In order to prove that the licensee or their agents caused, contributed, encouraged, or participated in an illegal incident through a method of operation, the government must show a demonstrable connection. As described in *Levelle*, a "demonstrable connection" requires more than proof about what occurred, but also how the licensee's method of operation contributed to the incident. *Levelle, Inc.*, 924 A.2d at 1037.

The court's decisions, such as *1900 M Restaurant Associations* and *Levelle* do not provide a bright line test on how to determine whether a method of operation has a demonstrable connection to an unlawful incident. In reasoning what does and does not qualify as a demonstrable connection, the Board is guided by the purpose of § 25-823(a)(2). Specifically, § 25-823(a)(2) creates a theory of absolute liability on the licensee for an incident of which they may not have actual knowledge. *Am-Chi Restaurant, Inc.*, 396 F.2d at 687. The element requires that the licensee or his or her agents engage in actions or a method of operation that are "conducive" or "[t]end to bring about or cause" the unlawful conduct. *Levelle, Inc.*, 924 A.2d at 1037; CONDUCIVE, WEBSTER'S II NEW COLLEGE DICTIONARY (2001). Moreover, in proving this element the finder of fact may look to the direct acts of the licensee and their agents and the duration of the acts. *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d at 519. In light of these principles, the Board can outline the following guidelines for proving a demonstrable connection.

First, any action committed directly by the licensee or management or by their agents with the approval, direction, or control of the licensee or his or her management that tends to cause illegal conduct or is illegal itself always qualifies as a demonstrable connection. This interpretation is justified because a licensee's ownership and management have direct control over the operations of the business. In light of this control, any illegal act committed by them or with their approval or direction amounts to a *per se* use of the premises for an illegal purpose under § 25-823(a)(2). § 25-823(a)(2) ("to be used"). Moreover, given the ownership and management's authority to control the business, in this type of scenario, it is inherently fair to presume actual or implied knowledge based on their direct participation in the illegal act or if the facts otherwise show intent or complicity on the part of the ownership or management. *Am-Chi Restaurant, Inc.*, 396 F.2d at 688. Indeed, this interpretation is a logical extension of *Am-Chi* where the licensee's maître d'hotel or "headwaiter" participated in a prostitution scheme inside the premises, even though there was no evidence of prior conduct or knowledge on the part of the ownership. *Id.* at 687-88; MAITRE D'HOTEL, WEBSTER'S II NEW COLLEGE DICTIONARY (2001).

Second, a method of operation or action committed by an employee or third party contractor that is it itself illegal or causes unlawful conduct generally requires proof of a continuous course of conduct to demonstrate a demonstrable connection without a showing of intent, complicity, or actual knowledge on the part of management or the licensee. In this case, as described in *Bakalis*, the continuous course of conduct requirement ensures that the licensee has actual or implied knowledge before finding them in violation. *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d at 519. While a single violation may be sufficient to show a violation, as was the case in *Am-Chi*, such a claim may be defeated if it is shown that (1) the

method of operation had no relation to the illegal conduct at issue; (2) the employee or contractor acted contrary to policy or the instructions of the licensee or management; or (3) there is a showing of a pattern of compliance. *4934, Inc.*, 375 A.2d at 22-23 (police did not observe illegal conduct during prior visits and employee violated the instructions of management and reprimanded); *1900 M Rest. Associations*, 56 A.3d at 490, 494 (licensee reprimanded bartender and no evidence of licensee's prior disciplinary practices). Nevertheless, the prosecution could rebut this defense by showing that the act occurred at the direction or participation of the ownership or management, as in *Am-Chi. Am-Chi Restaurant, Inc.*, 396 F.2d at 688 ("maitre d'hotel was an open part of that operation"). The prosecution could also overcome this defense by showing a pattern of illegal behavior that continued over time, because such occurrences suggest negligent supervision, nonenforcement of company policies, or willful blindness on the part of the licensee or management that may be conducive to the conduct at issue (i.e., demonstrable connection) and amounts to a method of operation. *1900 M Rest Associations* 56 A.3d at 495; *4934, Inc.*, 375 A.2d at 22-23; *James Bakalis & Nickie Bakalis, Inc.*, 434 F.2d at 517, 519 ("management had to be well aware").

b. Describing the Unlawful or Disorderly Purpose Element.

Next, in order to prove a violation, the Government must show that the premises were used for an "unlawful or disorderly purpose." § 25-823(a)(2). This means that the underlying alleged illegal conduct at issue must actually be illegal, whether committed by the licensee, its agents, patrons, or other third parties. *4934, Inc. v. Washington*, 375 A.2d at 23-24 (saying the Board cannot sustain a violation where the conduct does not violate the law and is protected by the First Amendment).[1]

c. Describing the Method of Operation Element.

Finally, in order to prove a violation, there must be a "method of operation" that creates the illegal or disorderly conduct at issue. *1900 M Rest. Associations*, 56 A.3d at 495. There is sufficient support in the law and case law to define the following as methods of operation under the law: (1) the licensee or its agents fail to contact the police regarding crime or when ejecting patrons engaging in criminal activity (e.g., assault);[2] or (2) the licensee or its agents fail to provide sufficient security; provide sufficient training for its security, enforce its security procedures; or has an inadequate security plan.[3] The Board also foresees that methods of

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[1] The disorderly conduct law provides for a number of violations that may occur in or around a licensed establishment. D.C. Official Code § 22-1321(a)-(e) (2013) (the disorderly conduct statute, among other offenses, includes threatening harm, inciting violence, making unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that disturbs persons in their residences, and urinating or defecating in public).

[2] *Levelle, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 924 A.2d 1030, 1036 (D.C. 2007).

[3] *Id.* at 1036-37; *see also St. Nicholas Greek Catholic Russian Aid Soc. v. Pennsylvania Liquor Control Bd.*, 41 A.3d 954, 957 (Pa. Commw. Ct. Apr. 13, 2012) (saying nonrenewal of license justified where, in light of the frequent assaults, fights, and unruly behavior occurring on a regular basis, the licensee failed to have a sufficient number of security inside or in the parking lot and failed to have adequate security when off-duty police officers were not available); *In re Beg Investments, LLC, t/a Twelve Restaurant & Lounge*, ABRA License No. 76366, Board Order No. 2014-247, ¶¶ 59-64 (D.C.A.B.C.B. Jun. 6, 2014) (saying the licensee constituted an imminent danger to the public in justifying a summary suspension where licensee's security were not communicating with each other about

operation that could lead to a violation of § 25-823(a)(2) include situations where a licensee or its agents bring a weapon or firearm on the premises;[4] (2) the licensee or its agents know or should know that patrons are bringing weapons onto the premises or using bottles and glasses as weapons and the licensee fails to take adequate steps to curb this practice (e.g., metal detectors, pat downs, plastic cups);[5] or (3) the licensee or its agents interfere or allow or permit third parties to interfere with first responders during an emergency.[6]

As noted in *1900 M Restaurant Associations*, there are two means of establishing a method of operation. *Id.* at 493-94. First, a method of operation may be proven under the continuous course of conduct test by showing a "pattern" or "continuance of the acts over a period of time." *Id.* at 493, 495; *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d at 519. It is reasonable to presume that such evidence may include observations regarding the conduct of the licensee, their agents, or patrons over time, past case reports, prior orders issued in protest, show cause, and summary suspension cases, formal or verbal warnings issued by government officials, hearing transcripts, public complaints, and police calls for service.[7]

Alternatively, as occurred in *Am-Chi*, "under some circumstances," a method of operation may be shown under the single instance test "absent evidence of a continuous course of conduct," based on a method of operation. *1900 M Rest. Associations*, 56 A.3d at 495.

Before the enactment of § 25-823(b), the outstanding issue unanswered in *1900 M Restaurant Associations* are those "circumstances" that allow for the usage of the single instance test in lieu of the continuous course of conduct test. *Id.* It is not a superfluous issue, as the proper test would determine the number of charges filed and the number of incidents presented at trial. *Compare James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d at 519 ("it would have been proper, and in fact preferable, to join the two cases together and thereby strengthen the

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incidents when they occurred, the number of security were inadequate based on the "significant blind spot" on the second floor, the licensee's crowds that swarmed first responders, and the record showed that security had insufficient training based on security's improper moving of a victim with a head injury).

[4] *Alrob Enterprises, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 337 A.2d 497, 498 (D.C. 1975) (revocation merited where licensee permitted an unregistered .22 caliber rifle to be kept on the premises).

[5] This issue generally arises as part of cases involving violations of a Board Order or security plan, but § 25-823(a)(2) could also be relied upon to curb this activity. *See e.g., In re Gebtri, Inc., t/a Cedar Hill Bar & Grill/Uniontown*, Case No. 17-PRO-00029, Board Order No. 2017-182, ¶¶ 46-49 (D.C.A.B.C.B. Mar. 31, 2017) (saying failure to use metal detecting wands violated a Board Order and the establishment's security plan).

[6] *See In re MPAC, LLC, t/a The Scene*, Case No. 13-251-00133, Board Order No. 2014-239, ¶¶ 81-83 (D.C.A.B.C.B. May 31, 2014) (finding during a summary suspension that licensee's crowds created dangerous conditions that prevented first responders from timely accessing the location and this situation would likely occur again if not remedied).

[7] When licensees receive an official warning providing notice of an issue and ignore the warning, this can lead to the revocation of the license. *2447 Good Hope Rd., Inc. v. D.C. Alcoholic Beverage Control Bd.*, 295 A.2d 513, 516 (D.C. 1972) ("In the case at bar, those in a position to lawfully operate the business had been specifically put on notice as to the proscription respecting Byrd's participation in the management of the establishment"; therefore, evidence of violating this proscription provided substantial evidence of the offense and justified revocation").

case against the licensee by covering a longer period") *with Am-Chi Restaurant, Inc.*, 396 F.2d at 688 ("need not have before it evidence to show that there were prior solicitations"). Moreover, the single instance test cannot apply in all circumstances, or else the prosecution would have the ability to bypass the continuous course of conduct test in every case. Nevertheless, as discussed below, this outstanding issue no longer has to be resolved because the D.C. Council, by enacting § 25-823(b), filled in the gaps.

III. The Impact of the Omnibus on the Interpretation of § 25-823(a)(2).

After the court's decision in *1900 M Restaurant Associations*, the Council added § 25-823(b) to Title 25 of the D.C. Official Code. In enacting § 25-823(b), the Council did away with the requirement to show a continuous course of conduct and allowed the Board to use the single instance test in all cases of assault, sexual assault, and violence.

a. Summary of the legislative history regarding the addition of § 25-823(b).

Section 25-823(b) went into effect on May 2, 2015, as part of the Omnibus Alcoholic Beverage Regulation Amendment Act of 2014. *Omnibus Alcoholic Beverage Regulation Amendment Act of 2014*, 2014 District of Columbia Laws 20-270, § 2 (Act 20-609) (West Supp. 2018) (effective May 2, 2015) [*Omnibus*]. According to the Committee Report, the new language

> clarifies that a single incident of assault, sexual assault or violence is sufficient to sustain a violation provided that the licensee has engaged in an method of operation that is conducive to unlawful or disorderly conduct. The amendment seeks to reduce collective case law to statutory form and is not intended to change the status of the law or the burden of proof required by the Rumors decision, or the decision in [*Levelle* or *Am-Chi*].

D.C. Council, Report on B20-902, the "Omnibus Alcoholic Beverage Regulation Amendment Act of 2014 at 2 (Nov. 17, 2014) [*Committee Report*]. In the Section-By-Section Analysis, the report indicated that the new provision would "*allow* the Board to hold licensees responsible for a single assault . . . or other violent act provided that the licensee has engaged in a method of operation that is conducive to unlawful or disorderly conduct." *Id.* at 13 (emphasis added); *see also id.* at 11 (in describing change to § 25-823, uses the word "allow").

In its public comment on the proposal, the Restaurant Association of Metropolitan (RAMW) noted that the association opposed "fines for a *single incident* of assault, sexual assault . . . or any other sort of violence" and "*that the legislation would reverse holdings of longstanding court decisions.*" *Id.* at 8 (emphasis added). In light of concerns expressed at the public hearing, ABRA later suggested in a letter to the Committee modifying part (b) to change the condition to trigger the "single incident" language to read ". . . provided that there is a demonstrable connection between the incident and the establishment's operation." *Letter from Fred P. Moosally, Director, ABRA to Vincent Orange, Chairperson, Committee on Business, Consumer and Regulatory Affairs,* 3 (Nov. 7, 2014) ("RE: Follow-up Information"). This

proposed change was not adopted, and the "demonstrable connection" language was left out of the current law. § 25-823(b).

b. The addition of § 25-823(b) drops the requirement to show prior history or a continuous course of conduct in cases of assault, sexual assault, or violence.

The legislative history surrounding § 25-823(b) indicates that the new statute represents a modest change to how § 25-823(a)(2) should be interpreted. Section 25-823(b) provides that "A single incident of assault, sexual assault, or violence shall be sufficient to prove a violation of subsection (a)(2) of this section; provided, that the licensee has engaged in a method of operation that is conducive to unlawful or disorderly conduct." D.C. Code § 25-823(b).

In adopting § 25-823(b), the legislative history shows that the Council did not want to radically alter the basic legal test to find a violation of § 25-823(a)(2). This interpretation of the legislative history is justified by the clear statement in the Committee Report that the amendment did not seek to "change the status of the law or the burden of proof." *Committee Report*, at 2. This means, as articulated above, that the general tests and required elements for finding a violation of § 25-823(a)(2) remains largely the same.

While the legal architecture attached to § 25-823(a)(2) generally remains the same, § 25-823(b) modifies the law by eliminating the need to prove a continuous course of conduct and allowing for the use of the single instance test, as described in *Am-Chi*, in cases of assault, sexual assault, or violence. This interpretation is justified by the text of § 25-823(b), which clearly states that a "single incident" is sufficient in the three listed scenarios. § 25-823(b). It is also justified by the Committee Report's analysis, which indicates the purpose of the change was to "allow" the Board to hold a licensee "responsible for a single assault." *Committee Report*, at 13. The use of the word "allow" further suggests a belief on the part of the D.C. Council that the prior version of the law did not allow such action, and that the enactment of § 25-823(b) would remedy this perceived deficiency. Indeed, the D.C. Council was warned by Restaurant Association of Metropolitan Washington that it was changing the law. *Id.* at 8. Finally, in further support of the Board's interpretation, the new bill adopts the "single incident" language used in *1900 M Restaurant Associations*, which further indicates that the drafters preferred the use of the single instance test over the continuous course of conduct test in cases of assault, sexual assault or violence. *1900 M Rest. Associations*, 56 A.3d at 495.

This shift in interpretation represents good public policy. In superintending a business that involves large crowds and intoxicated patrons, licensees have a responsibility to provide a safe environment and provide staff able to address common problems associated with alcohol use, such as violence. The single instance test ensures a safe environment because the law gives licensees a strong incentive for hiring good staff, providing sufficient training, handling violent incidents appropriately, and discouraging staff from abusing patrons before the establishment begins operating and inviting the public onto the premises.

c. The Board's Current Interpretation of § 25-823(a)(2)

Consequently, in light of the enactment of § 25-823(b), in cases involving assault, sexual assault, or violence, there is no need to prove a continuous course of conduct or prior acts. Instead, as in *Am-Chi*, when a fact pattern shows an assault, sexual assault, or violence, it is sufficient that the method of operation had a demonstrable connection to the illegal or unlawful conduct on one occasion to prove a violation. For all other incidents that fall outside of the categories listed in § 25-823(b), the test and case law remain in effect.

IV. The Board Relied on Sufficient Evidence to Establish a Violation of § 25-823(a)(2).

Turning to this case, the Board is satisfied that its finding of a violation of § 25-823(a)(2) on July 2, 2017, is supported by the substantial evidence in the record. As noted above, § 25-823(a)(2) makes it a violation for the "licensee [to] allow[] the licensed establishment to be used for any unlawful or disorderly purpose." § 25-823(a), (a)(2). Section 25-823(b) further adds that "A single incident of assault, sexual assault, or violence shall be sufficient to prove a violation of subsection (a)(2) of this section; provided, that the licensee has engaged in a method of operation that is conducive to unlawful or disorderly conduct." § 25-823(b). In reviewing each element of the offense, the record provides sufficient evidence to sustain the violation charged by the Government.

a. The Record Shows That the Unlawful or Disorderly Conduct That Occurred on July 2, 2017, Involves an Assault.

First, the illegal conduct at issue in this case involves an assault. In order to sustain a conviction under § 25-823(b), it must be shown that the premises must "be used for any unlawful or disorderly purpose." § 25-823(a), (a)(2). Under District law, as described in the prior Order, "simple assault" is a misdemeanor offense that only requires a general intent to commit assault. *In re Kabin Group, LLC, t/a Kabin,* Board Order No. 2018-094, at ¶ 20. In this case, on July 2, 2017, "during an ejection, Mr. Rush, Kabin's security manager, threw Mr. Quiroz onto the ground, dragged him out of the establishment, pulled him down the stairs, and punched him . . . ." *Id.* at ¶ 21. The incident started inside the premises, the entire incident occurred on or near the premises, and constituted one or more assaults. *Supra*, at ¶ 3. As a result, the Board is satisfied that the Government established the unlawful or disorderly purpose element and proved that the incident involved as assault.

b. The Record Shows that the Government Established Two Methods of Operation on July 2, 2017.

Second, in this case, there are two methods of operation at issue; namely, the use of excessive force by Mr. Rush and the failure to contact the police regarding the assault and ejection. In order to sustain a conviction there must be a specific method of operation. As noted above, a method of operation includes the failure of the licensee or their agents to contact the police regarding crime or violence. *Levelle, Inc.*, 924 A.2d at 1036. The Board also finds that the use of excessive force constitutes a method of operation sufficient to constitute a violation under

§ 25-823, as the use of excessive force shows inadequate training and security, as noted in *Levelle,* and constitutes an unlawful assault in and of itself. *Id.* at 1036-37; *see also* D.C. Code § 22-404 (making assault a crime).

Turning to incident on July 2, 2017, there exists sufficient evidence to establish that Mr. Rush engaged in excessive force and that the licensee and its agents failed to contact the police. On the matter of excessive force, at a minimum, the record shows that there was no need for Mr. Rush to pull Mr. Quiroz down the stairs. *In re Kabin Group, LLC, t/a Kabin,* Board Order No. 2018-094, at ¶¶ 4 (showing Mr. Quiroz at the top of the stairs with his hands "by his side or clasped."), ¶ 7 (Investigator Wilkinson did not believe Mr. Quiroz was the aggressor based on his review of the video). Moreover, the record shows that the establishment did not exhaust all means of resolving the situation peacefully, such as engaging in further conversation or waiting at the top of the stairs until the police arrived. *Id.* at ¶ 4. There also exists sufficient evidence to find that Kabin and its agents failed to contact the police regarding the incident. Specifically, the record demonstrated that Mr. Rush did not call the police, instruct staff to call the police, and there is no evidence that anyone on Kabin's staff independently called the police. *Supra,* at ¶¶ 6, 14. As a result, the Board is satisfied that the method of operation element has been satisfied in this case.

c. The Record Shows a Demonstrable Connection Between Kabin's Method of Operation and the Assault.

Third, the record shows that there exists a "demonstrable connection" between the method of operation that caused or tended to cause the assault that occurred on July 2, 2017.

Section 25-823(b) eliminates the need to show a continuous course of conduct, pattern, or prior acts in cases of assault. § 25-823(b). As explained in *Am-Chi,* the Board is permitted to rely on a single instance of a method of operation that leads to unlawful conduct and look to the future at what may occur if the method of operation continues. *Am-Chi Restaurant, Inc.,* 396 F.2d at 688 (saying no need to show prior incidents or knowledge where "his method of operation, continued over time, harbored sufficient danger of mischievous consequences sooner or later to permit such assignment of responsibility for the tawdry incidents when and if they take place."). Moreover, as noted above, any action committed directly by the licensee or management that tends to cause the illegal conduct at issue always qualifies as a demonstrable connection. Likewise, any illegal act committed by management amounts to a *per se* use of the premises for an illegal purpose under § 25-823(a)(2), and satisfies the demonstrable connection element as well.

In this case, the excessive force and failure to contact the police regarding an assault and the ejection represents two methods of operation. As noted above, both methods of operation were committed by, participated in, and known by Thad Rush, Kabin's security manager. *In re Kabin Group, LLC, t/a Kabin,* Board Order No. 2018-094, at ¶¶ 3, 21-23. Similar to the maître d'hotel in *Am-Chi,* because Mr. Rush is a manager, the conduct is directly attributable and presumably known to Kabin, and satisfies the demonstrable connection requirement.

Moreover, if "continued over time," it is reasonable to presume that these practices would lead to future assaults and other "mischievous consequences." *Am-Chi Restaurant, Inc.*, 396 F.2d at 688. For example, on its own excessive force is unacceptable, because it is illegal, can lead to avoidable injury and death, and if not heavily discouraged, may result in the licensee or its agents failing to exhaust nonviolent means to resolve incidents or unjustly abusing patrons. Further, failing to report crimes "amounts to hiding crime and violence," invites continued violence in the form of retaliation, escalation, more parties joining the fray, and other tragic consequences.[8] *In re Kabin Group, LLC, t/a Kabin*, Board Order No. 2018-094, at ¶ 23. Finally, in this specific case, had the establishment exhausted all nonviolent methods or called the police to deal with the noncooperative patron, there would have been no need for Mr. Quiroz to be pulled down the stairs or punched on the ground. *Id.* at ¶¶ 13, 21.

As a result, for these reasons, the Board affirms its finding that on July 2, 2017, Kabin violated § 25-823(a)(2).

V. Assuming *Arguendo* That a Continuous Course of Conduct Must Be Shown, There is Sufficient Evidence in the Record to Sustain the Conviction.

In issuing the prior Order, the Board did not apply the continuous course of conduct test. It should also be noted that even before the enactment of § 25-823(b), the court's precedent in *Am-Chi* would allow the use of the single instance test based on the involvement of Kabin's security manager in the incident. Nevertheless, even if it were required to do so, there is sufficient evidence in the record to sustain the conviction. Specifically, during his testimony, Mr. Rush, Kabin's security manager, stated that in situations where he forces a patron to the ground he would not always contact the police. *Tr.*, 2/7/18 at 80-81. As a result, this admission provides sufficient evidence to infer that Kabin's "regular" method of operation included not contacting the police when confronted with assaults, which has a nexus to the incident that occurred on July 2, 2017.[9] *Levelle, Inc.*, 924 A.2d at 1037.

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[8] The tragic consequences of not calling the police for assistance are well-documented. For example, in *M & M Grill, Inc.*, a local merchant was shot outside a bar and came inside to request help. *M & M Grill, Inc. v. Ohio Liquor Control Comm.*, 2005-Ohio-2431, ¶ 10 (Ohio Ct. App., 10th Dist., May 19, 2005). The bar's employees refused to contact the police or emergency medical services, which forced the victim to "stagger[] down the road" and flag down a police car himself before he died. *Id.*; *see also Maggiore v. Ohio Liquor Control Com'n*, 1996 WL 367268, at *2 (Ohio Ct. App. Mar. 29, 1996) (saying facts such as employees indicating that "they were not allowed to call the police" despite a gun fight occurring outside supported the finding that management "disregarded" problems and had a general disregard for the law).

[9] The Board also notes that this case is distinguishable from the situation in *4934, Inc.* Unlike that case, there is no evidence that Mr. Rush was reprimanded for his actions, acted contrary to the management or ownership's instructions (even though his actions as a manager make them directly attributable to Kabin). *4934, Inc. v. Washington*, 375 A.2d 20, 22 (D.C. 1977) (saying, in reversing Board, employee acted contrary to management's instructions, the employee was reprimanded, and prior police visits did not observe illegal conduct).

VI. Assuming *Arguendo* That *1900 M Restaurant Associations* is the Controlling Authority, the Present Matter is Distinguishable.

In issuing the present Order, the Board relies heavily on *Am-Chi*; nevertheless, even if *1900 M Restaurant Associations* controlled, the present case is sufficiently distinguishable to merit upholding the conviction.

First, the licensee in *1900 M Restaurant Associations* was not accused of not contacting the police or relying on excessive force, as in this case. Instead, the court's analysis of the method of operation and demonstrable connection in *1900 M Restaurant Associations* focused on not wearing uniforms and inadequate employee disciplinary measures. *1900 M Rest. Associations, Inc.*, 56 A.3d at 494. As a result, the analysis provided by the court in *1900 M Restaurant Associations* is not comparable or applicable to the present case.

Second, unlike *1900 M Restaurant Associations*, there is no credible claim that Mr. Rush acted in self-defense. *Id.* at 490. Nevertheless, even if Mr. Rush acted in self-defense, the Board would not change its determination. While self-defense may defeat a claim of assault, "aggression . . . completely disproportionate to the initial aggression faced" will not be deemed lawful self-defense. *Ewell* v. *United States*, 72 A.3d 127,130-31 (D.C. 2013). Furthermore, "where an accused, claiming self-defense, uses deadly force, he must—at the time of the incident—actually believe and reasonably believe that he is in *imminent peril of death or serious bodily harm*; whereas one utilizing nondeadly force must show that he reasonably believed that harm was imminent." *Id.* at 131.

During the incident, when security was "not touching him" at the top of the stairs, there was no indication that the victim "was actively resisting or attacking security." *In re Kabin Group, LLC, t/a Kabin*, Board Order No. 2018-094, at ¶¶ 4, 21. Indeed, the sole event precipitating Mr. Quiroz being pulled down the stairs was his failure to follow Mr. Rush's direction "to move towards the steps." *Id.* at ¶ 7. Furthermore, the Board does not credit Mr. Rush's statement that he believed Mr. Quiroz was going to hit him. *Supra*, at ¶ 12. Under these circumstances, Mr. Rush did not have a reasonable belief that harm was imminent, which negates any claim of self-defense.

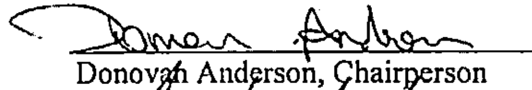
Moreover, even if Mr. Rush believed harm were imminent, he had no reason to use deadly force by pulling Mr. Quiroz down at least 12 steps. *Supra*, at ¶ 4; *see State v. Riley*, 1979 WL 207988, at *2 (Ohio Ct. App. Mar. 2, 1979) (saying a fall from the top of the stairs may result in "a serious or fatal fall" and constitute "deadly force" under some circumstances). Finally, even if Mr. Rush acted in self-defense, in pulling Mr. Quiroz down the stairs and forcefully ejecting him from the establishment, this created an obligation for him to report the alleged attempted assault by Mr. Quiroz to the police rather than trying to hide the incident or creating an opportunity for retaliation later in the evening. *Levelle, Inc.*, 924 A.2d at 1036 (affirming violation where club had "ill-advised practice of ejecting the participants of an altercation without notifying the police."); *In re Kabin Group, LLC, t/a Kabin*, Board Order No. 2018-094, at ¶ 22 ("any situation that results in security throwing someone to the ground,

dragging them out of the establishment, pulling them down the stairs, and punching them, is serious enough to require the licensee or their agents to report the incident to [the] police").

ORDER

Therefore, the Board, on this 25th day of April 2018, **DENIES** the Motion for Reconsideration. The ABRA shall deliver copies of this Order to the Government and the Respondent.

District of Columbia
Alcoholic Beverage Control Board

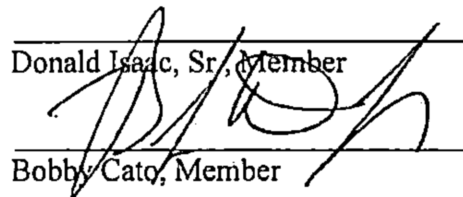


Donovan Anderson, Chairperson

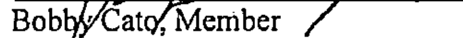
Nick Alberti, Member

Mike Silverstein, Member

James Short, Member



Donald Isaac, Sr., Member



Bobby Cato, Member

Rema Wahabzadah, 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).