



OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

Appeals Division

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Appeal No. 2301179

DEP v. Dalton's

October 26, 2023

APPEAL DECISION

The appeal of Respondent, premises owner, is denied. Respondent appeals from a recommended decision by Judicial Hearing Officer (JHO) D. Leung, dated July 27, 2023, sustaining a violation of § 24-244(b) of the Administrative Code of the City of New York (Code), for noise emitted from a sound reproduction device used for commercial or business advertising purposes and heard on a public street. Having fully reviewed the record, the Board finds that the JHO's decision is supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Table with 5 columns: Summons, Law Charged, Hearing Determination, Appeal Determination, Penalty. Row 1: 00600528P, Code § 24-244(b), In Violation, Affirmed - In Violation, \$440

In the summons, the issuing officer (IO) affirmed that on December 8, 2022, at 12:01 p.m., at 611 Ninth Ave., Manhattan, a citizen complainant observed noise playing from a sound reproduction device, speakers, that was audible on the sidewalk.

After a hearing held on July 26, 2023, the JHO sustained the violation finding that the cited sound, music, served as an advertisement to passersby. For the following reasons, the Board affirms the JHO's decision. Code § 24-244(b) prohibits anyone from operating a sound device "for commercial or business advertising purposes or for the purpose of attracting attention to any performance, show, sale or display of merchandise, in connection with any commercial or business enterprise outside or in front of any building, place or premises," inter alia. Here, the citizen's video showed that the restaurant was playing music onto the sidewalk from its exterior speakers. Although, Respondent's representative stated at the hearing that the music was played to entertain customers in the outdoor dining area, there is no outdoor dining shed or sidewalk dining area visible in the video, only a few sidewalk dining area barriers that were stacked against the building's facade. Therefore, the Board finds there was no outdoor dining area at the time of violation. Given the totality of the evidence presented here, it is a reasonable inference that the music from the exterior speakers audible on the public street was for the purpose of attracting passersby, "which is, in fact, the definition of advertising." See East End Essemble, Inc., Appeal No. 41190 (September 16, 2003); 177 Christie, Inc. v Environmental Control Bd., 83 A.D.3d 561 (1st Dept. 2011). Here, where music is emitting from speakers that are mounted over the entrance of the restaurant and there were no outdoor tables or chairs, the Board finds that the music was present to draw the attention of passersby to the restaurant's offerings, in effect advertising. See Eric Eisenberg (CC) v. Merrion Row, Appeal No. 2300954 (September 28, 2023); Dietmar Detering v. Westhouse Hotel New York, Appeal No. 2300439 (June 29, 2023). Consequently, Respondent is in violation.

Accordingly, the Board affirms the JHO's decision sustaining a violation of Code § 24-244(b), and imposing a civil penalty of \$440.

By: OATH Appeals Division