

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-10000

File: 48-524326; Reg: 23093393

DOG & PONY, INC.,
dba Polite Provisions
4936 30th Street
San Diego, CA 92116,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Hon. Doris Huebel

Appeals Board Hearing: August 9, 2024
Sacramento, CA/Videoconference

ISSUED AUGUST 14, 2024

Appearances: Appellants: Adam Koslin, of Soloman, Saltsman, and
Jamieson, as Counsel for Dog & Pony Inc.,

Respondent: Alanna Ormiston, as Counsel for the Department
of Alcoholic Beverage Control.

OPINION

I. INTRODUCTION

Appellant operates a licensed premises called Polite Provisions. The Department of Alcoholic Beverage Control ("the Department") filed a three-count accusation that alleged Appellant violated California Code of Regulations, title 4, section 108 (Rule 108). Rule 108 dictates how a Notice of Suspension is to be posted at a licensed premises. After an administrative

hearing, the Administrative Law Judge issued a Proposed Decision recommending the Department sustain all three counts and suspend Appellant's license for 60 days. The Department adopted the Proposed Decision,¹ and Appellant appealed. Appellant's appeal asks the Alcoholic Beverage Control Appeals Board ("the Board") to consider whether the Appellant violated Rule 108 as a matter of law.

Pursuant to Article XX, section 22 of the California Constitution, and for the reasons stated below, the Department's decision is affirmed.

II. FACTS

On September 13, 2012, the Department issued Appellant a type 48 on-sale general public premises license. Appellant operates a bar in San Diego, California called Polite Provisions. Mr. Arsalun Tafazoli is Appellant's corporate officer.

On December 23, 2022, Department Agents Camacho and Sun, visited Polite Provisions. They posted two suspension notices in conspicuous places. One notice was posted on the wall above the bar inside of Polite Provisions. The other notice was posted on the front door. Even though the front door was partially covered with painted snow for the holidays, the notice was clearly visible from Polite Provisions' exterior. The notices stated the suspension was in effect from December 23, 2022 to January 22, 2023.

¹ The Department's decision, dated March 14, 2024, is set forth in the appendix.

On January 5, 2023, Department Agents Shapiro, Camacho, and Barabas, visited Polite Provisions to conduct a compliance check. The agents wanted to ensure Polite Provisions was not selling alcohol during its suspension. They also wanted to ensure the suspension notices had not been moved. During the compliance check, the agents found two things. First, they found that the suspension notice on the front door was not there. Instead, the agents found that the front door was completely covered with painted snow and that a flyer had been placed on its exterior. The flyer stated Polite Provisions would be closed for a "winter break" from December 24, 2022 to January 23, 2023. Second, the agents found that the notice on the front door had been moved to an exterior window. The exterior window was a frame-paneled window that was partially covered in painted snow. Because of the window's frame and the painted snow, the suspension notice was heavily obscured.

On January 10, 2023, Agent Camacho spoke with Mr. Tafazoli on the telephone. Agent Camacho told Mr. Tafazoli that the suspension notice was no longer in a conspicuous place. Mr. Tafazoli told Agent Camacho that Polite Provisions was being renovated and that the notice had fallen off the door. Agent Camacho told Mr. Tafazoli that the notice should be placed on the front door and that the painted snow should be removed. Agent Camacho gave Mr. Tafazoli 24-hours to comply with his directive.

On January 12, 2023, Agent Camacho visited Polite Provisions. While there, he found that the notice had been re-posted on the front door. The painted

snow, however, had not been removed, and the words on the notice could not be clearly read.

III. PROCEDURAL HISTORY

On July 24, 2023, the Department filed a three-count accusation against Appellant. Count 1 alleged that on or about January 5, 2023, Appellant violated Rule 108 by not maintaining “two notices of license suspension in conspicuous places on the licensed premises” Count 2 alleged that on or about January 5, 2023, Appellant violated Rule 108 by posting “advertising or other signs to the effect that the premises had been closed or suspended its business for any reason or reasons other than by order of the Department.” Count 3 alleged that on or about January 12, 2023, Appellant violated Rule 108 by not maintaining “two notices of license suspension in conspicuous places on the licensed premises”

The administrative hearing was held on December 19, 2023. Administrative Law Judge Doris Heubel presided. Steven Elia represented the Appellant. Alanna Ormiston represented the Department. Mr. Tafazoli testified for the Appellant. Agents Shapiro and Camacho testified for the Department.

After the Administrative Hearing, Judge Heubel issued a Proposed Decision. Judge Heubel found Appellant violated Rule 108 on January 5 and January 10, 2023, by not having the exterior suspension notice posted in a conspicuous place. Judge Heubel further found Appellant violated Rule 108 on January 5, 2023, by posting a flyer that stated Polite Provisions would be closed

for a reason other than by order of the Department. Judge Heubel recommended that the Department sustain Counts 1, 2, and 3, and that the Department suspend Appellant's license for 60 days. The Department adopted Judge Heubel's Proposed Decision, and Appellant appealed to this Board. As stated in Appellant's Opening Brief, Appellant's appeal asks the Board to determine whether Appellant's de minimis movement and partial obstruction of the exterior suspension notice violates Rule 108 as a matter of law.

IV. DISCUSSION

A. Standard of Review

The Department has the power, in its discretion, to deny, to suspend, or to revoke any alcoholic beverage license if it determines for good cause that the granting or continuance of a license would be contrary to public welfare or morals. (Cal. Const., art. XX, § 22.) This discretion, however, is not absolute. The Department's decision should be based on sufficient evidence, and it should not act arbitrarily in determining what is contrary to public welfare and morals (*Stouman v. Reilly* (1951) 37 Cal.2d 713, 717.)

The scope of the Board's review of the Department's decision is established by statute. (Bus. & Prof. Code, § 23084.) The nature of this review is further governed by the California Constitution, statute, case law, and precedential decisions of the Department. (See Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23083, 23085; Gov. Code, § 11425.60; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d. 85, 94-96; and *American*

Federation of Labor v. Unemployment Ins. Appeals Bd. (1996) 13 Cal.4th 1017, 1027.)

In reviewing the Department's decision in this case, the Board's role is to determine whether the Department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence. (Bus. & Prof. Code, § 23084, subds. (b)-(d).) Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion. (*County of San Diego v. Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 555 quoting *Hosford v. State Personnel Board* (1977) 74 Cal.App.3d 302, 307.) It is evidence of "ponderable legal significance ... reasonable in nature, credible, and of solid value." (*County of San Diego, supra*, at p. 555 quoting *Ofsevit v. Trustees of the California State University and Colleges* (1978) 23 Cal.3d 773, fn. 9.)

In determining whether the Department's decision is supported by substantial evidence, the Board may not independently reweigh the evidence. (*Kirby v. Alcoholic Beverage Control Appeals Bd.* (1970) 7 Cal.App.3d 126, 129; *Reimel v. Alcoholic Beverage Control Appeals Bd.* (1967) 255 Cal.App.2d 40, 43.) The function of the Board is "merely to determine whether the findings of the Department are supported by substantial evidence." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113.) Any conflicts in the evidence are to be resolved in favor of the Department's decision, and the Board must accept all reasonable inferences from the evidence which support

the Department's decision. (*Ibid.*) The Board may not disregard or overturn a finding of fact by the Department simply because the Board believes that a different finding would have been more reasonable. (*Id.* at p. 114.)

B. Counts 1 and 3

The Board finds the Department's decision was supported by substantial evidence. Rule 108 states in relevant part, "Every licensee whose licenses have been suspended by order of the department shall post two notices in conspicuous places, one on the exterior and one on the interior of his premises, for the duration of the suspension." (Cal. Code Regs., tit. 4, § 108.) On December 23, 2022, the Department's agents posted a suspension notice on Polite Provisions' front door. The notice was visible from Polite Provisions' exterior. On January 5, 2023, the Department's agents visited Polite Provisions, and they found that the suspension notice had been moved to an exterior window. (Exhibit 8.) This notice was covered by the window's frame and painted snow. Because of the frame and snow, the notice could not be read. And on January 12, 2023, the notice was posted once again on the front door, but it could not be clearly seen because it was covered by painted snow. (Exhibit 9.) Therefore, there was enough credible evidence for a reasonable mind to conclude that the exterior notice was not posted in a conspicuous place as required by Rule 108. As the testimony and Exhibits 8 and 9 show, the notices were posted, but they were obscured by a window frame and painted snow. As such, the Department's decision was supported by substantial evidence, and it is affirmed.

The Board also finds the Department did not abuse its discretion by concluding that an obscured notice is not conspicuous. The same rules governing the construction of statutes apply to the construction and interpretation of administrative regulations. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Controls Appeals Bd.* (2017) 7 Cal.App.5th 628, citing *In re Richards* (1993) 16 Cal.App.4th 93, 97-98.) If the language of a statute is not ambiguous, the plain and commonsense meaning controls. (*MacIssac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083; *Jenkins v. Valley Oil Co.* (1964) 226 Cal.App.2d 41, 45.) The word conspicuous is not ambiguous, so the Board will apply its plain meaning. If something is conspicuous it is easily seen or noticed, or it is readily visible or observable. Also, the word obscure is an antonym of conspicuous (<https://www.thesaurus.com/browse/conspicuous> [as of Aug. 9, 2024].) So, in short, if something is obscured, it is not conspicuous. Thus, the Department did not abuse its discretion by concluding that an obscured notice is not conspicuous. Therefore, obscuring a suspension notice with a window frame or painted snow would violate Rule 108 as a matter of law.

Lastly, the Board finds that its decision in *Stefanos Papagiannis v. Department of Alcoholic Beverage Control* (2001) AB-7595 does not apply to this case. The Board's prior decisions are not precedent, but they may be considered for persuasive value. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2017) 7 Cal.App.5th 628, 639.) In

Papagiannis, the Board found that the Administrative Law Judge's findings did not show the suspension notice had been moved to a place that was not conspicuous. In other words, there was an error with the findings. The same error did not happen in this case. Judge Heubel found the notice was moved, obscured by the window-frame and painted snow, and not conspicuous. Because the same error did not occur in this case, the Board's decision in *Papagiannis* is not persuasive.

C. Count 2

The Board finds the Department's decision was supported by substantial evidence. Rule 108 states in relevant part, "Advertising or posting signs to the effect that the premises have been closed or business suspended for any reason other than by order of the department suspending alcoholic beverage license, shall be deemed a violation of this rule." (Cal. Code Regs., tit. 4, § 108.) On December 23, 2022, the Department's agents posted a suspension notice on Polite Provisions' front door. The notice was visible from Polite Provisions' exterior. The period of suspension began on December 23, 2022 and ended on January 22, 2023. On January 5, 2023, the Department's agents visited Polite Provisions, and there was a flyer posted on the front door. (Exhibits 6, 7.) The flyer advertised that Polite Provisions would be closed for a "winter break" from December 24, 2022 to January 23, 2023. Therefore, there was enough credible evidence for a reasonable mind to conclude Polite Provisions violated Rule 108 by posting the "winter break" flyer. As Exhibits 6 and 7 clearly show, there was a

sign that stated Polite Provisions would be closed for a reason other than by order of the Department. As such, the Department's decision was supported by substantial evidence, and it is affirmed.

V. CONCLUSION

The Department's decision is affirmed. The Department did not abuse its discretion by concluding that an obscured suspension notice is not conspicuous. Further, there was substantial evidence that showed Appellant did not post an exterior suspension-notice in a conspicuous place as required by Rule 108. There was also substantial evidence that showed Appellant violated Rule 108 by posting a flyer that stated it would be closed for a reason other than by order of the Department.

ORDER

Pursuant to Article XX, section 22 of the California Constitution, the Department's decision is affirmed.²

SUSAN A. BONILLA, CHAIR
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final order is filed in accordance with Business and Professions Code section 23088, and it shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq. Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

DOG & PONY, INC.
POLITE PROVISIONS
4696 30TH STREET
SAN DIEGO, CA 92116

ON-SALE GENERAL PUBLIC PREMISES -
LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

SAN DIEGO DISTRICT OFFICE

File: 48-524326

Reg: 23093393

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on March 13, 2024. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 400 R St, Suite 320, Sacramento, CA 95811. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after April 24, 2024, a representative of the Department will contact you to arrange to pick up the license certificate.



https://abcab.ca.gov/abcab_resources/

Sacramento, California

Dated: March 14, 2024

RECEIVED

MAR 14 2024

Alcoholic Beverage Control
Office of Legal Services

Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

Dog & Pony, Inc.	}	File: 48-524326
Db: Polite Provisions	}	
4696 30 th Street	}	Reg.: 23093393
San Diego, California 92116	}	
	}	License Type: 48
Respondent	}	
	}	Word Count: 19,232
	}	
	}	Kennedy Court Reporters:
	}	Court Reporter: Christina Rodriguez
	}	Video Host: Alex Burke
	}	
<u>On-Sale General Public Premises License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference on December 19, 2023.

Alanna Ormiston, attorney, represented the Department of Alcoholic Beverage Control (the Department).

Steven Elia, attorney, represented the Respondent, Dog & Pony, Inc. Arsalun Tafazoli, corporate officer for Dog & Pony Inc., was also present.

The Department seeks to discipline the Respondent's license on the grounds that:

1. On or about January 5, 2023, Respondent-Licensee failed to maintain two notices of license suspension in conspicuous places on the licensed premises, one interior and one exterior, in violation of California Code of Regulations, Title 4, Division 1, section 108 (hereinafter referred to as either section 108 or rule 108);
2. On or about January 5, 2023, Respondent-Licensee, whose premises had been posted for suspension by order of the Department, did, during the time of that same suspension, have posted, at the licensed premises, advertising or other signs to the effect that the premises had been closed or suspended its business for any reason or reasons other than by order of the Department, in violation of rule 108;
3. On or about January 12, 2023, the Respondent-Licensee failed to maintain two notices of license suspension in conspicuous places on the licensed premises, one interior and one exterior, in violation of rule 108. (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on December 19, 2023.

FINDINGS OF FACT

1. The Department filed an accusation on July 24, 2023. At the hearing the Department moved to amend the accusation in count 2, to change section 208 to section 108. The motion was granted, without objection.
2. The Department issued a type 48, on-sale general public premises license to the Respondent for the above-described location on September 13, 2012 (the Licensed Premises).
3. The following is the record of prior Department discipline against the Respondent’s license as established by official records introduced by the Department, which matters are final (Exhibits 2, 3, 4 and 5):

Violation Date	Violation	Registration Date	Registration Number	Penalty
2/11/2016	BP§§25177, 25176, 25613, 23300, 23355	05/19/2016	16084188	POIC in lieu of 15-day suspension
01/10/2019	Rule 107, BP§§23300, 23355	04/19/2019	19088749	POIC in lieu of 15-day suspension
05/30/2019	BP§§23300, 23355, 25170, 25176, 25177, 25613, Rule 107	09/20/2019	19089242	25-day suspension
11/18/2021	BP§§23300, 23355	06/28/2022	22092331	Revocation stayed for 3-years and 30-day suspension

4. Arsalun Tafazoli is the corporate officer for Dog & Pony, Inc. and Fortunate Son (a Chinese restaurant), two separate licensed premises, with common ownership, and adjacent to each other in the same building along Adams Avenue. On November 8, 2022, Department Agent Shapiro visited Fortunate Son to serve a 30-day suspension notice. Agent Shapiro posted two suspension notices, one of which could visibly be seen from outside the premises that was placed at the left side and middle of the front window directly below the “Fortunate Son” sign. (Exhibit 6 page 1.) Agent Shapiro met with Mr.

Tafazoli and advised him that he posted the suspension notices in conspicuous locations. Agent Shapiro instructed Mr. Tafazoli not to move the suspension notices and not to post or advertise any other reason why Fortunate Son may be closed.

5. On November 16, 2022, Agent Shapiro returned to Fortunate Son to find the suspension notice he had placed in the window on November 8, 2022, was not on the window. (Exhibit 6 page 2 – color photo of Fortunate Son window with no suspension notice.) Agent Shapiro saw through the front window that the suspension notice was lying, crumpled-up on a table. (Exhibit 6 page 3 – color photo of suspension notice on interior table.)

6. Agent Shapiro contacted the Fortunate Son manager, Travis Champer, and asked where the suspension notice was. Manager Champer said the suspension notice was torn down and wrinkled so they did not want to put it back up because it did not look good. Agent Shapiro advised manager Champer that the suspension notice needed to be reposted and if he wanted a clean, unwrinkled suspension notice Agent Shapiro would provide it to him or manager Champer could come to the district office to get a new one. Agent Shapiro reiterated that the suspension notice needed to be posted and not moved from the location where Agent Shapiro had posted it and added that they are not to post anything misleading regarding why Fortunate Son is closed. Agent Shapiro advised manager Champer that if the Fortunate Son licensee did not comply with his instructions it could result in an additional suspension. Manager Champer put the suspension notice back up in the window as it had originally been posted.

7. On December 23, 2022, Agents Camacho and Sun visited the Licensed Premises and posted two suspension notices in conspicuous locations therein. One notice was posted directly in the middle of the fixed bar approximately six feet high. (Exhibits A5 and A6.) Agent Camacho posted the second suspension notice on the interior glass of the front door under the Polite Provisions “P” logo, where it was clearly visible from the exterior. The perimeter of the glass on the front door was snow frosted, but not in the area where the agents placed the suspension notice. The agents took a photograph of the notice posted on the front door but were later unable to locate that photograph. (Exhibit A8 – a local San Diego article dated December 27, 2022, four days after the agents posted the suspension notices, which article contains a photo at the top right corner depicting the perimeter of the glass on the Licensed Premises’ front door snow frosted.) It is a common practice for Department agents to post suspension notices on the interior of the glass front door of licensed premises directly next to the name of the premises. Agent Sun informed Respondent’s manager, Chris, that the agents had posted two suspension notices in conspicuous locations and that they were not to be removed or moved. Manager Chris acknowledged the instructions. The notices stated December 23, 2022, as the first day of suspension and January 22, 2023, as the last day of suspension.

8. On January 5, 2023, Agents Shapiro, Camacho, and Barabas visited the Licensed Premises to conduct a compliance check to ensure whether the said suspension notices which had been posted on December 23, 2022, were still so posted and had not been moved and to make sure the Licensed Premises was not selling alcoholic beverages in violation of their suspension. The suspension notice on the Licensed Premises front door was not there. Instead, the agents found the glass on the front door was completely snow frosted white and a flyer posted on the exterior of the front door which could clearly be read and stated, "P10 As we approach our 10-year anniversary we will be taking a winter break. We will be closed from December 24th, until January 23rd. Fortunate Son will remain open, and in operation under normal schedule all throughout. We look forward to seeing you on our 10th birthday." (Exhibit 7, pages 1 and 2 – color photos of front door with flyer and close-up shot of said flyer on door, respectively. Hereinafter referred to as the "Winter Break flyer.")

9. The Licensed Premises' front door is positioned at a 45-degree angle at the corner or intersection of 30th Street and Adams Avenue. The agents observed the suspension notice was reposted behind partially snow frosted frame-paneled windows that face Adams Avenue, approximately three feet around the corner from the front door. The suspension notice and words thereon were heavily obscured and not clearly visible due to the frosting on the paneled glass windows. (Exhibit 8 – color photo.)

10. On January 10, 2023, Agent Camacho telephoned and spoke with Mr. Tafazoli, informing him the agent observed that the original suspension posting had been removed from its original conspicuous location and was placed in an area that was no longer clearly visible or conspicuous. Mr. Tafazoli said the Licensed Premises was being renovated and claimed it had fallen off the door. Agent Camacho advised Mr. Tafazoli that he must remove the frosting from the front door glass and replace the suspension notice to its original posted location on the front door. Agent Camacho gave Mr. Tafazoli a 24-hour deadline by which to comply, until January 11, 2023, at 6:00 p.m. Mr. Tafazoli informed Agent Camacho he would comply as late as possible.¹ Agent Camacho informed Mr. Tafazoli that the Licensed Premises could remain open to the public as long as there were no sales, service, or consumption of alcoholic beverages.

11. On January 12, 2023, Agent Camacho returned to the Licensed Premises to confirm whether the Respondent had complied with his instructions and found it had not. Agent

¹ In balancing Evidence Code section 780, it is found Mr. Tafazoli told agent Camacho he would handle it "as late as possible." Agent Camacho credibly maintained that he had placed in quotes this said response in his report which he had prepared close in time to the conversation with Mr. Tafazoli. Mr. Tafazoli's claimed denial at the hearing, based on his belief it "seems incredibly uncivil and disrespectful" for him to have said that is disbelieved based on his exhibited bias in the presentation of his testimony as the corporate officer of the Licensed Premises subject to revocation.

Camacho observed that the notice of suspension had been put back on the interior of the front door, but the white snow frosting remained on the glass of the door and obscured the notice so that the wording of the suspension notice could not clearly be read. (Exhibit 9.)

Respondent's Witness

12. Arsalun Tafazoli appeared and testified at the hearing. Mr. Tafazoli described his position with Respondent as officer and chairholder. Mr. Tafazoli said the Respondent sells merchandise at the Licensed Premises including home bar accessories (for customers to make their own cocktails at home), syrups, bitters and branded clothing, such as scarves, socks and beanies.

13. Mr. Tafazoli said that prior to 2023, the Licensed Premises and Fortunate Son were connected with an adjoining door, which Respondent's staff used to deliver food to patrons in the Licensed Premises. Mr. Tafazoli acknowledged prior violations against Respondent's license involving multiple incidents where undercover Department agents were permitted to carry open containers of alcoholic beverages from the Licensed Premises into Fortunate Son, for consumption off the Licensed Premises, including the serving of distilled spirits outside the boundaries of the Licensed Premises, resulting in a 30-day suspension beginning on December 23, 2022, with a stipulation and waiver for prehearing settlement. (Exhibit 5.) Mr. Tafazoli said that instead of remaining open during the license suspension he chose to close the Licensed Premises to address the adjoining access problem and built a wall, effectively closing off the access point between the Licensed Premises and Fortunate Son.

14. Mr. Tafazoli confirmed that the Licensed Premises has a "P" logo on its front door for its DBA Polite Provisions. (Exhibit A10 - photo depicts front door logo.) Mr. Tafazoli acknowledged that at some point the Respondent mounted the Winter Break flyer to the exterior of the front door covering the "P" logo. (Exhibits A1 and A2.) Mr. Tafazoli explained the reason he knew the Winter Break flyer was placed on the exterior of the door was because the flyer was not obstructed by the snow frosting that was applied to the front door as seen in exhibit A2. (Exhibit A2 depicts the Winter Break flyer as clearly legible, with no frosting obscuring it, and the suspension notice obscured behind the snow frosting of the glass front door.)

15. Mr. Tafazoli testified that the Respondent has been applying the snow frosting to the windows and glass of the front door of the Licensed Premises since 2017, when the Respondent founded its first annual holiday Christmas pop-up, known as Miracle on 30th Street. During this event the Licensed Premises is transformed into a North Pole establishment, with a completely different menu and look. (Exhibits A3 dated December 2, 2020, A4 dated December 23, 2017, A5 dated December 6, 2018, and A7 undated,

which are photographs from Respondent's Instagram account depicting the Licensed Premises' interior decorations.) Mr. Tafazoli reviewed, during his testimony, some of the exterior photographs posted on Respondent's Instagram account, which depict the snow frosting on the windows and front door glass over the years. (Exhibit A11 dated December 1, 2017; Exhibit A7 dated December 6, 2018; Exhibit A10 dated December 1, 2019.)

16. Mr. Tafazoli said the front door of the Licensed Premises opens outward as depicted in exhibit A11, a photograph dated December 1, 2017. During the suspension beginning December 23, 2022, the Respondent's front door was propped open between 9:00 a.m. and 5:00 p.m. while construction crews were working in the Licensed Premises. The construction workers walked in and out of the front door and carried materials in and out of the front door, which, Mr. Tafazoli said caused the notice of suspension to be torn at the bottom left corner. Mr. Tafazoli claimed the notice had been knocked off the front door by the construction workers. Respondent's on-site manager put the notice on the bar counter, took a picture of the damaged notice, which still contained thick tape along two sides of the notice. (Exhibit A9 – photo of suspension notice with torn bottom left corner.) The manager asked Mr. Tafazoli what to do with the notice given the construction crew was hitting it as they entered and exited the Licensed Premises. Mr. Tafazoli said that patrons were also entering the Licensed Premises believing it to be open because they did not see the suspension notice with the door propped open during construction. Mr. Tafazoli believed the location where Agent Camacho had taped the suspension notice (the interior of the front door) was no longer conspicuous during the construction. He instructed the manager to place the suspension notice on the window along Adams Avenue, just to the right of the front door, which the manager did by placing the notice approximately three feet around the corner from its original location behind partially snow frosted paneled windows. Mr. Tafazoli believed this new placement was a good solution to the foregoing problems of construction crew damaging the sign and patrons not seeing the notice with the door propped open. Mr. Tafazoli testified he was "absolutely not" trying to hide the suspension notice with its new placement. He said the 30th Street side windows would not have been a good alternative because Respondent has a sidewalk patio café with plants and canopies, which would have obstructed the view of the notice.

17. Respondent presented a photograph of a local San Diego article dated December 27, 2022, documenting the Respondent's license suspension with a photograph of the suspension notice obscured behind the snow frosting on the paneled windows along Adams Avenue. Respondent claimed that the snow frosting on the windows did not prevent people from reading or receiving notice of Respondent's license suspension, given this article reciting Respondent's license suspension. (Exhibit A8.)

18. Mr. Tafazoli said that on January 10, 2023, immediately after speaking with Agent Camacho, he reached out to the on-site management telling them to move the suspension notice from the Adams Avenue window back to the front door. The management placed the suspension notice on the interior of the glass portion of the front door, without removing the snow frosting from the glass. Mr. Tafazoli testified that he did not recall Agent Camacho giving him any instruction to remove the snow frosting from the glass on the front door. Mr. Tafazoli said the snow frosting was on the door the entire month of December 2022, and, in fact, it had been put on the day after Thanksgiving. There was no evidence presented as to why the snow frosting which originally had only included a perimeter around the glass of the front door, had been completely frosted in at some point after Agent Camacho had posted the notice of suspension thereon.

19. On January 12, 2023, Mr. Tafazoli visited the Licensed Premises to check on the construction and observed that the snow frosting on the glass of the front door obstructed the suspension notice. The notice was damaged in two places, at the top right corner and the bottom left corner as depicted in exhibit A2. He immediately instructed a crew member to remove the frosting because it was obstructing the suspension notice. Respondent presented a photograph posted to its Instagram account dated January 12, 2023, with timestamp 5:38 p.m., depicting the suspension notice clearly visible on the front door with no snow frosting. (Exhibit A13.) Mr. Tafazoli further testified that no one from the Department had informed him to remove the Winter Break flyer from the front door, and that had they so instructed him he would have absolutely removed it. Mr. Tafazoli added that the second suspension notice originally taped on the wall behind the fixed bar remained there the entire suspension period. (Exhibits A5 and A6.)

20. Mr. Tafazoli explained that the Fortunate Son notice of suspension was knocked down by guests seated at the banquette against the glass window where the notice was placed as seen in exhibit 6. He said the timing was unfortunate that the Department agents should happen to visit when staff were getting ready for service that day. He further testified that the Fortunate Son later laminated the notice and remounted it in a manner so that guests would not knock it down consistently.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Rule 108 provides in part, “Every licensee whose licenses have been suspended by order of the department shall post two notices in conspicuous places, one on the exterior and one on the interior of his premises, for the duration of the suspension.” Rule 108 further provides, “Advertising or posting signs to the effect that the premises have been closed or business suspended for any reason other than by order of the department suspending alcoholic beverage license, shall be deemed a violation of this rule.”

4. Cause for suspension or revocation of the Respondent’s license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that on January 5, 2023, and January 10, 2023, the Respondent-Licensee failed to maintain the exterior notice of license suspension in a conspicuous place on the Licensed Premises, in violation of rule 108. Furthermore, on January 5, 2023, Respondent-Licensee, whose premises had been posted for suspension by order of the Department, did, during the time of that same suspension, have posted, at the Licensed Premises, advertising or other signs, namely the Winter Break flyer, to the effect that the Licensed Premises had been closed or suspended its business for any reason or reasons other than by order of the Department, in violation of rule 108 (Counts 1, 2 and 3.) (Findings of Fact ¶¶ 1, 7-11, 18 and 19.) The Respondent did maintain the interior notice of license suspension in a conspicuous place on the Licensed Premises, directly in the middle of the fixed bar approximately six feet high, in compliance with rule 108.

5. The Respondent argued Mr. Tafazoli’s intent was not to hide the suspension notice but to post it in a conspicuous location. This argument is rejected. First of all, there is no element of intent necessary to show a violation of section 108. Regardless, the Respondent and Mr. Tafazoli were aware the suspension notice needed to be placed in a conspicuous location, clearly visible from the exterior. However, it is unclear, and there was no evidence, as to why the Respondent would allow snow frosting on the glass front door and on the windows along Adams Avenue² to hide the suspension notice, so as to cause it to be obstructed from view from the exterior. Even Mr. Tafazoli acknowledged that on January 12, 2023, when he visited the Licensed Premises the suspension notice was clearly obstructed by the snow frosting so he instructed crew members to remove the frosting. The photographs presented by the Department and Respondent show the suspension notice was not conspicuous and not completely visible but obstructed from view by the snow frosting on the front door and window along Adams Avenue. (Exhibits 8, 9 and A2.)

6. Respondent’s further argument that the December 27, 2022, article and other claimed articles were proof the alternate location on Adams Avenue where Respondent placed the suspension notice was a conspicuous location that still provided notice to the public is

² Giving the Respondent’s argument the benefit of the doubt that it allegedly posted the suspension notice on Adams Avenue to remain conspicuous.

rejected. Even Respondent's own photo of said notice (exhibit A8) depicts the notice as heavily obscured. There was no evidence the reporters of any article, let alone other claimed articles the Respondent failed to produce, were able to read the obscured suspension notice. Furthermore, there was no evidence as to how the reporter gleaned the information of Respondent's license suspension, whether it was from interviewing Respondent's employees, Mr. Tafazoli and/or contacting the Department itself. This weaker, less satisfactory evidence offered by Respondent is viewed with distrust when it was within Respondent's power to produce stronger and more satisfactory evidence. (Evidence Code, section 412.)

7. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness's testimony at the hearing, the extent of the opportunity of the witness to perceive any matter about which the witness testifies, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

8. Respondent's contentions and Mr. Tafazoli's claims that (1) Mr. Tafazoli/Respondent did not know he/it could not post the Winter Break flyer on the Licensed Premises' front door during Respondent's license suspension, and (2) Mr. Tafazoli/Respondent thought he/it could relocate the suspension notice from the front door of the Licensed Premises to a location other than where Agent Camacho had placed it, are disbelieved for the following reasons. Mr. Tafazoli exhibited a bias in the presentation of his testimony as the corporate officer of the Licensed Premises subject to revocation. Agent Shapiro credibly testified that on November 8, 2022, he met with Mr. Tafazoli, advised him that he posted the suspension notices in conspicuous locations at the Fortunate Son, and instructed Mr. Tafazoli not to move the suspension notices and not to post or advertise any other reason why Fortunate Son may be closed. On November 16, 2022, when Agent Shapiro found the suspension notice missing from the Fortunate Son front window, he spoke to manager Champer and reiterated that the suspension notice needed to be posted and not moved from the location where Agent Shapiro had posted it and added that they are not to post anything misleading regarding why Fortunate Son is closed. Then on December 23, 2022, Agent Sun informed Respondent's manager, Chris, that the agents had posted two suspension notices in conspicuous locations on the Licensed Premises and that they were not to be removed or moved. Mr. Tafazoli is the corporate officer for both Fortunate Son and the Licensed Premises. Given these clear and recent instructions, Respondent and Mr. Tafazoli were placed on notice (constructive and/or actual notice) not to post or advertise any other reason why the Licensed Premises may be closed and not to relocate the suspension notice from the Licensed Premises' front door. There was

no evidence as to why Mr. Tafazoli did not contact the Department for guidance as to what he should do under the claimed circumstances of construction workers damaging and knocking off the suspension notice from the front door given the clear instructions not to remove the said notice. There was no evidence presented as to why the snow frosting which originally had only included a perimeter around the glass of the front door, had been completely frosted in at some point after Agent Camacho had posted the notice of suspension thereon.

9. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

PENALTY

The Department requested the Respondent's license be suspended for a period of 60 days for the violation of section 108, based on the following aggravating factors given the totality of the circumstances, including: (1) the Respondent's disciplinary history in the last seven to eight years involving four prior violations, with some as recent as in 2019 and 2021, (2) the clear continuing course or pattern of violations and non-compliance with varying escalating degrees of suspension, and (3) despite the Department's repeated attempts to help the licensee come into compliance the Respondent has shirked its affirmative duty to comply as evidence by its conduct.

The Respondent recommended a stayed penalty, arguing that mitigation included Respondent timely reposting the suspension notice on the Licensed Premises' front door, albeit untimely removing the snow frosting, as well as constructing a wall to block access between Fortunate Son and the Licensed Premises, to address the violations related thereto.

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as Rule 144. Under the penalty guidelines for violation of rule 108 rule 144 recommends a penalty of a five (5) day suspension up to a suspension equal to double the original suspension. Rule 144 offers guidance on adjusting a penalty up or down depending on aggravating and mitigating factors. The penalty guidelines are not intended to be an exhaustive list, nor intended to preclude imposition of a greater or lesser discipline. Higher or lower penalties may be recommended "based on the facts of individual cases where generally supported by aggravating or mitigating circumstances." In this matter the facts and evidence clearly warrant such a deviation toward aggravation. Rule 144 further provides, "It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law."

The Respondent is correct that mitigation is warranted for its efforts to correct the problem by building a wall to block off the access point between the Licensed Premises and Fortunate Son. However, the argued-for aggravating factors outweigh Respondent's mitigation efforts. The penalty recommended complies with Rule 144.

ORDER

Counts 1, 2 and 3 are sustained. With respect to those counts the Respondent's on-sale general public premises license is hereby suspended for a period of 60 days total.

Dated: February 2, 2024



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____ <i>J. McCullough</i>
Date: _____ <i>03/13/24</i>