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

AB-9567a
File: 48-474154; Reg: 14081518

THE OFFICE BAR, LLC,
dba The Office Bar
13221 Garden Grove Boulevard,
Garden Grove, CA 92843-2256,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 3, 2018
Los Angeles, CA

ISSUED MAY 30, 2018

Appearances: *Appellant:* Armando H. Chavira, as counsel for appellant, The Office Bar, LLC.

Respondent: Jennifer M. Casey, as counsel for the Department of Alcoholic Beverage Control.

OPINION

The Office Bar, LLC, doing business as The Office Bar, appeals from a decision of the Department of Alcoholic Beverage Control[1] finding that appellant failed to establish that the prosecution of the case was the result of discriminatory or selective enforcement of the law, and affirming its original decision revoking appellant's license

[1]The decision of the Department, dated September 27, 2017, is set forth in the appendix.

(with the revocation conditionally stayed for a period of three years, provided no further cause for discipline arises during that time) and concurrently suspending its license for 45 days because appellant permitted its employees or agents to solicit alcoholic beverages; violated its petition for conditional license by permitting live entertainment inside the premises; provided topless entertainment; purchased alcoholic beverages for resale from another retailer; and possessed a cane gun.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. In the first appeal, the Appeals Board affirmed the Department's decision as to the 16 counts sustained, but remanded the matter to the Department for an evidentiary hearing on the issue of selective enforcement and discriminatory prosecution.

Following remand, administrative hearings were held by the Department on May 3, 3017, and June 30, 2017. At those hearing, documentary evidence was received and testimony was presented by Department Deputy Division Chief Marcie Griffin; Department Agent Eric Gray; and Department Agent and Investigator, Danny Vergara.

Testimony established that on or about February 21, 2016, counsel for appellant filed a Public Records Act (PRA) request with the Department (exh. C-7), asking for all Department accusations filed between January 2005 and February 2016 alleging violations of Business and Professions Code sections 24200.5(b), 25657(a), 25657(b), and Penal Code sections 303 and 303(a). This material was provided by Ms. Bordenkircher, of the Office of Legal Services. (Exh. C-8) On April 24, 2017—nine days before the May 3, 2017 hearing on remand—counsel for appellant requested that Ms Bordenkircher certify the PRA documents. On May 1, 2017, Ms Bordenkircher

responded, informing counsel that the Department does not certify documents under the PRA. Ms. Bordenkircher retired on May 31, 2017. At no time was she subpoenaed to testify at the May 3, or June 30, 2017 hearings.

In addition to exhibit C-8, counsel for appellant submitted exhibit F, which was a copy of exhibit C-8, marked up by appellant. The ALJ found that appellant "did not present any evidence to establish how this information was derived or compiled, nor did it otherwise lay a foundation authenticating these documents. Accordingly, exhibits C-8 and F were not admitted." (Finding of Fact, ¶ 23.) Additional exhibits, consisting of individual pages from exhibit C-8 coupled with documents purporting to be from the Department's publicly available database regarding licensees, or License Query System (LQS), were presented by appellant but were not admitted due to a lack of foundation to authenticate the documents. (Exhibits C-9 through C-14; Finding of Fact, ¶ 24.) Exhibit G, containing a selection of accusations derived from exhibit C-8 was similarly not admitted. (Finding of Fact, ¶ 25.)

In addition to the material presented pursuant to the PRA request, appellant's counsel accessed the Department's LQS on an unknown date, and obtained information relating to the total number of on-sale beer licenses (type 40), on-sale beer and wine public premises licenses (type 42), and on-sale general public premises licenses (type 48). (Exhibits C-1, 2, 3.) Appellant also obtained the Department's annual reports from the LQS to show the number of disciplinary actions for type 40, 42, and 48 licenses. (Exhibits C-4, 5, 6.) Two lists were submitted from the LQS showing holders of type 40 and 42 licenses sorted by name. (Exh. C-15.) No list of type 48 licensee names was submitted. (See Findings of Fact ¶¶ 1 through 19 in regards to the LQS

evidence presented.)

Marcie Griffin, Deputy Division Chief, Southern Division, testified about the Department's organization and its handling of enforcement matters. In addition, she testified about the LQS as well as the Department's internal database regarding licensees, or Alcoholic Beverage Information System (ABIS). Neither database contains information on licensees' race or ethnicity.

Department Agents Eric Gray and Danny Vergara testified that they were assigned to investigate the licensed premises following an anonymous complaint. Both testified that they had never been assigned an investigation based on the race or ethnicity of a licensee or the race or ethnicity of the clientele of a licensed premises.

Further testimony was given about the Department's enforcement activity. Some enforcement actions are random, such as spot checks performed by agents while in the field, while others are based on complaints received from the public or other law enforcement agencies. Agents are free to pursue any violation observed during the course of an investigation, whether related to the complaint or not.

Following the hearing, the Department issued its decision which determined that appellant failed to establish that the prosecution of the case was the result of discriminatory or selective enforcement of the law. The original decision of the Department—as upheld by the Appeals Board on September 29, 2016—was affirmed.

Appellant then filed a timely appeal raising the following issues: (1) the Department abused its discretion when it excluded evidence offered by appellant; (2) the Department unfairly failed to consider appellant's selective prosecution and discriminatory enforcement arguments; and (3) the Department engages in systematic

selective enforcement and discriminatory prosecution of Hispanic licensees for violations of the drink-solicitation statutes, in violation of the equal protection clause of the 14th and 5th amendments to the United States Constitution. Issues two and three will be discussed together.

DISCUSSION

I

Appellant contends the Department abused its discretion when it excluded evidence offered by appellant. (App.Op.Br., at pp. 3-16.)

The trier of fact is accorded broad discretion in ruling on the admissibility of evidence, and the ruling will be reversed only if there is a clear showing of an abuse of discretion. (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038 [228 Cal.Rptr. 768].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666 [49 Cal.Rptr. 901].)

Here, appellant sought to introduce various records which were received as a result of a PRA request to the Department. No steps were taken by appellant to authenticate the documents received as a result of the PRA, which came from the Department's internal database, known as ABIS, or to subpoena witnesses who could provide the testimony necessary to lay a foundation for the admission of the documents.

> "Proof" is made by evidence (Evid. Code, § 190). Evidence means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact. (Evid. Code, § 140.) Testimony is received through witnesses. A witness is a person whose declaration under oath is received as evidence for any purpose whether such declaration be made on oral examination or by deposition or by affidavit. (Code Civ. Proc., § 1878.) Statements of counsel not under oath or by way of stipulation or by way of admission are not evidence. (*Mills v. Vista Pools, Inc.* (1960) 184 Cal.App.2d 668, 672 [7 Cal.Rptr. 545].)

(*People v. Ruster* (1974) 40 Cal.App.3d 865, 874 [115 Cal.Rptr. 572]; *People v.*

Richardson (2008) 43 Cal.4th 959, 1004 [77 Cal.Rptr.3d 163] [Statements and arguments by counsel are not evidence].)

> Writings must be authenticated before they are received into evidence or before secondary evidence of their contents may be received. (Evid. Code, § 1401.) Authentication means either the introduction of evidence sufficient to sustain a finding that the writing is what the proponent claims it is, or "the establishment of such facts by any other means provided by law" (e.g., by stipulation or admissions). (Evid. Code, § 1400.)

(*Midland Funding LLC v. Romero* (2016) 5 Cal.App.5th Supp.1, 8 [210 Cal.Rptr.3d 659].)

The evidence excluded by the ALJ (in Findings of Fact paragraphs 23 through 25) was rejected because no competent evidence was presented to establish how the information was derived or compiled — except for the statements and arguments of appellant's own counsel, which does not constitute evidence. (See *Ruster*, *supra,* and *Richardson, supra.*) Furthermore, appellant failed to lay a foundation to authenticate these documents by producing any witnesses to identify, authenticate, or describe the documents. Without such evidence, it was impossible for the ALJ to "sustain a finding that the writing is what the proponent claims it is." (*Midland Funding, supra*.)

In its brief, appellant argues that the excluded documents should be admitted because they are "official records" under Evidence Code section 1280. (App.Op.Br. at pp. 12-13.) This issue was not raised at the administrative hearing. Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Bd.* (1980) 111 Cal.App.3d 572, 577

[168 Cal.Rptr. 822]; *Shea v. Bd. of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) The Board is entitled to consider this issue waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.)

The excluded evidence here is hearsay evidence. The relevant portion of section 1200 of the Evidence Code states:

> (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
>
> (b) Except as provided by law, hearsay evidence is inadmissible.

In order to be admissible under the exception urged by appellant under Evidence Code section 1280—the official records exception to the hearsay rule—the code requires:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
>
> (a) The writing was made by and within the scope of duty of a public employee.
>
> (b) The writing was made at or near the time of the act, condition, or event.
>
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(Cal. Evid. Code § 1280.) Appellant maintains the ALJ erred in failing to admit the excluded evidence under this exception and cites *People v. Goldsmith* (2014) 172 Cal.Rptr.3d 637 [59 Cal. 4th 258] for the proposition that "computer-generated digital

data are authenticated as a matter of law since the data generated by computers is not hearsay; machines are not declarants." (App.Cl.Br. at p. 2.)

We disagree with counsel's characterization of the holding in *Goldsmith*—where the court held that photographs generated by an automated traffic enforcement system (ATES) are inherently reliable and not hearsay. This was not a blanket holding applicable to any and all computer-generated data, it only concerned computer generated photographs. The court explained:

> As with other writings, the proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error. [Citation.] The first step is to determine the purpose for which the evidence is being offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.] The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.] Essentially, what is necessary is a prima facie case. "As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." [Citation.]

(*Goldsmith, supra*, at p. 267.) The court then goes on to conclude "the ATES evidence does not constitute hearsay." (*Id at p.* 274.) This conclusion cannot be extrapolated so broadly so as to label *all* computer-generated data as non-hearsay. And, even if such evidence is found to be admissible, a foundation is still required.

Even if we assume, for the sake of argument, that the section 1280 exception applies to the computer printouts excluded by the ALJ, the writings at issue here would only be admissible as administrative hearsay. The administrative hearsay exception, described in the Government Code section 11513(d) and California Code of Regulations section 7429(f)(4), allows admission of hearsay evidence in administrative

hearings for the limited purpose of supplementing or explaining other properly admitted evidence. (Gov. Code, § 11513, subd. (d); Cal. Code Regs., tit. 2, § 7429, subd. (f)(4).)

> (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

(Cal. Gov. Code § 11513(d).)

In the instant case, the Department did object at the hearing to the admission of the computer printouts in question, so a timely objection was made. Even if appellant had raised this section 1280 argument at the administrative hearing—which they did not—the evidence might not have been excluded, but, because of the timely objection, the hearsay evidence would not have been sufficient proof in and of itself to make appellant's case. Appellant could only have relied upon it to supplement or explain other admissible evidence.

Furthermore, appellant failed to lay a foundation to establish "sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered." (*Goldsmith, supra*, at p. 267.) In order for the ABIS printouts to be admissible to supplement or explain other evidence, it was first necessary to lay a foundation to enable the ALJ to make the findings required by section 1280—that the writing was made by and within the scope of duty of a public employee; that the writing was made at or near the time of the act, condition, or event; and that the sources of information and method and time of preparation were such as to indicate its trustworthiness. Counsel's own statements during the hearing are insufficient to supply this foundation, and no other foundation was laid.

Appellant could have taken steps to authenticate the documents or to subpoena witnesses who could have provided the testimony necessary to lay a foundation for the admission of the documents, but it did not. Furthermore, appellant's section 1280 argument should have been raised initially at the administrative hearing in order to be raised on appeal, and it was not. We see no abuse of discretion in the ALJ's exclusion of this evidence.

II

Appellant contends the Department unfairly failed to consider appellant's selective prosecution and discriminatory enforcement arguments. It also contends that evidence supports its assertion that the Department engages in systematic selective enforcement and discriminatory prosecution of Hispanic licensees for violations of the drink-solicitation statutes, in violation of the equal protection clause of the 14th and 5th amendments to the United States Constitution. (App.Op.Br. at pp. 16-27.)

The Supreme Court has ruled that "the equal protection clause is violated if a criminal prosecution is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." (*Oyler v. Boles* (1962) 368 U.S. 448, 456 [82 S.Ct. 501].)

> The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." [Citation.] The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." [Citation.] **To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.**

(*United States v. Armstrong* (1996) 517 U.S. 456, 465 [116 S.Ct. 1480], emphasis added.)

Yick Wo v. Hopkins (1886) 118 U.S. 356 [6 S.Ct. 1064] stands as the landmark decision applying the principles of the equal protection clause to the discriminatory enforcement of a law by administrative or executive officials. The case involved a San Francisco ordinance prohibiting any person from maintaining a laundry in a building not made of brick or stone without first obtaining a permit from the Board of Supervisors. 280 individuals had applied for permits under the ordinance. Even though the applicants were apparently equally qualified, the board granted permits only to the 80 non-Chinese applicants and denied permits to the 200 applicants who were Chinese. Yick Wo, one of the unsuccessful applicants, was thereafter convicted and imprisoned for maintaining a laundry without a permit. On appeal, the Supreme Court found that the board had impermissibly discriminated against the Chinese applicants, and that such administrative discrimination directly violated the mandate of the equal protection clause, stating:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

(*Id*. at pp. 373-374.)

The elements necessary to prove discriminatory or selective prosecution are as follows:

> To demonstrate that he was the subject of an invidious discrimination, appellant must prove "(1) 'that he has been deliberately singled out for prosecution on the basis of some invidious criterion;' and (2) that 'the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.' " [Citations.]
>
> An invidious criterion for prosecution is "one that is arbitrary and thus

> unjustified because it bears no rational relationship to legitimate law enforcement interests . . . ." [Citations.] "Unequal treatment which results simply from laxity of enforcement or which reflects a nonarbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement." [Citation.]
>
> It is not necessary that members of law enforcement harbor "a specific intent . . . to punish the defendant for membership in a particular class . . . ." [Citation.] Appellant must show that he would not have been prosecuted but for his membership in a constitutionally protected, or suspect, class, or his exercise of a statutory or constitutional right. [Citations.]

(*People v. Owens* (1997) 59 Cal.App.4th 798, 801 [69 Cal.Rptr.2d 428].)

The Board has voiced concern in the past about the possibility of selective enforcement in drink solicitation cases prosecuted by the Department:

> Our second serious concern is about a feature the Board has noticed appears common to drink solicitation appeals — they overwhelmingly involve Hispanic surname licensees. A sampling of cases on our official website involving prosecutions for drink "solicitation" strongly suggests our perception of this skewed enforcement against Hispanic licensees comports with reality[fn.] and raises serious public policy and legal questions.

(*Torres* (2016) AB-9510, at p. 15.) Subsequent cases, however, failed to present a sufficient record or adequate briefing for the Board to consider the issue. (See *Irma Fajardo* (2016) AB-9491a.)

In the instant case, appellant argues that "the Department's failure to address Appellant's case on the merits caused the failure." (App.Op.Br. at p. 22.) It maintains that the statistical evidence presented at the administrative hearing—but deemed inadmissible by the ALJ—would have shown discriminatory intent had it been admitted. The problem, of course, is that appellant relies on evidence which was <u>not</u> admitted to make his argument that the Department selectively enforces drink solicitation statutes

against Hispanic-surnamed licensees.

The ALJ reached the following conclusions on this issue:

> 7. Statistical analysis, by its very nature, is only as good as the information on which it is based. In order to draw any conclusions from a set of statistics, the data from which the statistics are drawn must not only be complete, but must be clearly defined. . . .
>
> 8. The Solicitation Provisions can be violated by any on-sale licensee. Thus, a complete analysis of cases brought under the Solicitation Provisions would require statistics relating to all accusations filed against any on-sale licensee under any of the six Solicitation Provisions.
>
> 9. In the present case, the data submitted by the Respondent is spotty, at best. First, the Respondent only requested information relating to five of the six Solicitation Provisions, omitting information relating to rule 143. (Exhibit C-7.)
>
> 10. Second, the statistical evidence presented by the Respondent only focused on three types of on-sale licenses: on-sale beer licenses (type 40), on-sale beer and wine public premises licenses (type 42), and on-sale general public premises licenses (type 48). The Respondent did not present any evidence relating to other types of on-sale licenses, even though such cases clearly exist. For example, a quick review of Appeals Board cases indicate that there are a number of cases in which the Department has filed against individuals and entities holding on-sale general eating place licenses (type 47): *In re Jose Gerardo Martinez & Lynn Lupe Martinez,*[fn.] *In re Western Avenue Bistro, Inc.,*[fn.] *In re Kil Ye Kang,*[fn.] and *In re Kui H. Young & Michael S. Young.*[fn.]
>
> 11. Third, the terms "Drink solicitation" and "Illegal Solicitation of Drinks" as used in the annual reports are undefined. Moreover, there is no evidence concerning the compilation of the data in these reports. While it is tempting to assume that the terms "Drink solicitation" and "Illegal Solicitation of Drinks" refer to all cases filed against any licensee under all of the Solicitation Provisions, without context such an assumption is little more than speculation.
>
> 12. In short, the data submitted by the Respondent and admitted into evidence is, on its face, incomplete and speculative. As such, it is impossible to draw any conclusions from it.

(Conclusions of Law, ¶¶ 7-12.) Appellant's statistical argument to support a claim of

discriminatory enforcement must fail, for the reasons pointed out by the ALJ.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

The standard of proof required by *Armstrong, supra,* to show discriminatory effect—proof that similarly situated individuals of another race were not prosecuted—was simply not met in this case. As the ALJ explains:

> 4. In *Murgia v. Municipal Court,*[fn.] the California Supreme Court noted that "an equal protection violation does not arise whenever officials 'prosecute one and not [another] for the same act'; instead, the equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate

treatment on an invidiously discriminatory basis. . . ."

(Conclusions of Law, ¶ 4, citing *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 [124 Cal.Rptr. 204].) In other words, no matter how much proof exists that a certain number of Hispanic licensees have been prosecuted for drink solicitation offenses, this will not rise to the level of selective or discriminatory enforcement absent proof that similarly situated individuals of another race or ethnicity were not prosecuted. Such proof is lacking here.

The ALJ identified the following reasons for appellant's failure to make a case for discriminatory enforcement:

> 13. Throughout the hearing, the Respondent referred to the percentage of accusations filed against Hispanics. Since the Respondent did not present any evidence concerning the race or ethnicity of licensees, such a percentage is, in fact, impossible to determine from the evidence. Respondent's counsel argued that he went through C-8, C-9, C-10, C-11, C-12, C-13, and C-14, F, and G (hereinafter, the Unadmitted Exhibits) and looked for licensees who had traditional Spanish surnames. He did not personally testify about his review of the documents, nor did the Respondent call any witness who had actually reviewed the documents. This purported analysis is flawed in a number of ways.
>
> 14. First, the Unadmitted Exhibits are not evidence since the Respondent was unable to authenticate them or lay a proper foundation for admitting them. As such, they cannot be used directly or indirectly as proof.
>
> 15. Second, the Respondent did not submit any evidence to establish the race or ethnicity of any licensee, whether subject to prosecution under the Solicitation Provisions or not.
>
> 16. Third, there is no evidence to explain what the Respondent considered to be a Spanish surname. While some names may be commonly accepted as being of Spanish origin others may not be so clear. Additionally, the use of Spanish surnames as a stand-in for individuals' ethnicity relies on the unsupportable assumption that people with Spanish surnames are automatically Hispanic. Two examples highlight the problem with this assumption: (1) the ethnicity of a married woman who takes her husband's name is impossible to determine based

> on surname alone since the surname reflects her husband's heritage, hot hers; and (2) many Filipinos have Spanish surnames based on the historical relationship between Spain and the Philippines.
>
> 17. This, the Respondent did not establish how many accusations have been filed against any licensee, whether Hispanic or not, either in absolute terms or as a percentage of all accusations filed.

(Conclusions of Law, ¶¶ 13-17.) We see no error in the ALJ's conclusions, and agree with his assessment that appellant failed to meet its burden of proof.

> [W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." [Citation.]

(*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279 [88 Cal.Rptr.3d 186].) The evidence here does not compel a finding in favor of the appellant as a matter of law. Appellant's evidence fails both tests for such a finding: the evidence presented was not uncontradicted and unimpeached, nor was it of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding. Appellant failed to meet its burden of proof. Therefore, the Department's decision must be affirmed.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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.

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST:

THE OFFICE BAR LLC
THE OFFICE BAR
13221 GARDEN GROVE BLVD
GARDEN GROVE, CA 92843-2256

ON-SALE GENERAL PUBLIC
PREMISES - LICENSE

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

SANTA ANA DISTRICT OFFICE

File: 48-474154

Reg: 14081518

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 September 11, 2017. 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. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after November 7, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: September 27, 2017

RECEIVED
SEP 28 2017
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:

The Office Bar LLC dba The Office Bar 13221 Garden Grove Blvd. Garden Grove, California 92843-2256 Respondent	File: 48-474154 Reg.: 14081518 License Type: 48 Word Count: 50,000 (5/3/17) & 29,000 (6/30/17) Reporters: Jennifer Renee Dacus (5/3/17) Kennedy Court Reporters Lisa Gutierrez (6/30/17) California Reporting
On-Sale General Public Premises License	**PROPOSED DECISION** **UPON REMAND**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on May 3, 2017 and at Cerritos, California, on June 30, 2017.

Jennifer M. Casey, Attorney, represented the Department of Alcoholic Beverage Control.

Armando H. Chavira, attorney-at-law, represented respondent The Office Bar LLC.

This matter was originally heard on October 13, 2015 by the undersigned, who prepared a proposed decision dated November 12, 2015. That decision was adopted by the Department in its entirety, after which the Respondent filed an appeal. As part of this appeal, the Respondent alleged that the Department had improperly engaged in discriminatory or selective enforcement of the law. In support of this argument, the Respondent attempted to submit some documents which it had not presented at the original hearing.

On September 29, 2016, the Appeals Board upheld the Department's decision in its entirety.[1] The Board, however, remanded the matter to the Department "for

[1] AB-9567 (2016).

consideration of the selective enforcement issue."[2] The Department, on December 20, 2016, issued a Decision Following Appeals Board Decision which ordered the matter remanded to the undersigned so that a further evidentiary hearing could be held on the sole issue of selective enforcement.[3] (Exhibit 20.)

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 June 30, 2017.

FINDINGS OF FACT

1. On an unknown date, counsel for the Respondent accessed the Department's public website. He ran a search relating to the total number of licenses issued by the Department by license type as of June 30, 2014. The Respondent highlighted the data from the report relating to the total number of on-sale beer licenses (type 40), on-sale beer and wine public premises licenses (type 42), and on-sale general public premises licenses (type 48). Based on the report, the Respondent emphasized that, as of June 30, 2014, 897 on-sale beer licenses, 1,439 on-sale beer and wine public premises licenses, and 2,764 on-sale general public premises licenses were in operation. (Exhibit A ¶ 2; Exhibit C-l).

2. The 2,764 on-sale general public premises licenses emphasized by the Respondent are only a portion of the total number of on-sale general public premises licenses in operation on June 30, 2014. The report marked as exhibit C-1 has two separate listings for type 48 licenses. The first listing indicates that there are 193 such licenses, while the second indicates that there are 2,764, for a total of 2,957. The Respondent did not present any evidence to explain why there are two separate listings for on-sale general public premises licenses, nor did it present any explanation for excluding one of the two listings from its calculations.

3. Exhibit C-1 also lists a variety of other on-sale licenses. The Respondent did not refer to these other licenses at any time during the course of the proceeding. Rather, the Respondent focused on bar licenses (to use the vernacular) and excluded restaurant licenses (e.g., on-sale beer and wine eating place [type 41], on-sale general eating place [type 47]) and specialty licenses.

4. On an unknown date, counsel for the Respondent accessed the Department's public website. He ran a search relating to the total number of licenses issued by the Department by license type as of June 30, 2015. The Respondent highlighted the data from the report relating to the total number of on-sale beer licenses (type 40), on-sale

[2] *Id.* at 16.
[3] Decision Following Appeals Board Decision.

beer and wine public premises licenses (type 42), and on-sale general public premises licenses (type 48). Based on the report, the Respondent emphasized that, as of June 30, 2015, 889 on-sale beer licenses, 1,440 on-sale beer and wine public premises licenses, and 2,724 on-sale general public premises licenses were in operation. (Exhibit A ¶ 3; Exhibit C-2).

5. The 2,724 on-sale general public premises licenses emphasized by the Respondent are only a portion of the total number of on-sale general public premises licenses in operation on June 30, 2015. The report marked as exhibit C-2 has two separate listings for type 48 licenses. The first listing indicates that there are 201 such licenses, while the second indicates that there are 2,724, for a total of 2,925. The Respondent did not present any evidence to explain why there are two separate listings for on-sale general public premises licenses, nor did it present any explanation for excluding one of the two listings from its calculations.

6. Exhibit C-2 also lists a variety of other on-sale licenses. The Respondent did not refer to these other licenses at any time during the course of the proceeding. Rather, the Respondent focused on bar licenses and excluded restaurant licenses and specialty licenses.

7. On an unknown date, counsel for the Respondent accessed the Department's public website. He ran a search relating to the total number of licenses issued by the Department by license type as of June 30, 2016. The Respondent highlighted the data from the report relating to the total number of on-sale beer licenses (type 40), on-sale beer and wine public premises licenses (type 42), and on-sale general public premises licenses (type 48). Based on the report, the Respondent emphasized that, as of June 30, 2016, 888 on-sale beer licenses, 1,449 on-sale beer and wine public premises licenses, and 2,689 on-sale general public premises licenses were in operation. (Exhibit A ¶ 4; Exhibit C-3).

8. The 2,689 on-sale general public premises licenses emphasized by the Respondent are only a portion of the total number of on-sale general public premises licenses in operation on June 30, 2016. The report marked as exhibit C-3 has two separate listings for type 48 licenses. The first listing indicates that there are 202 such licenses, while the second indicates that there are 2,689 for a total of 2,891. The Respondent did not present any evidence to explain why there are two separate listings for on-sale general public premises licenses, nor did it present any explanation for excluding one of the two listings from its calculations.

9. Exhibit C-3 also lists a variety of other on-sale licenses. The Respondent did not refer to these other licenses at any time during the course of the proceeding. Rather, the

Respondent focused on bar licenses and excluded restaurant licenses and specialty licenses.

10. On an unknown date, counsel for the Respondent accessed the Department's public website. He downloaded the Department's Annual Report for Fiscal Year 2012-2013. The Respondent noted that the report "serves to show the number of disciplinary actions for type 40, 42, and 48 licenses." (Exhibit A ¶ 5; Exhibit C-4).

11. The Annual Report for Fiscal Year 2012-2013 includes a graph (and, a few pages later, a corresponding chart) which purports to "illustrate[] the number and type of violation charged by ABC during this reporting period . . . ." One of the segments of the graph is labeled "Drink solicitation," while the corresponding chart refers to "Illegal Solicitation of Drinks." The Respondent did not present any evidence to establish how this information was derived or compiled. The Respondent also did not present any evidence to establish how the Department defined "Drink solicitation" for the purposes of the graph or how it defined "Illegal Solicitation of Drinks" for the purposes of the corresponding chart.

12. The Annual Report for Fiscal Year 2012-2013 includes a series of charts which purport to show disciplinary actions against licensees based on license type. The four charts purport to show the "[n]umber of fines imposed as a result of disciplinary action," the "[n]umber of permanent licenses revoked as a result of disciplinary action," the "[n]umber of permanent licenses revoked as a result of disciplinary action, with the revocation stayed," and the "[n]umber of permanent licenses suspended as a result of disciplinary action, including suspensions stayed." There is a one line reference to the number of warning letters issued to permanent license holders, without any breakdown by license type. There is also a chart listing the "[n]umber of permanent licenses automatically canceled for non-payment of renewal fee," broken down by license type. The Respondent did not present any evidence to establish how this information was derived or compiled. The Respondent also did not present any evidence breaking down the number of warning letters sent by license type.

13. On an unknown date, counsel for the Respondent accessed the Department's public website. He downloaded the Department's Annual Report for Fiscal Year 2013-2014. The Respondent noted that the report "serves to show the number of disciplinary actions for type 40, 42, and 48 licenses." (Exhibit A ¶ 6; Exhibit C-5).

14. The Annual Report for Fiscal Year 2013-2014 includes a graph (and, a few pages later, a corresponding chart) which purports to "illustrate[] the number and type of violation charged by ABC during this reporting period . . . ." One of the segments of the chart is labeled "Drink solicitation," while the corresponding chart refers to "Illegal Solicitation of Drinks." The Respondent did not present any evidence to establish how

this information was derived or compiled. The Respondent also did not present any evidence to establish how the Department defined "Drink solicitation" for the purposes of the graph or how it defined "Illegal Solicitation of Drinks" for the purposes of the corresponding chart.

15. The Annual Report for Fiscal Year 2013-2014 includes a series of charts which purport to show disciplinary actions against licensees based on license type. The four charts purport to show the "[n]umber of fines imposed as a result of disciplinary action," the "[n]umber of permanent licenses revoked as a result of disciplinary action," the "[n]umber of permanent licenses revoked as a result of disciplinary action, with the revocation stayed," and the "[n]umber of permanent licenses suspended as a result of disciplinary action, including suspensions stayed." There is a one line reference to the number of warning letters issued to permanent license holders, without any breakdown by license type. There is also a chart listing the "[n]umber of permanent licenses automatically canceled for non-payment of renewal fee," broken down by license type. The Respondent did not present any evidence to establish how this information was derived or compiled. The Respondent also did not present any evidence breaking down the number of warning letters sent by license type.

16. On an unknown date, counsel for the Respondent accessed the Department's public website. He downloaded the Department's Annual Report for Fiscal Year 2014-2015. The Respondent noted that the report "serves to show the number of disciplinary actions for type 40, 42, and 48 licenses." (Exhibit A ¶ 7; Exhibit C-6).

17. The Annual Report for Fiscal Year 2014-2015 includes a chart which purports to show the "[n]umbers of violations charged, by violation type." One of the lines of the chart refers to "Illegal Solicitation of Drinks." The Respondent did not present any evidence to establish how this information was derived or compiled. The Respondent also did not present any evidence to establish how the Department defined "Illegal Solicitation of Drinks" for the purposes of the chart.

18. The Annual Report for Fiscal Year 2014-2015 includes a series of charts which purport to show disciplinary actions against licensees based on license type. The four charts purport to show the "[n]umber of fines imposed as a result of disciplinary action," the "[n]umber of permanent licenses revoked as a result of disciplinary action," the "[n]umber of permanent licenses revoked as a result of disciplinary action, with the revocation stayed," and the "[n]umber of permanent licenses suspended as a result of disciplinary action, including suspensions stayed." There is a one line reference to the number of warning letters issued to permanent license holders, without any breakdown by license type. There is also a chart listing the "[n]umber of permanent licenses automatically canceled for non-payment of renewal fee," broken down by license type. The Respondent did not present any evidence to establish how this information was

derived or compiled. The Respondent also did not present any evidence breaking down the number of warning letters sent by license type.

19. The Respondent did not present any evidence detailing the number of licenses voluntarily cancelled by licensees in any year.

20. The Respondent submitted two lists printed out from the Department's public website. The lists show the holders of on-sale beer licenses (type 40) and on-sale beer and wine public premises licenses (type 42) by name. The Respondent did not submit a similar list for on-sale general public premises licenses (type 48) or any other type of on-sale license. (Exhibit C-15.)

21. The Respondent did not present any evidence concerning the race or ethnicity of any licensees.

22. On or about February 21, 2016, counsel for the Respondent submitted a public records request to the Department requesting copies of all accusations filed under Business and Professions Code section 24200.5(b),[4] section 25657(a), section 25657(b), Penal Code section 303, and Penal Code section 303a from January 1, 2005 through February 21, 2016. (Exhibit C-7.)

23. At the hearing, the Respondent submitted exhibit C-8, which it claimed was the Department's response to the public information request. The Respondent also submitted exhibit F, a copy of exhibit C-8 which had been marked up by the Respondent. The Respondent did not present any evidence to establish how this information was derived or compiled, nor did it otherwise lay a foundation authenticating these documents. Accordingly, exhibits C-8 and F were not admitted.

24. The Respondent also submitted exhibits C-9, C-10, C-11, C-12, C-13, and C-14, which it indicated contain copies of individual pages from exhibit C-8, coupled with documents purporting to be printouts from the Department's license query system. The Respondent did not present any evidence to establish how this information was derived or compiled, nor did it otherwise lay a foundation authenticating these documents. The Respondent did not present any evidence to establish how the purported printouts from the license query system were obtained. Accordingly, exhibits C-9, C-10, C-11, C-12, C-13, and C-14 were not admitted.

25. Finally, the Respondent submitted exhibit G, which it indicated contained a selection of accusations derived from exhibit C-8. The Respondent did not present any evidence to

[4] All statutory references are to the Business and Professions Code unless otherwise noted.

establish how this information was derived or compiled, nor did it otherwise lay a foundation authenticating these documents. Accordingly, exhibit G was not admitted.

26. Marcie Griffin, Deputy Division Chief for Southern Division, provided general background into the Department's organization and its handling of enforcement matters. She also testified about the Department's license query system and the Alcoholic Beverage Information System (ABIS). Neither the license query system nor ABIS contain information on licensees' race or ethnicity. The Department does not collect such information during the application process, nor does it maintain such information in its files or databases.

27. Agents Eric Gray and Danny Vergara, the two agents involved in the case at hand, testified that they were assigned to investigate the Licensed Premises based on an anonymous complaint. Both testified that they had never been assigned an investigation based on the race or ethnicity of a licensee. Both also testified that they had never been assigned an investigation based on the race or ethnicity of the clientele of a licensed premises.

28. Deputy Division Chief Griffin, Agent Gray, and Agent Vergara all testified that the Department's enforcement operations are carried out without regard to race or ethnicity. Some enforcement activity is random, such as spot checks performed by agents while they are in the field, while others are based on complaints, such as those received from the public or another law enforcement agency. Agents are free to pursue any violation they observe during the course of an investigation, whether directly related to the complaint or not.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution 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. Section 24200.5(b), section 25657(a), section 25657(b), rule 143,[5] Penal Code section 303, and Penal Code section 303a deal with the illegal solicitation of alcoholic beverages (hereinafter, the Solicitation Provisions). The violations in the present case arise from sections 24200.5(b), section 25657(b), and rule 143 only.

[5] All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

4. In *Murgia* v. *Municipal Court,*[6] the California Supreme Court noted that "an equal protection violation does not arise whenever officials 'prosecute one and not [another] for the same act'; instead, the equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis. As the Court of Appeal succinctly stated in *City of Banning v. Desert Outdoor Advertising, Inc.:* 'The protection afforded is against unlawful discrimination which uses law enforcement as its vehicle.' As such, the doctrine imposes absolutely no impediment to legitimate law enforcement operations, for it does not insulate particular lawbreakers from prosecution, but simply requires that the authorities enforce the laws evenhandedly."[7]

5. The court in *Murgia* went on to hold that, "in order to establish a claim of discriminatory enforcement[,] a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion. Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the direct victim of the discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities."[8]

6. In the present case, the Respondent failed to establish that the Department has engaged in discriminatory enforcement of the Solicitation Provisions. The Respondent also failed to establish that it has been the subject of selective or discriminatory enforcement of the Solicitation Provisions.

7. Statistical analysis, by its very nature, is only as good as the information on which it is based. In order to draw any conclusions from a set of statistics, the data from which the statistics are drawn must not only be complete, but must be clearly defined. For example, under the ABC Act a minor is a person under the age of 21. The same holds true in California under current law for tobacco sales. Up until recently, a minor for the purposes of tobacco sales was a person under the age of 18. For most other purposes, a minor is a person under the age of 18. Thus, statistics which only refer to "minors" are inherently unclear, since it is impossible to determine if the grouping includes or excludes 18-year-olds, 19-year-olds, and 20-year-olds.

8. The Solicitation Provisions can be violated by any on-sale licensee. Thus, a complete analysis of cases brought under the Solicitation Provisions would require statistics

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[6] 15 Cal. 3d 286 (1975).
[7] *Id.* at 297 (citations omitted).
[8] *Id. at* 298.

relating to all accusations filed against any on-sale licensee under any of the six Solicitation Provisions.

9. In the present case, the data submitted by the Respondent is spotty, at best. First, the Respondent only requested information relating to five of the six Solicitation Provisions, omitting information relating to rule 143. (Exhibit C-7.)

10. Second, the statistical evidence presented by the Respondent only focused on three types of on-sale licenses: on-sale beer licenses (type 40), on-sale beer and wine public premises licenses (type 42), and on-sale general public premises licenses (type 48). The Respondent did not present any evidence relating to other types of on-sale licenses, even though such cases clearly exist. For example, a quick review of Appeals Board cases indicate that there are a number of cases which the Department has filed against individuals and entities holding on-sale general eating place licenses (type 47): *In re Jose Gerardo Martinez & Lynn Lupe Martinez,*[9] *In re Western Avenue Bistro, Inc.,*[10] *In re Kil Ye Kang,* [11] and *In re Kui H. Young & Michael S. Young.*[12]

11. Third, the terms "Drink solicitation" and "Illegal Solicitation of Drinks" as used in the annual reports are undefined. Moreover, there is no evidence concerning the compilation of the data in these reports. While it is tempting to assume that the terms "Drink solicitation" and "Illegal Solicitation of Drinks" refer to all cases filed against any licensee under all of the Solicitation Provisions, without context such an assumption is little more than speculation.

12. In short, the data submitted by the Respondent and admitted into evidence is, on its face, incomplete and speculative. As such, it is impossible to draw any conclusions from it.

13. Throughout the hearing, the Respondent referred to the percentage of accusations filed against Hispanics. Since the Respondent did not present any evidence concerning the race or ethnicity of licensees, such a percentage is, in fact, impossible to determine from the evidence. Respondent's counsel argued that he went through C-8, C-9, C-10, C-11, C-12, C-13, and C-14, F, and G (hereinafter, the Unadmitted Exhibits) and looked for licensees who had traditional Spanish surnames. He did not personally testify about his review of the documents, nor did the Respondent call any witness who had actually reviewed the documents. This purported analysis is flawed in a number of ways.

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[9] AB-9595 (2017).
[10] AB-7608 (2001).
[11] AB-6990 (1998).
[12] AB-6565 (1996).

14. First, the Unadmitted Exhibits are not evidence since the Respondent was unable to authenticate them or lay a proper foundation for admitting them. As such, they cannot be used directly or indirectly as proof.

15. Second, the Respondent did not submit any evidence to establish the race or ethnicity of any licensee, whether subject to prosecution under the Solicitation Provisions or not.

16. Third, there is no evidence to explain what the Respondent considered to be a Spanish surname. While some names may be commonly accepted as being of Spanish origin, others may not be so clear. Additionally, the use of Spanish surnames as a stand-in for individuals' ethnicity relies on the unsupportable assumption that people with Spanish surnames are automatically Hispanic. Two examples highlight the problem with this assumption: (1) the ethnicity of a married woman who takes her husband's name is impossible to determine based on surname alone since the surname reflects her husband's heritage, not hers; and (2) many Filipinos have Spanish surnames based on the historical relationship between Spain and the Philippines.

17. Thus, the Respondent did not establish how many accusations have been filed against any licensee, whether Hispanic or not, either in absolute terms or as a percentage of all accusations filed.

18. The three witnesses called by the Department—Deputy Division Chief Marcie Griffin, Agent Eric Gray, and Agent Danny Vergara all testified credibly that the Department does not use race or ethnicity as a basis for its enforcement operations. Agents Gray and Vergara further testified credibly that the investigation in this case was the result of an anonymous complaint—in other words, was not based on race or ethnicity.

ORDER

The Respondent failed to establish that the prosecution of the case at hand was the result of discriminatory or selective enforcement of the law. Accordingly, its selective enforcement defense is rejected. The original decision of the Department, upheld in all other respects by the Appeals Board, shall become effective without change.

Dated: July 31, 2017

Matthew G. Ainley
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: _____

By: _____

Date: 9/11/17

ORIGINAL DECISION

DATED

JANUARY 6, 2016

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

IN THE MATTER OF THE ACCUSATION AGAINST:

OFFICE BAR LLC THE
OFFICE BAR THE
13221 GARDEN GROVE BLVD GARDEN GROVE, CA 92843-2256

ON-SALE GENERAL PUBLIC PREMISES - LICENSE

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

SANTA ANA DISTRICT OFFICE

File: 48-474154

Reg: 14081518

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 December 18, 2015. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

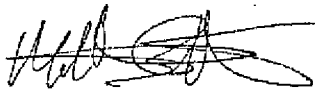
Any party may petition for reconsideration of this decision. Pursuant to Government Code Section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date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

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capital Mall, Suite 1245, Sacramento, CA 95814.

On or after February 17, 2016, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: January 6, 2016



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

The Office Bar LLC dba The Office Bar 13221 Garden Grove Blvd. Garden Grove, California 92843-2256 Respondent	File: 48-474154 Reg.: 14081518 License Type: 48 Word Count: 33,000 Reporter: Marie Martinez Kennedy Court Reporters
On-Sale General Public Premises License	**PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on October 13, 2015.

Jennifer M. Casey, Attorney, represented the Department of Alcoholic Beverage Control.

Armando H. Chavira, attorney-at-law, represented respondent The Office Bar LLC. Diego Barriga Santoyo was present on behalf of the Respondent.

The Department seeks to discipline the Respondent's license on the grounds that, on various dates, it

(1) employed or permitted three different individuals to solicit or encourage others to buy them drinks in the licensed premises under a commission, percentage, salary, or other profit sharing scheme in violation of California Business and Professions Code section 24200.5(b);[1]

(2) employed or knowingly permitted three different individuals to loiter in or about the licensed premises for the purpose of begging or soliciting patrons to purchase alcoholic beverages for them in violation of section 25657(b); and

(3) permitted three different individuals to solicit the purchase or sale of any drink inside the licensed premises, or to accept any drink purchased or sold there, a

[1] All statutory references are to the Business and Professions Code unless otherwise noted.

portion of which was intended for the consumption or use of such employee, in violation of rule 143.[2] (Exhibit 1.)

The Department also seeks to discipline the Respondent's license on four other grounds. First, it seeks to discipline the Respondent's license on the basis that, on June 13, 2014, it purchased alcoholic beverages for resale from various entities which did not hold a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license in violation of section 23402. (Exhibit 1.)

Second, it seeks to discipline the Respondent's license on the basis that, on April 25, 2014, May 2, 2014, and June 6, 2014, it failed to comply with conditions attached to its license in violation of Business and Professions Code section 23804. (Exhibit 1.)

Third, it seeks to discipline the Respondent's license on the grounds that, on May 2, 2014, the Respondent permitted an unidentified entertainer, who was not on a stage 18 inches above the floor nor six feet removed from the nearest patron, to expose her breasts or buttocks while performing in violation of rule 143.3(2) while inside the Licensed Premises. (Exhibit 1.)

Finally, the Department seeks to discipline the Respondent's license on the grounds that, on June 13, 2014, Diego Barriga Santoyo, its managing member, manufactured or caused to be manufactured, imported into the state, kept for sale, or offered or exposed for sale, gave, lent, or possessed a cane gun in violation of Penal Code section 24410. (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 October 13, 2015.

FINDINGS OF FACT

1. The Department filed the accusation on November 3, 2014.

2. The Department issued a type 48, on-sale general public premises license to the Respondent for the above-described location on March 4, 2009 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondent's license.

4. Diego Barriga Santoyo and his wife own 100% of the Respondent. Barriga Santoyo is the Respondent's managing member. (Exhibits 2-3.)

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[2] All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

5. On February 25, 2009, a petition for conditional license was executed by the Respondent. This petition for conditional license contains four conditions relating to the operation of the Licensed Premises. The fourth condition provides that "[t]here shall be no live entertainment of any type, including but not limited to live music, disc jockey, karaoke, topless entertainment, male or female performers or fashion shows." (Exhibit 10.)

April 25, 2014
(Counts 1-5)

6. On April 25, 2014, Agent Danny Vergara and Agent Eric Gray entered the Licensed Premises. They sat at a cocktail table near the front of the Licensed Premises.

7. Agent Vergara was approached by a woman who identified herself as Prima, whom he knew from another location. She asked them if they wanted anything to drink and they ordered two beers. Prima served them two 12-oz. bottles of Bud Light beer. The beers cost $3.75 each. Agent Vergara paid with a $10 bill and gave the change to Prima as a tip.

8. Agent Vergara was subsequently approached by a woman who identified herself as Isabella. Isabella asked him if he wanted a dance. He agreed and she gave him a lap dance which lasted approximately five minutes. He tipped her as she danced.

9. Prima returned to the table and asked him to buy her a beer. He agreed. Prima went to the bar counter and obtained a 7-oz. bottle of Bud Light beer. Prima told him that the beer cost $7. He handed her a $10 bill and told her to keep the change. Prima left a short time later.

10. Isabella returned to the table and said that they needed to leave. She told Agent Vergara to return next Friday between 10:00 and 11:00 p.m. She walked away and entered a room on the other side of the Licensed Premises. She came out a little later. Barriga Santoyo handed some money to her, then she left.

11. Maria Catalan approached the agents and asked them if they wanted anything else. They ordered two more beers, which she obtained from the bar counter. Agent Vergara paid her for the beers.

12. Catalan remained at the table after serving the beers to them. She subsequently asked Agent Vergara to buy her a beer. He agreed. Catalan went to the bar counter and obtained a small can of Clamato. She told Agent Vergara that the Clamato cost $3, which he paid.

May 2, 2014
(Counts 6-10)

13. On May 2, 2014, Agent Vergara returned to the Licensed Premises, this time accompanied by two other agents. They sat down at a table. Prima approached them and asked them if they wanted anything to drink. They ordered three beers. Prima suggested that they order a bucket of beers instead since it cost less. They agreed. Prima obtained the bucket of beers and served it to them.

14. Prima subsequently asked Agent Vergara to buy her a beer. He agreed. Prima went to the bar counter and obtained a 7-oz. bottle of Bud Light beer. She returned to the table and began to consume the beer.

15. Prima asked them if they wanted a girl to come over. The said that they did and Prima brought over a woman in a bikini. The woman asked them if they wanted a dance. She indicated that, for $20, she would dance topless. Agent Vergara agreed and handed her a $20 bill. The woman removed her top and gave him a lap dance. During the dance the woman was within six feet of Agent Vergara and was not on a stage. She danced topless for approximately five minutes.

16. Prima returned to the table and asked Agent Vergara to buy her another beer. He agreed and she obtained a 7-oz. bottle of Bud Light beer. She came back to the table and consumed the beer while speaking to Agent Vergara.

17. Agent Vergara told Prima that they had to leave. He asked her how much he owed. Prima told him that the bucket of beer cost $18 and that her two beers cost $7 each. He gave her $32.

June 6, 2014
(Counts 11-17)

18. On June 6, 2014, Agents Vergara and Gray returned to the Licensed Premises. They entered and sat down at the bar counter. They ordered two beers from the bartender, Silvia Catalina Solano, which she served to them. Agent Vergara paid $8 for the two beers.

19. Agent Vergara noticed Catalan attending to other tables (e.g., taking orders, serving beers, and clearing tables). At some point she approached their table and asked Agent Vergara to buy her a beer. He agreed and she obtained a 7-oz. bottle of Bud Light from the bartender. She returned to the table and consumed her beer. She then asked Agent Vergara to buy her a beer. He said no and explained that he wanted to save his money for

the dancers. She told him that he owed her $7 for her beer. He paid her with a $20 bill. She gave him $13 in change.

20. A number of females in bikinis came out from the rear of the Licensed Premises. They began circulating among the patrons. A woman named Cece approached and asked Agent Vergara if he wanted a lap dance. He said that he did. She performed a lap dance for him. He tipped her throughout the dance.

21. Isabella subsequently came over and asked Agent Vergara if he wanted a dance. He agreed and she performed a lap dance for him. He tipped her as she danced.

22. Martha Famoso approached Agent Vergara and asked him to buy her a beer. He agreed. Famoso obtained a 7-oz. bottle of Bud Light beer and returned to the table, which she ultimately consumed. Famoso told Agent Vergara that her beer cost $7, which he paid to her.

June 13, 2014
(Counts 18-21)

23. On June 13, 2014, Agents Vergara and Gray returned to the Licensed Premises. They entered and went to a spot near the pool tables. Catalan approached Agent Gray and asked him to buy her a beer. He agreed and she went to the bar counter. Catalan obtained a 12-oz. can of Bud Light and returned to Agent Gray, who paid $3.50 for the beer.

24. Back up officers were summoned and entered the Licensed Premises. The back-up team included Supervising Agent-in-Charge Daniel D. Hart, Agent Benjamin Delarosa, and Agent Vic Duong.

25. Agent Duong performed a bar inspection. During the inspection, he noticed four bottles of distilled spirits. (Exhibits 16-19.) The size of the bottles drew his attention because, based on his training and experience, that size is only sold retail. Agent Duong asked Barriga Santoyo about the four bottles; he admitted purchasing them from retailers.

26. Agent Delarosa located what appeared to be a cane gun (exhibits 5-8) in Barriga Santoyo's office and informed Supv. Agent-in-Charge Hart. Supv. Agent-in-Charge Hart examined the cane gun and determined that it was, in fact, a weapon. The cane gun was seized and booked into evidence. No ammunition for the cane gun was located at the Licensed Premises.

27. Agent Delarosa asked Barriga Santoyo about the cane gun. Barriga Santoyo indicated that the cane gun was a gift. He further indicated that he knew the cane gun was in the office and that it was a weapon.

28. Supv. Agent-in-Charge Hart subsequently removed the cane gun *from* evidence and took it to the firing range. He loaded it with a .22-caliber bullet and successfully test fired it. He reloaded it and successfully test fired it a second time.

29. Barriga Santoyo testified that he purchased the four bottles of distilled spirits when he first opened the Licensed Premises because he did not know where to obtain them otherwise. Since then he has purchased distilled spirits from a distributor.

30. Barriga Santoyo further testified that, while he used to employ dancers, he no longer does. He also testified that he does not permit anyone to solicit drinks. If he learns of anyone soliciting, he tells them to stop. He asks them to leave if they persist. He changed his procedure with respect to drink solicitations after the investigation at issue here.

31. Barriga Santoyo admitted owning the cane gun. He indicated that it was a gift from his brother-in-law. He knew it was a weapon, but never used it as such.

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

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. Section 24200.5(b) provides that the Department shall revoke a license "[i]f the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy."

4. Section 25657(b) provides that it is unlawful "[i]n any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting

any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting."

5. Rule 143 prohibits a licensee's employees from soliciting, in the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee. Rule 143 further prohibits a licensee's employees from accepting, in the licensed premises, any drink purchased or sold there, any part of which is for, or intended for, the consumption or use of any employee.

6. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violations of section 24200.5(b), section 25657(b), and rule 143 alleged in counts 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 13. (Findings of Fact ¶¶ 6-22.)

7. On April 25, 2014, Prima (counts 2, 3, and 4) was working as a waitress inside the Licensed Premises. After serving drinks to the agents and accepting payment therefor, she solicited a beer from Agent Danny Vergara. In connection with this solicitation, a surcharge was imposed on the price of her beer. Later, Maria Catalan (count 5), who also was working as a waitress, solicited a can of Clamato juice from Agent Vergara. Agent Vergara paid for this drink. (Findings of Fact ¶¶ 6-12.)

8. The same holds true for May 2, 2014. On that date, Prima (counts 6, 7, and 8) was working as a waitress at the time she solicited two beers from Agent Vergara. She imposed a surcharge on the price of both beers. (Findings of Fact ¶¶ 13 -17.)

9. Finally, on June 6, 2014, Catalan (counts 11, 12, and 13) was working as a waitress inside the Licensed Premises. During the course of waiting on Agent Vergara, she solicited a beer from him. A surcharge was imposed on the price of her beer. (Findings of Fact ¶¶ 18-22.)

10. Cause for suspension or revocation of the Respondents' license was not established for the violations of section 24200.5(b), section 25657(b), and rule 143 alleged in counts 15, 16, 17, 18, and 19. (Findings of Fact ¶¶ 18-23.)

11. On June 6, 2014, Martha Famoso (counts 15, 16, and 17) solicited a drink from Agent Vergara. In connection with this solicitation, Famoso collected a surcharge upon the price of her beer. However, there was no evidence that Famoso was employed at the Licensed Premises. Additionally, there was no evidence that any employee of the Licensed Premises overheard or was otherwise aware that Famoso had solicited a beer from Agent Vergara or that she charged him therefor. (Findings of Fact ¶¶ 18-22.)

12. On June 13, 2014, Catalan (counts 18 and 19) solicited a beer from Agent Gray. Agent Gray paid the normal cost of the beer for Catalan's drink. Importantly, there was no evidence that Catalan was working on June 13, 2014. Without some evidence that she was working at the time, there is no basis for attributing her knowledge to the Respondent. Since there was no evidence that any employee was aware of the solicitation, these counts must fail. (Finding of Fact ¶ 23.)

13. Section 23402 provides that "[n]o retail on- or off-sale licensee, except a daily on-sale general licensee holding a license issued pursuant to Section 24045.1, shall purchase alcoholic beverages for resale from any person except a person holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license.

14. 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 the Respondent purchased four bottles of distilled spirits from retailers in violation of section 23402. (Findings of Fact ¶¶ 24-25 & 29.)

15. The evidence in support of this violation is weak. First, the Department alleged that the distilled spirits were purchased on June 13, 2014, a date on which they quite clearly were not. Rather, June 13 was the date on which the distilled spirits were seized. Second, the Department merely alleged that the distilled spirits were purchased from various retailers without identifying which ones (the retailers set forth in the accusation were listed by way of example only). The Department did not establish from whom the distilled spirits were purchased, much less the license types held by such sellers. The only evidence which tended to prove the allegation was the hearsay statement Barriga Santoyo made to one of the agents, a statement which Barriga Santoyo partially denied when he testified. (Findings of Fact ¶¶ 24-25.) In his testimony, however, Barriga Santoyo admitted that he purchased the distilled spirits in question at retail approximately five years earlier. (Finding of Fact ¶ 29.) This admission, by itself, is sufficient to sustain count 20.[3]

16. Section 23804 provides that the violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.

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[3] Interestingly, the Respondent did not raise a statute of limitations defense to this cause of action. Sections 24206 and 24207 set forth a one year and three year statute of limitation period, respectively, for various violations of the ABC Act. Section 23402 is not among the section listed therein. A violation of section 23402 is a misdemeanor under section 25617. Based on Barriga Santoyo's testimony, the bottles were purchased nearly five years ago, which is well outside the general statute of limitations for most, if not all, misdemeanors.

17. 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) for the violations of section 23804 alleged in counts 1, 9, and 14. With respect to all three counts, the evidence established that dancers were permitted to perform at the Licensed Premises, providing entertainment for the patrons in the form of lap dances. (Findings of Fact ¶¶ 5-22.)

18. Rule 143.3(2) permits live entertainment on a licensed premises by entertainers whose breasts, buttocks, or both are exposed to view, provided that such entertainers perform upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron. Performances which violate these restrictions are contrary to public welfare or morals and, therefore, no on-sale license shall be held at any premises where a licensee permits such performances.

19. 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 May, 2, 2014, the Respondent permitted a female entertainer to expose her breasts to view while performing even though she was not on a stage at least 18 inches high and at least six feet removed from the nearest patron, in violation of rule 143.3(2). (Finding of Fact ¶ 15.)

20. Penal Code section 24410 provides that any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any cane gun is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to Penal Code section 1170(h).

21. 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 June 13, 2014, Diego Barriga Santoyo, the Respondent's managing member, possessed a cane gun inside the Licensed Premises in violation of Penal Code section 24410. (Findings of Fact ¶¶ 24, 26-28 & 31.)

PENALTY

The Department recommended that the Respondent's license be revoked. The Department argued that, even though the Respondent did not have any prior violations, the variety of violations in this case and the Respondent's unwillingness to comply with the law until after he was caught warranted an aggravated penalty. The Respondent, on the other hand, argued that the absence of any prior disciplinary violations indicated that

a mitigated penalty was appropriate. The Department is correct, at least in part—an aggravated penalty is appropriate under the circumstances.

Section 24200.5(b) mandates revocation for a violation of its provisions, although case law has held that a stayed revocation satisfies the statutory mandate. For violations of section 25657(b), rule 144 provides for a penalty ranging from a 30-day suspension up to revocation. Elsewhere, rule 144 provides for a 15-day suspension for violations of rule 143. In order to reconcile these various provisions, some form of revocation is appropriate for the b-girl violations at issue here.

The penalties set forth in rule 144 for the other violations at issue here are less harsh. A 15-day suspension is recommended for violations of section 23402, while a 15-day suspension with 5 days stayed is recommended for condition violations. The recommended penalty for violations of rule 143.3 ranges from a 30-day suspension up to revocation. The condition violation set forth in count 9 duplicates, in part, the rule violation set forth in count 10 (the former is for permitting entertainment, the latter is for permitting topless entertainment). It is generally impermissible to impose a penalty for both types of violations. Accordingly, no penalty will be imposed at this time based on count 9.

Finally, rule 144 does not set forth any penalties for the possession of an illegal weapon. The reported cases differ widely in the length of suspensions imposed. For example, in *Thorp* v. *Department of Alcoholic Beverage Control,* a case involving violations of Penal Code sections 337a, 330b, and 12020, the license in question was revoked based on the bookmaking counts and was suspended for two consecutive 15-day terms for possession of a punchboard and possession of a blackjack.[4] On the other hand, in *In re Raad J. Kiti,* the license in question was suspended for 45 days for selling/furnishing narcotics and possession of a nunchaku.[5] Most recently, in *In re RBI Food Mart & Deli, Inc.,* the licensee possessed for sale shurikens and metal knuckles. The Appeals Board upheld the Department's penalty, a stayed revocation for a period of one year coupled with a 15-day suspension.[6]

Both *Thorp* and *Kiti* involved simple possession of illegal weapons. *RBI Food Mart & Deli,* on the other hand, involved possession of illegal weapons for sale. The violations in *Thorp* were committed by the licensee,[7] the violation in *RBI Food Mart & Deli* was committed by the corporation's officer and shareholder,[8] while the violations in *Kiti* were

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[4] 175 Cal. App. 2d 489, 491, 346 P.2d 433, 435 (1959).
[5] AB-6629 (1997).
[6] AB-9143 (2011).
[7] 175 Cal. App. 2d at 490, 346 P.2d at 434-35.
[8] AB-9143 at 2.

committed by an employee.[9] Since this case involved possession of an illegal weapon by the Respondent's managing member, the penalty in *Thorp* is more directly on point and offers greater guidance than the penalties imposed in the other two cases.

ORDER

With respect to counts 2, 3, 4, 5, 6, 7, 8, 11, 12, and 13, the Respondent's on-sale general public premises licenses is revoked, with the revocation stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within three years from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent. In addition, the Respondent's license is suspended for a period of 45 days.

With respect to counts 1 and 14, the Respondent's on-sale general public premises licenses' is suspended for a period of 20 days, with execution of 5 days of the suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

[9] AB-6629 at 1.

With respect to count 10, the Respondent's on-sale general public premises licenses is suspended for a period of 30 days.

With respect to count 20, the Respondent's on-sale general public premises licenses is suspended for a period of 15 days.

With respect to count 21, the Respondent's on-sale general public premises licenses is suspended for a period of 30 days.

All of the foregoing penalties are to run concurrently.

With respect to count 9, no penalty is imposed at this time.

Counts 15, 16, 17, 18, and 19 are dismissed.

Dated: November 12, 2015

Matthew G. Ainley
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

By: _____

Date: 12/18/15