

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

AB-9688

File: 48-442384; Reg: 17085640

THE RAMPWA CORPORATION,
dba Deane's Bar & Thrill
8108 San Bernardino Road,
Rancho Cucamonga, CA 91730-3123,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: October 4, 2018
Ontario, CA

ISSUED OCTOBER 19, 2018

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as
counsel for The Rampaw Corporation,

Respondent: John P. Newton, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

The Rampaw Corporation, doing business as Deane's Bar & Thrill, appeals from a decision of the Department of Alcoholic Beverage Control,¹ suspending its license for 20 days because it sold an alcoholic beverage to an obviously intoxicated person, in

¹The decision of the Department, dated January 25, 2018, is set forth in the appendix.

violation of Business and Professions Code section 25602, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on September 18, 2006. There are two prior instances of departmental discipline against the licensee — one in 2008 for a sale of alcohol to a minor, and one in 2009 for possession of an illegal gambling device.

On June 12, 2017, the Department instituted an accusation against appellant charging that on December 8, 2016, appellant's employee furnished an alcoholic beverage to an obviously intoxicated person, in violation of Business and Professions Code section 25602, subdivision (a).

An administrative hearing was held on October 4, 2017. Documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Gilbert Castillo and Mehul Patel, as well as licensee Pete Wright, president and secretary of The Rampaw Corporation.

Testimony established that on December 8, 2016, Department Agents Castillo and Patel entered the licensed premises in an undercover capacity at 7:55 p.m. to investigate complaints from local law enforcement and private citizens about the over-serving of alcoholic beverages in the premises. The agents sat at the fixed bar and observed a female bartender, Robin Schwarz, working behind the bar. The agents ordered and were each served a beer by the bartender.

The agents observed the patrons in the bar to see if anyone showed signs of being obviously intoxicated. Agent Castillo noticed a male patron, later identified as James Brannon, who had a red-flushed face, droopy eyelids, slow and deliberate movements, difficulty keeping his eyes open, holding himself up by placing his hands on

the table, and difficulty getting food to his mouth. (Findings of Fact, ¶¶ 6-7.) Castillo reported his observations to Agent Patel and they continued to observe Mr. Brannon.

Agent Patel watched as an individual with Brannon, named Mark, placed an order with the bartender for a pitcher of beer, while pointing at Brannon to indicate it was for the two of them. Bartender Schwarz obtained a pitcher of beer and two glasses; she placed them in front of Mark and Brannon. The bartender was approximately two feet away from Brannon and looked directly at him as she served the beer. The two of them engaged in conversation, but Agent Patel could not understand what Brannon said to the bartender because his speech was slurred. Brannon paid the bartender for the beer. (Finding of Fact, ¶ 11.)

Agent Patel said to the bartender, “Hey is that guy drunk or what?” while pointing at Brannon. The bartender replied, “Who him? On yea, he’s frickin’ lit dude. I contemplated not giving him that last one. He asked me my name six times already.” (Finding of Fact, ¶ 12.) Agent Castillo heard the conversation between Patel and Schwarz.

Later, the two agents advised the bartender that they were law enforcement officers and explained the violation to her. She asked if she was going to jail and said, “I’m sorry, I knew I shouldn’t have sold him that last one, I should have known.” (Finding of Fact, ¶ 13.) Both Brannon and Schwarz were subsequently cited and arrested. A color photograph was taken of Brannon while he was being booked at the police station. (Exh. 4.)

The administrative law judge submitted her proposed decision on November 3, 2017, sustaining the accusation and recommending a 20-day suspension of the license.

The Department adopted the proposed decision on December 14, 2017, and issued its Certificate of Decision on January 25, 2018.

Appellant then filed a timely appeal raising the following issues: (1) the ALJ's finding that the patron was obviously intoxicated is not supported by the evidence, (2) the ALJ abused her discretion by excluding relevant evidence, and (3) the ALJ erred in applying aggravating factors to increase the penalty.

DISCUSSION

I

Appellant contends the ALJ's finding that the patron was obviously intoxicated is not supported by the evidence and is contradicted by the surveillance video. (AOB at pp. 7-20.)

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 findings are attacked as being unsupported by the evidence, the power of

this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. 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].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

Business and Professions Code section 25602, subdivision (a) states:

Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

This statute "places a duty on the seller, before serving the intended purchaser, to use his powers of observation." (*People v. Johnson* (1947) 81 Cal.App.2d Supp. 973, 975 [185 P.2d 105].)

The test for “obvious intoxication” is as follows:

A seller violates the law, and is liable, if the seller serves a customer affected by the commonly known outward manifestations of liquor intoxication, whether by failing to observe what was plain and easily seen or discovered or, having observed, by ignoring what was apparent. To establish liability, it must be proved not only that the patron was intoxicated but that this was obvious. The standard for determining obvious intoxication is measured by that of a reasonable person having normal powers of observation.

(*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1135 [19 Cal.Rptr.2d 205].) The standard articulated in *Schaffield*, for determining whether a person is obviously intoxicated, is that of a reasonable person who observes the outward manifestations of intoxication, which include:

incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior.

(*Jones v. Toyota Motor Co.* (1988)198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

Appellant maintains the details described in the ALJ’s decision are not consistent with what is shown in the video evidence in exhibit A — surveillance video of the premises on the evening in question. (AOB at p. 7.) It maintains the “ALJ picked out a few instances that when combined constitute at best a minute out of the over three hours Brannon is seen on camera.” (*Ibid.*) Appellant contends the portion of the video which shows Brannon falling asleep is not evidence of intoxication, but rather that Brannon might simply have “nodded off momentarily as some older men do from time to time.” (*Id.* at p. 8.) Furthermore, the symptoms which the ALJ attributes to intoxication are instead attributed by appellant to Brannon being “an older gentleman who is tired and not in the best of health.” (*Id.* at p. 18.)

Brannon's symptoms, observed by the agents and recounted in their testimony, include: a flushed red face, droopy eyes, slow and deliberate movements, slurred speech, difficulty sitting upright, and difficulty getting food to his mouth. (Findings of Fact, ¶¶ 6-7.) Appellant argues, "the video discredits the testimony of the Agents." (ACB at p. 6.)

The Board finds no support for this contention. We have thoroughly reviewed the entire record, including the video, and find that it supports the ALJ's findings. Appellant's assertions — that the agents' testimony should be discredited and that their version of events was largely fabricated — are simply not supported by the record.

In addition to her findings based on the agents' testimony, the ALJ made findings based on her own viewing of the surveillance video (exh. A). In those findings she notes that Brannon's symptoms included: decreased alertness, diminished motor skills, slow deliberate movements, deep breathing, difficulty staying awake, swaying uncontrolled body movements, and difficulty getting food to his mouth. (Findings of Fact, ¶¶ 20-21.) We completely disagree with appellant's characterization of the video evidence as being non-supportive of these findings.

Most importantly, the bartender's admission — that she knew Brannon was intoxicated and that she should not have sold him more alcohol (Findings of Fact, ¶¶ 12-13) — supports the ALJ's conclusion that the accusation should be sustained. Appellant's assertion that the bartender was not in a position to witness the symptoms displayed by Brannon is simply not supported by the record. Nor is its contention that "[a]t best Brannon starts to show the obvious signs of intoxication at the end of the evening, *after* Schwartz [*sic*] observed those signs." (AOB at p. 19.)

After careful examination of the entire record, we find no flaw in the ALJ's findings or her determination that the evidence supports a conclusion that appellant's employee served an alcoholic beverage to an obviously intoxicated person, in violation of section 25602(a). Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

II

Appellant contends the ALJ abused her discretion by excluding a line of questioning regarding Penal Code section 647(f) — known colloquially as “drunk in public.” The Department's objections to this line of questioning were sustained on the basis of relevance. (AOB at pp. 20-23.)

Appellant maintains the questions should have been permitted, even though this was not the statute cited in the accusation. It contends that questions regarding the uncharged statute were relevant to show that the agents “either grossly abused their power by arresting Brannon or did not know the law.” (*Id.* at p. 20.)

Appellant further contends this line of questioning was relevant to determining the credibility of the agents' testimony. (*Id.* at p. 22.) It maintains that the ALJ's rulings prevented it “from conducting a thorough cross-examination and testing of the credibility of the agent witnesses.” (ACB at p. 11.)

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].) It is a firmly established principal that it is the province of the ALJ,

as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]); *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

Appellant has supplied no support for its assertion that error occurred — merely a blanket assertion that the ALJ's exclusion of this line of questioning prevented it from testing the credibility of the Department's witnesses. It complains that the ALJ sustained "the majority of Department counsel's objections to relevant questions posed by Appellant" (AOB at p. 21) but does not point out why this was an error.

To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [126 Cal.Rptr.2d 178].) Where a point is merely asserted without any argument of or authority for the proposition, "it is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) We find no abuse of discretion.

III

Appellant contends the ALJ erred in applying "unsupported and inappropriate" aggravating factors to increase the penalty. (AOB at pp. 23-26.) It maintains the ALJ "failed to explain which 'aggravating factors' influenced her decision." (ACB at p. 11.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "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*, 240 Cal. App. 2d 659, 666-667 (1966) [49 Cal. Rptr. 901].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled “Penalty Guidelines” (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation,

and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(*Ibid.*)

In the decision, the ALJ devotes a separate section to the issue of penalty and explains the factors she considered which contributed to the recommendation of a 20-day suspension:

The Department requested the Respondent's license be suspended for a period of 20 days. The Department recommends an aggravated penalty for the following reasons: (1) Licensee's prior violations in 2008, while remote, show the Licensee does not have a discipline-free history, (2) a continuing course and pattern of conduct of service to obviously intoxicated persons established through the Department agents' confirmation on December 8, 2016, of the prior law enforcement and private citizen complaints, (3) bartender Schwarz received no discipline for the said violation and still remains employed at the Licensed Premises, (4) bartender Schwarz' own admissions she observed Brannon and knew he was displaying symptomology of being obviously intoxicated prior to serving alcoholic beverages to him and despite this knowledge and observation served him anyway.

The Respondent did not recommend a penalty in the event the accusation was sustained. Respondent argued for mitigation based on sending employees to Department training courses once annually; and as of December 8, 2016, bartender Schwarz had attended two Department training courses. Respondent said it did not discipline bartender Schwarz for the said violation because, “I don’t think she did anything wrong. Why would I discipline her?”

The *standard* penalty under rule 144^[fn.] for a first-time violation of section 25602(a) is a 15-day suspension. Rule 144 offers guidance on adjusting the standard up or down depending on aggravating and mitigating factors. The penalty recommended herein complies with rule 144.

(Decision, at p. 11.)

Prior Discipline: Appellant contends the prior discipline on the license — in 2008, for the sale of alcohol to a minor, and in 2009, for possession of an illegal gambling device — is too remote in time to constitute an aggravating factor. We are aware of no rule or any case law that establishes a “too remote in time” rule for using prior discipline as an aggravating factor. The simple fact, as the ALJ notes, is that appellant’s license does not have a discipline-free history. Since rule 144 directs the ALJ to consider the length of licensure without prior discipline for the purposes of mitigating the penalty, it was not improper for the ALJ to note that appellant does not have a discipline-free history.

Continuing Course or Pattern of Conduct: Appellant maintains the agents’ assertion that there were prior complaints is the only evidence of a continuing course or pattern of conduct, and argues that complaints are not evidence of conduct. Appellant asserts that the Department failed to establish a “continuing course or pattern of conduct.” We disagree. The agents testified that the Department received complaints about appellant’s over-serving of customers and that they conducted an investigation in

response to those complaints. That investigation revealed the precise activity which had been complained about — thereby establishing a pattern of conduct.

No Consequences: Appellant contends that the failure of the licensee to discipline the bartender is beyond the purview of the Department's authority and should not have been considered as a factor in aggravation. It contends the licensee — having viewed the video evidence and not observing anything on the video it felt was wrong — was justified in not disciplining its employee. Appellant argues that the fact that the Department *wishes* appellant had fired its employee is not an appropriate factor in aggravation. We disagree with appellant's conclusion that the aggravation resulted from the Department's wish that the bartender had been disciplined. The firing or disciplining of an employee found responsible for violating a statute is oftentimes viewed by the Department as a positive action taken by the licensee to correct the problem. Here, since the bartender incurred no consequences, and the licensee failed to acknowledge that a violation occurred. The ALJ was justified in considering this to be an aggravating factor, since nothing was done to correct the problem — thereby making it more likely that such a violation might reoccur.

Admissions: Appellant contends that the bartender's admissions should not be considered an aggravating factor. Instead, it argues that her admission of wrongdoing was actually evidence of cooperation by the licensee in the investigation and, as such, should actually have been a factor in mitigation of the penalty. We disagree. The bartender admitted she knew she should not have served Brannon the alcohol, and that she knew he was already intoxicated — yet she served him anyway. Such disregard for the law is precisely why a penalty is aggravated — as opposed to situations where

mitigation of the penalty is appropriate, because the licensee or its employees are attempting to do the right thing. The bartender here was certainly not trying to do the right thing.

Contrary to appellant's assertion that the ALJ failed to explain which aggravating factors influenced her decision to impose a 20-day suspension, or that she failed to articulate her reasoning (see ACB at pp. 11-12), the penalty section of the decision clearly lays out the four factors articulated above as the basis for deviating upwards from a standard 15-day suspension. (Decision, at p. 11.) The contention that the ALJ simply rubber-stamped the Department's argument is not persuasive.

As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The factors in aggravation applied here were entirely reasonable, for the reasons articulated by the ALJ.

The extent to which the Department considers mitigating or aggravating factors is a matter within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion. Appellant has not established that the Department abused its discretion by imposing a 20-day penalty in this matter.

ORDER

The decision of the Department is affirmed.²

²This 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

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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 RAMPAW CORPORATION
DEANES BAR & THRILL
8108 SAN BERNARDINO ROAD
RANCHO CUCAMONGA, CA 91730-3123
ON-SALE GENERAL PUBLIC PREMISES -
LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 48-442384

Reg: 17085640

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 14, 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, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after March 7, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: January 25, 2018



Matthew D. Botting
General Counsel

RECEIVED

JAN 25 2018

**Alcoholic Beverage Control
Office of Legal Services**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

The Rampaw Corporation	}	File: 48-442384
dba Deanes Bar & Thrill	}	
8108 San Bernardino Road	}	Reg.: 17085640
Rancho Cucamonga, California 91730-3123	}	
	}	License Type: 48
Respondent	}	
	}	Word Count: 37,255
	}	
	}	Reporter:
	}	Shelby Maaske
	}	Kennedy Court Reporters
	}	
<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 at San Bernardino, California, on October 4, 2017.

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

Peter Wright, President and Secretary of Corporate Licensee/Respondent appeared on behalf of Respondent, The Rampaw Corporation.

The Department seeks to discipline the Respondent's license on the grounds that, on December 8, 2016, the Respondent, through their employee or agent, Robin Schwarz, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given an alcoholic beverage, to-wit: beer, to James Brannon, an obviously intoxicated person, in violation of Business and Professions Code section 25602(a).¹ (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 4, 2017.

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

FINDINGS OF FACT

1. The Department filed the accusation on June 12, 2017.
2. The Department issued a type 48, on-sale general public premises license to the Respondent at the above-described location on September 18, 2006 (the Licensed Premises).
3. The Respondent's license has been the subject of the following discipline:

<u>Violation Date</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
November 21, 2008	09070556	PC §§ 330b, 330.1 & 330.4, BP §§ 24200(a,b);	15-day susp. (POIC)
May 12, 2008	08069812	BP §§ 25658(a) 24200(a,b)	15-day susp. (POIC)

The foregoing disciplinary matters are final. (Exhibits 2 and 3.)

4. On December 8, 2016, at 7:55 p.m., Department of Alcoholic Beverage Control Agents Gilbert Castillo and Mehul Patel entered the Licensed Premises in an undercover capacity to follow-up on complaints, made by local law enforcement (the San Bernardino County Sheriff's Department, Rancho Cucamonga Station) and private citizens, that the Licensed Premises was providing over-service of alcoholic beverages to patrons. Agents Castillo and Patel sat at the fixed bar. Agent Castillo observed a female bartender, named Robin Schwarz, (hereinafter bartender Schwarz) behind the fixed bar performing bartending duties. Bartender Schwarz was the only bartender on-duty during the period of the investigation that evening. Agent Castillo ordered from and was served by bartender Schwarz a draft beer. Agent Castillo took incidental sips of the draft beer. Agent Patel ordered from and was served by bartender Schwarz one 805 tap beer. Agent Patel tasted the 805 tap beer, and determined it had alcohol in it.
5. Within five to ten minutes after entering the Licensed Premises, Agents Castillo and Patel, based on their training and experience, both began surveying the interior of the Licensed Premises and its patrons looking for symptomology of obviously intoxicated persons.
6. Agent Castillo's attention was caught by a male patron, subsequently identified as James Brannon (hereinafter referred to as Brannon), because he exhibited the symptomology of someone who was intoxicated. During the course of Agent Castillo's observation of Brannon Agent Castillo observed Brannon to have a red-flushed face,

droopy eyelids, slow and deliberate movements, difficulty keeping his eyes open while seated at the fixed bar, and placement of his hands upon nearby objects, such as the fixed bar or tables, with which to hold himself up. Agent Castillo continued to observe Brannon because he looked intoxicated. At some point, Agent Patel went to the restroom.

7. Approximately 8:36 p.m. Agent Castillo saw Brannon at the fixed bar pick up, what appeared to Agent Castillo, a chicken strip. Brannon then brought the piece of food toward his face, attempted to eat it, missed his mouth, and instead touched his cheek with the food first before getting it to his mouth. Agent Castillo recognized this as decreased alertness, a sign of intoxication. Based on Agent Castillo's training and experience, and the totality of his observations of Brannon, he came to the conclusion Brannon was obviously intoxicated.

8. Agent Patel returned to the fixed bar from the restroom. Agent Castillo reported to Agent Patel his observations of Brannon, including Brannon's attempt to eat the piece of food. Agent Patel considered Agent Castillo's description of Brannon's actions to be a sign of intoxication known as diminished motor skills. Thereafter, Agents Castillo and Patel, both then focused on observing Brannon.

9. Agent Patel observed Brannon with a red-flushed face, droopy eyes, and his upper body swaying in uncontrolled movement forward and backward while seated. Agent Patel knew from his training and experience that those were the signs of intoxication, including, but not limited to, diminished motor skills and slurred speech. Agent Patel concluded that Brannon appeared to be obviously intoxicated, based on his training, experience and observations of Brannon.

10. While inside the Licensed Premises Agent Castillo saw that bartender Schwarz had an opportunity to observe Brannon on more than one occasion and had multiple interactions with Brannon.

11. While observing Brannon, Agent Patel saw a man in Brannon's company (hereinafter referred to as Mark). Agent Patel saw Mark place an order for a pitcher of beer with bartender Schwarz, while pointing toward Brannon, indicating to bartender Schwarz that Mark and Brannon wanted beer. Bartender Schwarz retrieved a pitcher of tap beer and two new beer glasses and placed them on the fixed bar in front of Brannon, who was leaning against the fixed bar. At that moment, bartender Schwarz was two feet away from Brannon, Brannon and bartender Schwarz were looking at each other, with bartender Schwarz in a position to clearly observe Brannon with nothing obstructing her view of Brannon. Agent Patel was close enough to see and hear bartender Schwarz and Brannon's conversation. Agent Patel could not understand what Brannon said because

Brannon spoke with slurred speech. Agent Patel noticed Brannon was breathing deeply. Agent Patel observed as Brannon then paid bartender Schwarz for the pitcher of beer.

12. After bartender Schwarz served Brannon the pitcher of beer Agent Patel said to bartender Schwarz, "Hey is that guy drunk or what?" while pointing to Brannon, who was now approximately 20 feet away near the south end of the Licensed Premises. Bartender Schwarz' eyes looked in the direction of Brannon, (who was in view of bartender Schwarz, Agent Castillo, and Agent Patel) and replied, "Who him? Oh yea, he's frickin' lit dude." Bartender Schwarz then added, "I contemplated not giving him that last one. He asked me my name six times already." Agent Castillo overheard the conversation between Agent Patel and bartender Schwarz.

13. At some later point, Agents Castillo and Patel surrendered their undercover capacity, advised bartender Schwarz they were law enforcement officers and explained the violation to bartender Schwarz. Agent Patel told bartender Schwarz he was going to cite her for selling alcohol to an obviously intoxicated person. Bartender Schwarz asked if she was going to jail and said, "I'm sorry I knew I shouldn't have sold him that last one," referring to Brannon and added, "I should have known." Agent Patel asked bartender Schwarz what Brannon was drinking inside the Licensed Premises that evening. Bartender Schwarz said Brannon was drinking Bud Light or Coors Light. Both Bud Light and Coors Light are alcoholic beverages. Agent Castillo overheard the conversation between Agent Patel and bartender Schwarz.

14. Bartender Schwarz did not deny serving alcoholic beverages to Brannon and did not deny that Brannon appeared to be obviously intoxicated inside the Licensed Premises on December 8, 2016.

15. Agent Patel then made contact with Brannon, who smelled of alcohol. Brannon and bartender Schwarz were cited and arrested. During Brannon's transport to the station Agent Patel asked Brannon whether he was sick or injured, to which Brannon replied that he was not. A color photograph of Brannon was taken while he was being booked at the station, which depicts a bloodshot right eye and a shadowed left eye. (Exhibit 4.)

16. While inside the Licensed Premises during the undercover operation Agent Patel served two beers and consumed approximately one and one-half of the beers served to him. At no time during the operation was Agent Patel impaired and his consumption of alcohol did not impact his judgment. Agent Patel was wearing prescription eye glasses during the operation and had clear vision, with nothing impacting his ability to perceive the events during the said operation. Agent Patel was able to hear both the audio from the Raider football game which was on and people's conversations inside the Licensed Premises during the said operation. The distance between Brannon and Agents Castillo

and Patel, during their observations of him while the agents were seated at the fixed bar, ranged from approximately 10 feet while Brannon was seated at the fixed bar, and 15 to 20 feet while Brannon was at the pool table at the south end of the Licensed Premises.

(Respondent's Witness - Peter Wright)

17. Peter Wright appeared and testified at the hearing. He is the president of the Respondent-Licensee, The Rampaw Corporation. He sends all of the Respondent's employees to Department training once a year. As of December 8, 2016, bartender Schwarz had attended two Department training courses. Mr. Wright claims that none of the symptoms of intoxication which bartender Schwarz was trained in through the Department courses was witnessed by her on December 8, 2016. Mr. Wright testified that bartender Schwarz has been to jail in the past. Mr. Wright watched the video prior to producing it at the hearing in the form of a flash drive (Exhibit A). The video does not produce any sound. Mr. Wright claims "The objective symptoms, signs of intoxication are not seen on the video." Mr. Wright further claims that, pursuant to bartender Schwarz and the video, "Brannon is doing nothing different than anyone else in the bar that date" of December 8, 2016. Mr. Wright claims the video does not show Brannon missing his mouth while attempting to eat, but in fact he "never misses his mouth." Mr. Wright is not sure how the agents can hear anything, such as Brannon slurring his words while speaking with bartender Schwarz, because "my juke box system is extremely loud." There was no evidence that Mr. Wright was inside the Licensed Premises during the said investigation of December 8, 2016.

18. The Respondent has a multiple camera video surveillance system which records, in black and white, the interior and exterior of the Licensed Premises from different angles. The Respondent presented at the hearing a copy of the flash drive containing various video clips without any equipment by which to view the same. Subsequent to the hearing, as agreed upon by the parties, the entirety of the video clips not objected to by the Department and admitted into evidence as Exhibit A, including jim1-002.exe, jim5-002.exe, jim6.exe, jim6-002.exe, as well as all relevant video clips referenced during the hearing, were reviewed at length by the Court. The video does not contain audio. The video supports and is consistent with the credible testimony of Agents Castillo and Patel as to their observations of Brannon inside the Licensed Premises, Brannon's signs of intoxication and Agent Patel's conversation with bartender Schwarz regarding her admissions/statements.

19. Brannon appears to enter the Licensed Premises on video jim5.exe at approximately 18:00:00. The video, beginning with clip jim6.exe and time marker 18:09:53, depicts Brannon consuming beer, an alcoholic beverage, over approximately two hours and 30

minutes (up until the point when bartender Schwarz serves the said pitcher of beer to Brannon), with the video continuing on video clip jim6-002.exe.

20. Video jim6.exe at time markers 18:23:20 and 18:23:43 Brannon appears able to walk without his cane or leaning upon objects. Over the duration of the evening while Brannon consumes beer it appears his level of intoxication increases and he exhibits decreased alertness and diminished motor skills, slow, deliberate movements, and deep breathing. Prior to Agents Castillo and Patel's arrival Brannon appears to show signs of obvious intoxication. Jim6.exe at 19:06:47 Brannon's head jerks down and up, appearing as if he fell asleep, then he appears to have uncontrolled upper body movement, with his torso moving in a forward and backward motion. On jim6.exe, at time marker 19:08:44, Brannon leans back against the chair, his head falls backward, and rests in that position, appearing that he fell asleep for a few seconds before he nodded awake. Brannon appears to do this again at jim6.exe 19:22:00. Jim6.exe at 19:26:32 it appears to be bartender Schwarz who approaches Brannon, who is seated at the fixed bar, and jim6.exe at 19:26:35 bartender Schwarz and Brannon shake hands. Another 34 minutes lapse, with Brannon continuing to consume beer, and appearing to show signs of obvious intoxication, before the agents enter (jim6.exe 19:55:17) and begin observing Brannon's signs of obvious intoxication. Jim6.exe at time marker 19:43:29 depicts bartender Schwarz appearing to communicate with Brannon, who is leaning against the fixed bar.

21. Video clip jim5.exe at 19:58:38 Agent Patel, who is seated at the fixed bar, turns his head and appears to look directly at Brannon, who walks within inches of Agent Patel, with Agent Patel having a clear, unobstructed view of Brannon's face. Several times Brannon leans both his hands upon the pool table, appearing to rest for a few seconds and take deep breaths, beginning with video jim6-002.exe at time marker 20:35:01. On video jim6-002.exe at approximately 20:36:53, consistent with Agent Castillo's testimony, Brannon appears to attempt to eat food and misses his mouth with the piece of food, which a second later appears to make it into Brannon's mouth. On video clip jim6-002.exe at time marker 20:37:59 it appears as if Brannon briefly fell asleep, then Mark looks at Brannon and walks right up to Brannon, with no reaction from Brannon until Mark appears to say something and slap Brannon on the shoulders. Video jim6-002.exe at 20:38:39 Mark appears to order the said pitcher of beer motioning to Brannon, appearing to indicate to bartender Schwarz the pitcher is for Brannon and himself. Video jim6-002.exe at 20:39:51 is consistent with Agent Patel's testimony of bartender Schwarz furnishing a pitcher of beer and two glasses to Brannon, who pays her for the same, with bartender Schwarz in a position to clearly observe Brannon with nothing obstructing her view of Brannon.

22. 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 25602(a) provides that any person who sells, furnishes, or gives any alcoholic beverage to any obviously intoxicated person is guilty of a misdemeanor.
4. In cases such as this, the term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. *People v. Johnson* 81 Cal.App.2d Supp. 973, 185 P.2d 105. Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. *Jones v. Toyota Motor Co*, 198 Cal.App.3d 364 at 370,243 Cal.Rptr. 611. It is not necessary for all of the signs described to be present in order to find a person is obviously intoxicated, but there must be sufficient indications "to cause a reasonable person to believe that the one with whom he or she is dealing is intoxicated." *Schaffield v. Abboud* 15 Cal.App.4th 1133, 19 Cal.Rptr.2d205.
5. 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 December 8, 2016, Respondent-Licensee's employee, bartender Robin Schwarz, inside the Licensed Premises, sold, furnished an alcoholic beverage, to-wit: beer, to James Brannon, an obviously intoxicated person, in violation of section 25602(a). (Findings of Fact ¶¶ 4-16,18-21.)
6. 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 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.

7. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.)²

8. Peter Wright's testimony and Respondent's contentions that (1) none of the symptoms which bartender Schwarz was trained in during the Department courses was witnessed by her on December 8, 2016, and therefore, bartender Schwarz did not think Brannon to be obviously intoxicated, (2) "The objective symptoms, signs of intoxication are not seen on the video," (3) the agents presented conflicting, inconsistent testimony that is not credible, and (4) Bartender Schwarz did not make the statements, "Oh yea, he's frickin' lit dude," "I contemplated not giving him that last one. He asked me my name six times already," "I'm sorry I knew I shouldn't have sold him that last one," referring to Brannon and added, "I should have known," are disbelieved for the following reasons.

9. First of all, Agents Castillo and Patel both presented sworn, direct, credible testimony, as more fully addressed below. Secondly, the video produced by Respondent as Exhibit A supports and is consistent with Agent Castillo and Agent Patel's credible testimony. The video depicts Brannon's signs of obvious intoxication and confirms the credible testimony of Agents Castillo and Patel as to their observations of Brannon inside the Licensed Premises and Agent Patel's conversations with bartender Schwarz regarding her admissions/statements. These signs of Brannon's intoxication depicted in the video clips include, but are not limited to, slow and deliberate movements, diminished motor skills, decreased alertness, deep breathing, leaning upon objects to hold himself up, missing his mouth while attempting to eat, and difficulty keeping his eyes open while seated at the fixed bar. For example, on video clip jim6-002.exe at time marker 20:37:59 it appears as if Brannon briefly fell asleep and Mark looks at Brannon, then walks right up to Brannon, with no reaction from Brannon until Mark says something, slapping Brannon on the shoulders. The color photograph of Brannon, which was admitted as Exhibit 4, depicts Brannon's right eye to be bloodshot. Brannon's left eye in the photograph is shadowed and therefore cannot be seen as clearly as the right eye. All of these signs combined are sufficient indicia "to cause a reasonable person to believe that the one with whom he or she is dealing is intoxicated."

10. Two significant points of contention which the video also resolves in favor of the Department include the following: (1) video clip jim6-002.exe, at time marker 20:36:53, the video is consistent with Agent Castillo's testimony of Brannon initially missing his

²Although a defendant is not under duty to produce testimony adverse to himself, if he fails to produce evidence that would naturally have been produced, he must take the risk that the trier of facts will infer that if the evidence had been produced it would have been adverse. *Breland v. Traylor Engineering & Manufacturing Co.* (App. 1 Disl. 1942) 52 Cal.A pp.2d 415, 126 P.2d 455. Where defendant, refuses to produce evidence which would overthrow case made against him if not founded on fact, presumption arises that evidence, if produced would operate to defendant's prejudice. *Dahl v. Spotts* (App. 1932) 128 Cal.App. 133, 16 P.2d 774.

mouth with the food because it appears the food does not go in Brannon's mouth at first attempt and a second later it looks to make it into his mouth. Part of Respondent's argument as to this issue referred to a different, earlier section of the video of Brannon eating pizza; and (2) video clip jim1-001.exe, at time marker 20:46:46, is consistent with both agents' testimony relating to Agent Patel's question to bartender Schwarz, "Hey is that guy drunk or what?" while motioning toward Brannon, and bartender Schwarz looking toward Brannon and her reply statements as credibly testified to by the agents. Since the video has no audio it does not confirm what was spoken or whether Agent Patel could hear, from his position at the fixed bar, Brannon slurring his words whilst speaking with and paying bartender Schwarz for the pitcher of beer she brought. These points are more fully discussed below.

11. Respondent argued that agents Castillo and Patel's testimony are not credible. During Respondent's closing Respondent does not explain why he believes the agents are not credible however during his cross-examination of agent Castillo Respondent alluded to the agents' alleged inconsistent testimony and not being credible due to their recalling different events during the night in question despite sitting "side by side." Respondent's argument is rejected. Both Agents Castillo and Patel's sworn, direct testimony was credible and consistent. On December 8, 2016, Agents Castillo and Patel made observations over approximately 40 minutes, which included a fact intensive scenario of events. Neither agent has any bias or motive in the presentation of their testimony. No two people will use the exact same words to describe the same event. Their word choice, distance, time estimates, and so forth will naturally vary from person to person. Any alleged minor differences in the agents' testimony do not call into question either agent's credibility.

12. Respondent also argued that there is no proof of the complaints by law enforcement or private citizens. This argument is rejected. Agent Castillo's sworn, direct testimony credibly maintained that complaints about over-service of alcoholic beverages to patrons at the Licensed Premises were received by both law enforcement and private citizens. Respondent's supposition otherwise is without merit. In fact, Respondent's closing argument contradicts his own argument by acknowledging that "there will be calls for service, problems, complaints of overserving - that's just the nature of the business."

13. The Respondent argued, regarding Agent Patel's testimony of Brannon slurring his words, that the "agents can only see the side of his [Brannon's] face, so I don't know how they can see his lips moving let alone hear" what he says, "the events may or may not have occurred." Respondent also argued the juke box with the football game on is extremely loud and "it would be almost impossible for the agents to hear any communications that occurred." These arguments are rejected. First of all, there is no evidence Mr. Wright was present on the evening of December 8, 2016, to say at what

volume the juke box or football game was. Agent Patel presented consistent, credible testimony that he was close enough to hear Brannon slurring his words. From Agents Castillo and Patel's testimony it was clear that Brannon was approximately 10 feet away from them while Brannon was at the fixed bar. The video clip jim1-002.exe confirms Agent Patel's credible testimony that he could see Brannon from his position at the fixed bar. Furthermore, Agent Patel has no motive to make up anything about which he observed or heard. Again, the Respondent's supposition and speculation otherwise is without merit.

14. The Respondent further argued that bartender Schwarz did not make the statements as alleged. This argument is also rejected. It was within Respondent's power to produce stronger, more satisfactory evidence, in the form of presenting as a witness bartender Schwarz herself. The Respondent failed to produce bartender Schwarz despite his receiving notice of his right to do so. When weaker and less satisfactory evidence is offered, the evidence and contentions offered by Respondent is viewed with distrust. In balancing the conflicting evidence of the Respondent's hearsay statements against the sworn, direct, consistent and credible testimony of both Agents Castillo and Patel, the undersigned finds in favor of the agents' testimony that bartender Schwarz made the statements as testified to by the agents.

15. The preponderance of evidence establishes bartender Schwarz made admissions that she observed Brannon and knew he was displaying symptomology and signs of being obviously intoxicated, prior to serving Brannon the said pitcher of beer, and was later remorseful when contacted by law enforcement, stating, "I'm sorry I knew I shouldn't have sold him that last one," referring to Brannon and adding, "I should have known." Agent Castillo's credible testimony indicated that bartender Schwarz had an opportunity to observe Brannon on more than one occasion and had multiple interactions with Brannon to observe Brannon's signs of intoxication. The opportunities bartender Schwarz had to observe Brannon's signs of intoxication while Brannon was inside the Licensed Premises beginning with video clip jim6.exe at 19:26:35 when they shook hands, coupled with bartender Schwarz' own admissions, make it clear that bartender Schwarz was aware Brannon was obviously intoxicated prior to her serving him the said pitcher of beer, or as she admitted "that last one."

16. Lastly, Mr. Wright's bias, as the president of the Corporate Licensee, The Rampaw Corporation, and his lengthy involvement with the Licensed Premises since April of 2005, tend to disprove the truthfulness of his testimony and contentions. In Mr. Wright's opening argument he admits that, "I have a self-serving interest in painting a different picture," and further states that Brannon "may or may not have been drinking before his arrival" to the Licensed Premises. This latter statement that Brannon may have been drinking prior to arrival only adds to the level of Brannon's intoxication as he continues

to consume alcoholic beverages inside the Licensed Premises over two hours and 30 minutes, until served “that last one.” The video appears to depict Brannon’s level of intoxication to increase, including the duration of time both bartender Schwarz and the agents had the opportunity to observe Brannon’s signs of obvious intoxication. In fact, prior to the agents entering the Licensed Premises the video appears to show Brannon’s upper body swaying in uncontrolled movement forward and backward and Brannon having difficulty keeping his eyes open. In addition to the symptomology and signs as described in detail in the paragraphs above, is the color photo of Brannon which depicts his bloodshot eye in Exhibit 4. More importantly, Respondent’s contentions are further disproved by bartender Schwarz’ own admissions to Agent Patel at the Licensed Premises on December 8, 2016. As addressed above, the agents have no reason or motive to make up any of their testimony, testimony which was consistent and credible.

PENALTY

The Department requested the Respondent’s license be suspended for a period of 20 days. The Department recommends an aggravated penalty for the following reasons: (1) Licensee’s prior violations in 2008, while remote, show the Licensee does not have a discipline-free history, (2) a continuing course and pattern of conduct of service to obviously intoxicated persons established through the Department agents’ confirmation on December 8, 2016, of the prior law enforcement and private citizen complaints, (3) bartender Schwarz received no discipline for the said violation and still remains employed at the Licensed Premises, (4) bartender Schwarz’ own admissions she observed Brannon and knew he was displaying symptomology of being obviously intoxicated prior to serving alcoholic beverages to him and despite this knowledge and observation served him anyway.

The Respondent did not recommend a penalty in the event the accusation was sustained. Respondent argued for mitigation based on sending employees to Department training courses once annually; and as of December 8, 2016, bartender Schwarz had attended two Department training courses. Respondent said it did not discipline bartender Schwarz for the said violation because, “I don’t think she did anything wrong. Why would I discipline her?”

The *standard* penalty under rule 144³ for a first-time violation of section 25602(a) is a 15-day suspension. Rule 144 offers guidance on adjusting the standard up or down depending on aggravating and mitigating factors. The penalty recommended herein complies with rule 144.

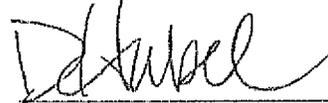
³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

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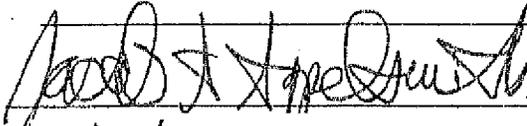
ORDER

Respondent's on-sale general public premises license is hereby suspended for a period of 20 days.

Dated: November 3, 2017



D. Huebel
Administrative Law Judge

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<input type="checkbox"/> Non-Adopt:
By: 
Date: 12/14/17