

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

AB-9774

File: 42-530606; Reg: 18086955

JOUMANA VUCKOVICH,
dba Nara Ultra Lounge
8055 Clairemont Mesa Boulevard, Suite 108A,
San Diego, CA 92111,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: August 16, 2019
Sacramento, CA

ISSUED AUGUST 26, 2019

Appearances: *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for
Joumana Vuckovich,

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

OPINION

Joumana Vuckovich, doing business as Nara Ultra Lounge, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending her license for 15 days because she possessed distilled spirits upon a premises for which a license had not been issued, in violation of Business and Professions Code section 25607, and because she failed to comply with two conditions attached to the license in violation of Business and Professions Code section 23804.

¹The decision of the Department, dated November 21, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on June 13, 2013. There is no record of departmental discipline against the license.

On May 21, 2018 the Department instituted a three-count accusation against appellant, charging that on January 18, 2018:

(Count 1) the licensee possessed upon the premises distilled spirits (listed in 14 sub-counts) for which a license had not been issued, in violation of Business and Professions Code section 25607;

(Count 2) the licensee's employee permitted the sale of alcohol after 11 p.m. on a Thursday, in violation of condition #1 on the license which states: "Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 10:00 am and 11:00 pm Sunday through Thursday and 10:00 a.m and 12 Midnight Friday and Saturday," in violation of Business and Professions Code section 23804, and;

(Count 3) the licensee's employee allowed a disc jockey to perform and play music inside the premises, in violation of condition #2 on the license which states "There 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," in violation of Business and Professions Code section 23804.

At the administrative hearing held on August 29, 2018, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Andrew De La Torre. Appellant presented no witnesses.

Testimony established that Department Agent De La Torre and another agent went to the licensed premises posing as customers, to investigate an anonymous

complaint that appellant was serving distilled spirits, on January 18, 2018 at approximately 10:10 p.m. They sat at the bar and ordered beers from the bartender. De La Torre observed a bottle labeled “Skyy Vodka” on display behind the bar. (Exh. 3) He ordered a shot of vodka from the bartender, but was told that she had been instructed by her manager that she could not sell shots.

As the agents consumed their beers, De La Torre observed the bartender preparing two mixed drinks using the Skyy Vodka. She served the drinks to individuals seated at a table — one of whom was subsequently identified as Yannis Albana, the bar manager. De La Torre also observed a bottle labeled “Hendricks Gin” on the display shelf behind the bar. (Exh. 5.)

While in the bar De La Torre observed a disc jockey playing music, wearing headphones, and using a keyboard and laptop computer to control the music. (Exh. 6A-D.) The agents exited the premises at approximately 10:30 p.m.

De La Torre and several other agents re-entered the premises at approximately 11:15 p.m. wearing clothing that identified them as police officers. De La Torre observed a female individual grabbing the Skyy Vodka from the shelf behind the bar and placing it under the bar where it was not visible. Manager Albana was observed seated at a table with the two drinks served earlier as well as an ice bucket containing half a bottle of Ciroc Peach Vodka. (Exh. 7A-B.)

A total of 14 distilled spirit bottles were discovered during a search of the premises. (Counts 1A through 1N; Finding of Fact ¶¶ 16.) When questioned, the manager said the distilled spirits were for personal consumption. He also stated that there was no disc jockey — that the music equipment was his.

The administrative law judge issued his proposed decision on September 10, 2018, sustaining 11 sub-counts² and dismissing 3 sub-counts³ of count 1, dismissing count 2, sustaining count 3, and recommending a 15-day suspension of the license. The Department adopted the proposed decision in its entirety on November 13, 2018, and a Certificate of Decision was issued on November 21, 2018.

Appellant then filed a timely appeal raising the following issues: (1) the decision is not supported by substantial evidence, (2) condition #2 is too vague to be enforced, and (3) the ALJ improperly aggravated the penalty.

DISCUSSION

I

Appellant contends count 1 is not supported by substantial evidence. Specifically, she maintains “there is no evidence to support the finding that the opened, untested, bottles contained distilled spirits.” (AOB at p.3.)

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

²Counts 1A, 1B, 1D, 1E, 1F, 1G, 1J, 1K, 1L, 1M, & 1N were sustained, as was count 3.

³Counts 1C, 1H, & 1I were dismissed, as was count 2.

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, 114 [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 25607, subdivision (a) states, in relevant part:

It is unlawful for any person or licensee to have upon any premises for which a license has been issued any alcoholic beverages other than the

alcoholic beverage which the licensee is authorized to sell at the premises under his or her license. **It shall be presumed that all alcoholic beverages found or located upon premises for which licenses have been issued belong to the person or persons to whom the licenses were issued.** Every person violating the provisions of this section is guilty of a misdemeanor. The department may seize any alcoholic beverages found in violation of this section.

(Bus. & Prof. Code, § 25607(a), emphasis added.)

In the case of an on-sale beer and wine public premises license, a violation is proved if the licensee is shown to "have upon [the] premises" any alcoholic beverages not authorized under the license. (*Ibid.*) Proof that a patron actually consumed or was served the distilled spirits is not an element of the violation — the mere presence of distilled spirits in a premises which is only licensed for beer and wine is sufficient to constitute a violation of this section.

The ALJ made the following finding in regards to the violation of section 25607:

7. Seven of the bottles did contain varying amounts of liquid (Exhibits 1A, 1B, 1E, 1F, 1G, 1J and 1K). Although they were seized and booked into evidence, none of these items were tested to determine if in fact they were distilled spirits. However, given the locations where they were found, in the office and on the display shelf wall behind the fixed bar and some having pour spouts attached, a preponderance of the evidence presented at the hearing points to the fact that these bottles contained what their labels stated, vodka, rum and tequila.

(Conclusions of Law, ¶ 7.)

Appellant asserts that since no chemical analysis was performed on the liquid contents of the bottles seized, that substantial evidence is lacking to establish that the bottles contained distilled spirits. We disagree — these bottles are variously labeled: vodka, gin, tequila, and rum. The Board has addressed this issue on prior occasions and found that the labels on the bottles themselves are sufficient to establish a presumption that the liquid inside them is distilled spirits — unless that presumption is

rebutted by presenting evidence to the contrary. (See e.g., *Georggin* (1991) AB-6030 and *Truyen Dang Do* (1997) AB-6631.) Appellant has presented no authority to the contrary, nor any evidence which might refute this presumption.

Case law tells us there is a presumption that liquor bottles contain what they purported to contain (*Mercurio v. Dept. of Alcoholic Bev. Control* (1956) 144 Cal.App.2d 626, 628 [301 P.2d 474]), just as there is a presumption that liquor is served when requested — unless contrary evidence is presented. (*Griswold v. Dept. of Alcoholic Bev. Control* (1956) 141 Cal.App.2d 807, 811 [297 P.2d 762].) The court in *Molina* held that “the word ‘beer,’ like the words ‘brandy,’ ‘whisky,’ ‘gin,’ and ‘rum,’ is held universally to be an intoxicating liquor *per se* for the reason that it is within the common knowledge and ordinary understanding that it is an intoxicating liquor. (*Molina v. Munro* (1956) 145 Cal.App.2d 601, 606 [302 P.2d 818].) No chemical analysis of the liquid is required.

We agree with the ALJ that “a preponderance of the evidence presented at the hearing points to the fact that these bottles contained what their labels stated, vodka, rum and tequila.” (Decision at p. 5.) It was appellant’s burden to rebut the presumption that the bottles found in the premises contained what the labels indicated — i.e., distilled spirits. Appellant, however, did not testify nor present any documentary evidence to rebut this presumption. Accordingly, the sub-counts of count 1 sustained by the ALJ must be affirmed.

II

Appellant contends condition #2 — the prohibition of live entertainment, including disc jockeys — is too vague to be enforced. Appellant maintains the term “disc jockey”

is not defined within the condition, nor was the licensee informed of the Department's definition of a disc jockey. (AOB at p. 4.)

In count 3 of the accusation, appellant is charged with violating condition #2 on her license, in violation of section 23804 of the Business and Professions Code which states:

A 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.

Condition #2 states:

There 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.

Appellant maintains the term "disc jockey" is too vague to be enforced and that the "changing of songs is no different from the changing of a radio's frequency to a new station." (AOB at p. 5.) She contends that "requests were not taken, names of songs were not announced, and patrons were not dancing to the songs." (*Ibid.*) These assertions are irrelevant. The definition of "disc jockey" is commonly known to be a person who selects and plays recorded music — typically nonstop. Various other dictionaries contain nearly identical definitions — none of which include the taking of requests or the requirement that patrons be dancing.

At the administrative hearing, the following testimony was given regarding the agent's observation of a disc jockey:

[BY MR. NGUYEN]

Q What did you - - what did you observe?

[BY AGENT DE LA TORRE]

A I observed a male which we later identified as - - I believe his last name is Mr. Khadour. He was manipulating what I identified as DJ equipment, disc jockey equipment.

[¶ . . . ¶]

Q Where was this equipment set up?

A So it was set up on the north side at the end - - at the end of the north side of the fixed bar.

Q Was there music playing in the premises?

A Yes.

Q You said Mr. Khadour was manipulating this agreement. [sic] What did you see him do exactly?

A I believe I saw him move the equipment, like the keyboards as well as take control of the laptop that was in front of him And I believe he also had on him a headset which you normally see a disc jockey be in possession of and have on his head.

Q Did Mr. Khadour's manipulation of this equipment affect the music played in the premises?

A Yes, I believe it did.

Q In what way?

A The transitioning of the music from one song to another, I think that was the more obvious sign.

[¶ . . . ¶]

Q How long did you observe Mr. Khadour for on this equipment?

A I would say anywhere from three to five minutes that I specifically paid attention to him. That was after conducting our other investigation regarding the distilled spirits.

(RT at pp. 22-25.)

Based on this testimony, the ALJ made the following findings:

11. De La Torre observed a disc jockey playing music. De La Torre

noted that the disc jockey was wearing headphones and using a keyboard and lap top computer to play the music. The disc jockey was using this equipment to transition from one song to the next, keeping the music continuous, without interruption. Photos were taken of the equipment used by the disc jockey (Exhibits 6A, 6B, 6C and 6D). There was no evidence that music was playing or that there was a disc jockey present playing music when the agents entered at 11:15 p.m.

(Findings of Fact, ¶ 11.)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (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].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Here, the ALJ found Agent De La Torre's testimony to be credible in regards to his observation of the disc jockey's activities, and we cannot go behind that determination to reach a contrary conclusion. Furthermore, appellant presented no evidence to rebut Agent De La Torre's testimony. The Board is prohibited from engaging in its own independent inquiry, as it is urged to do by appellant — in an effort to reach a contrary conclusion that it thinks is equally or more reasonable — when, as here, the Department's decision is supported by substantial evidence. As higher courts have told us time and again, we must defer to the Department's findings when they are reasonable. We cannot re-weigh the evidence and reach a different conclusion simply because an alternate interpretation of the facts is possible. We affirm count 3.

III

Appellant contends the ALJ improperly aggravated the penalty. She maintains "there was no evidence produced at the hearing or analysis by the ALJ as to why a citizen complaint is significant, let alone aggravation." (AOB at p. 6.)

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but 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.

In the decision, a separate section is devoted to the issue of penalty and the factors in mitigation and aggravation weighed by the ALJ:

PENALTY

The Department requested that the Respondent's license be suspended for a period of 20 days. The Respondent more or less conceded to the sealed unopened bottles being distilled spirits on the premises, but objected to the others because they were never proven to be distilled spirits. Respondent argued that the Department did not prove the condition violations. Respondent did not recommend a penalty in the event that the accusation was sustained.

Respondent has been licensed since 2013 with no history of prior Departmental discipline. That is a mitigating factor. In aggravation we have a citizen complaint and numerous bottles of distilled spirits. Applying discretion to the totality of the evidence presented at the hearing, the penalty recommended herein complies with Rule 144^[fn]. Reasonable minds may differ as to penalties. In this case a more thorough investigation and presentation of evidence would have resulted in a more severe penalty recommendation.

(Decision at p. 7.)

The recommended penalty for a violation of section 25607, for possession of distilled spirits in a premises without the necessary license, is a 10-day suspension. The recommended penalty for a violation of section 23804, for violating a condition on the license, is a 15-day suspension. (Cal. Code Regs., tit. 4, § 144.) Thus, the recommended penalty for the counts sustained by the ALJ would ordinarily be a 25-day suspension, with perhaps a 5-day conditional stay because of the term of licensure without discipline. We fail to see how the imposition of a 15-day suspension can be termed an “aggravated penalty” by appellant when it is less than that recommended under rule 144. The ALJ statement that “[i]n aggravation we have a citizen complaint and numerous bottles of distilled spirits” does not mean he actually increased the penalty. Clearly he did not.

Appellant’s disagreement with the penalty imposed does not mean the Department abused its discretion or that the penalty is arbitrary and capricious. 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. “[T]he propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse.” (*Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].) The Board is simply not empowered to reach a contrary conclusion from that of the Department if the penalty imposed is reasonable.

The penalty imposed here comports with the Department’s penalty guidelines pursuant to rule 144, and is, in fact, a mitigated penalty. We find it to be entirely reasonable based on the record in this case.

ORDER

The decision of the Department is affirmed.⁴

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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:**

JOUMANA VUCKOVICH
NARA ULTRA LOUNGE
8055 CLAIREMENT MESA BLVD., STE 108A
SAN DIEGO, CA 92111

ON-SALE BEER AND WINE PUBLIC PREMISES -
LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 42-530606

Reg: 18086955

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 November 13, 2018, 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 January 2, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 21, 2018

RECEIVED

NOV 26 2018

**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:

Joumana Vuckovich
dba Nara Ultra Lounge
8055 Clairemont Mesa Bl.
Suite 108 A
San Diego, CA 92111

Respondent

} File: 42-530606
}
} Reg.: 18 086 955
}
} License Type: 42
}
} Word Count: 17,000
}
} Reporter:
} Ed Serrano
} Kennedy Reporting
}
}

On-Sale Beer and Wine Public Premises License

PROPOSED DECISION

Administrative Law Judge John W. Lewis, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California, on August 29, 2018.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Dean Leuders, attorney-at-law, represented respondent /Licensee Joumana Vuckovich. Joumana Vuckovich was present throughout the hearing.

The Department seeks to discipline the Respondent's license on the grounds that, on January 18, 2018, Respondent possessed upon the premises distilled spirits for which a license had not been issued in violation of Business and Professions Code section 25607.¹ (Count 1) It should be noted that Count 1 contains fourteen sub-counts, designated 1A through 1N. The Department also seeks to discipline the Respondent's license on the grounds that, on January 18, 2018, the Respondent failed to comply with conditions attached to her license in violation of Business and Professions Code section 23804. (Exhibit 1.)

Evidence was received at the hearing. The matter was argued and submitted for decision on August 29, 2018.

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

FINDINGS OF FACT

1. The Department filed the accusation on May 21, 2018.
2. The Department issued a type 42, on-sale beer and wine public premises license to the Respondent for the above-described location on June 13, 2013. (Licensed Premises).
3. There was no evidence of prior departmental discipline against the Respondent's license presented at the hearing.
4. On April 8, 2013, the Respondent executed a petition for conditional license containing six conditions. (Exhibit 2.) Conditions #1 and #2 are as follows:

Condition #1 provides that "Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 10:00 am and 11:00 pm Sunday through Thursday and 10:00 am and 12:00 midnight Friday and Saturday."

Condition #2 provides that " There 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,"

5. The Department received an anonymous complaint that Respondent was serving distilled spirits to customers. A Type 42 license does not permit distilled spirits on the licensed premises. See Business & Professions Code Section 25607.
6. In response to the citizen complaint, on January 18, 2018, at approximately 10:10 p.m., Alcoholic Beverage Control Agent Andrew De La Torre entered the premises with another agent. They were both posing as customers. January 18, 2018, was a Thursday.
7. The agents sat at the fixed bar. Agent De La Torre observed a bottle labeled Skyy Vodka on a display shelf behind the fixed bar (Exhibit 3). Vodka is a distilled spirit. Agent De La Torre ordered beers for him and his partner from bartender Yvonne Navarro. De La Torre then ordered a shot of vodka from Navarro. Navarro told De La Torre that she could not sell shots as per instructions from her manager.
8. The agents sat at the bar consuming their beers. De La Torre observed bartender Navarro prepare two mixed drinks. She prepared the drinks using the Skyy Vodka and an unknown liquid which he thought to be some type of juice. Navarro served the two mixed drinks to two patrons seated at a table. It was subsequently determined that these two mixed drinks (seen in Exhibit 23) were served to the bar manager Yannis Albanna and another person.

9. De La Torre also observed a bottle labeled Hendricks Gin on the display shelf behind the fixed bar (Exhibit 5). Gin is a distilled spirit.

10. De La Torre observed a disc jockey playing music. De La Torre noted that the disc jockey was wearing headphones and using a keyboard and lap top computer to play the music. The disc jockey was using this equipment to transition from one song to the next, keeping the music continuous, without interruption. Photos were taken of the equipment used by the disc jockey (Exhibits 6A, 6B, 6C and 6D). The agents exited the premises at approximately 10:30 p.m.

11. Agent De La Torre and several other agents entered the premises at 11:15 p.m. All of the agents were wearing clothing that identified themselves as police officers.

12. At this time agent De La Torre noted that there were approximately sixty (60) patrons in the premises. Some of the patrons had drinks in front of them. De La Torre noted that some of the drinks were clear bottles that contained an amber colored liquid in what appeared to possibly be beer bottles. Agent De La Torre was not able to identify any labels from any of the bottles he observed.

13. Upon re-entry De La Torre observed a female, Ms. Fatouh, grab the bottle of Skyy vodka (Exhibit 3) from the shelf behind the fixed bar and place it under the bar where it was not visible. When De La Torre asked Ms. Fatouh why she did that, she said she was asked to do so by the manager, subsequently identified as Yannis Albana.

14. Manager Albana was seated at a table with other patrons. The table had two drinks on it that appeared to be the same drinks that were poured earlier by bartender Navaro. [Finding of Fact 7]. Also on the table was an ice bucket that contained a bottle labeled Ciroc Peach Vodka that was approximately half filled. See Exhibits 7A and 7B.

15. De La Torre questioned manager Albana about the distilled spirits being inside the premises. Albana said that the distilled spirits were for personal consumption. Albana told De La Torre that the two glasses depicted in Exhibit 23 contained vodka.

16. A total of fourteen (14) distilled spirit bottles were discovered during a search of the premises. They are as follows:

Count 1A – Ciroc Peach Vodka In ice bucket at table of manager Albana.
Approximately half full. Exhibit 8, 7A and 7B.

Count 1B – Skyy Vodka On shelf behind fixed bar. Less than half full.
Exhibits 3 and 4.

Count 1C – Skyy Vodka This is an empty bottle found under the fixed bar in an empty Coca Cola carton. Exhibits 17A and 13.

Count 1D – Prestige Vodka Found on a chair in the office. The bottle is sealed, not opened. Exhibits 10C, 9A and 9B.

Count 1E – La Cadena Vodka Found in office / store room. Pour spout attached. Contains liquid. Exhibits 11A, 11B and 12.

Count 1F – Skyy Vodka Found on a chair in the office. Open but nearly full. Exhibits 10A, 9A and 9B.

Count 1G – Skyy Vodka Found on a chair in the office. Nearly empty. Exhibits 10B, 9A and 9B.

Count 1H – Grey Goose Vodka Found under the fixed bar. The bottle was empty. Exhibits 15 and 14.

Count 1I – Skyy Vodka Found under the fixed bar. The bottle was empty. Exhibits 17B and 16A and 16B.

Count 1J – Hendricks Gin Found under the fixed bar. Contains liquid. Exhibits 5, 16A and 16B.

Count 1K – Sauza Tequila Found in refrigerator with pour spout attached. One fourth full. Exhibits 19 and 18.

Count 1L – La Cadena Rum Found on shelf behind fixed bar. The bottle is sealed, not opened. Exhibit 21B.

Count 1M – La Cadena Rum Found on shelf behind fixed bar. The bottle is sealed, not opened. Exhibit 21C.

Count 1N – Tres Diablos Tequila Found on shelf behind fixed bar. The bottle is sealed, not opened. Exhibit 21A.

17. Albana told De La Torre that there was no disc jockey and that the equipment was his.

18. 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 25607 provides that except as provided in subdivisions (b) and (c), it is unlawful for any person or licensee to have upon any premises for which a license has been issued any alcoholic beverages other than the alcoholic beverage which the licensee is authorized to sell at the premises under his or her license. It shall be presumed that all alcoholic beverages found or located upon premises for which licenses have been issued belong to the person or persons to whom the licenses were issued. Every person violating the provisions of this section is guilty of a misdemeanor. The department may seize any alcoholic beverages found in violation of this section.
4. 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.
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 January 18, 2018, Respondent did possess upon the licensed premises alcoholic beverages which the Respondent was not licensed to sell.
6. Four of the bottles found on the premises were sealed and never opened. One was found in the office (Exhibit 1D) and three were found on the display shelf of the wall behind the fixed bar (Exhibits 1L, 1M and 1N). It is undisputed that these four sealed bottles contained exactly what the labels stated, vodka, rum and tequila. All four are distilled spirits that Respondent is prohibited from possessing on the premises.
7. Seven of the bottles did contain varying amounts of liquid (Exhibits 1A, 1B, 1E, 1F, 1G, 1J and 1K). Although they were seized and booked into evidence, none of these items were tested to determine if in fact they were distilled spirits. However, given the locations where they were found, in the office and on the display shelf wall behind the fixed bar and some having pour spouts attached, a preponderance of the evidence presented at the hearing points to the fact that these bottles contained what their labels stated, vodka, rum and tequila.

8. De La Torre testified that manager Albana told him that the distilled spirits were for personal consumption. Albana also told him that the two drinks on the table where he was seated contained vodka. Samples were taken of those two drinks however the samples were never submitted for testing.

9. Exhibits 1C, 1H and 1I are empty bottles. It is not a violation to possess empty bottles.

10. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on January 18, 2018, Respondent permitted a disc jockey to perform and play music inside the premises in violation of the conditions on its license and, therefore, in violation of section 23804. (Findings of Fact ¶ 9.)

11. De La Torre observed the disc jockey wearing headphones and using a keyboard and lap top computer to play the music. The disc jockey was using this equipment to transition from one song to the next, keeping the music continuous, without interruption. The equipment used by the disc jockey (Exhibits 6A, 6B, 6C and 6D) was professional in appearance, not that of an amateur. There was no evidence that the music was playing or that there was a disc jockey present playing music when the agents entered at 11:15 p.m.

12. Cause for suspension or revocation of the Respondent's license does not exist under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on January 18, 2018, Respondent permitted the sales, service and consumption of alcoholic beverages after 11:00 p.m. in violation of the conditions on its license and, therefore, in violation of section 23804.

13. Agent De La Torre and the other agents did enter the premises at 11:15 p.m. on January 18, 2018, a Thursday. However, there was no testimony from De La Torre that he observed sales of alcoholic beverages after 11:00 p.m. There was no testimony from De La Torre that he observed the service of alcoholic beverages after 11:00 p.m. Lastly, there was no testimony from De La Torre that he observed the consumption of alcoholic beverages after 11:00 p.m.

14. De La Torre did not identify any label of any bottle that was located in front of any patron. None of the bottles or drinks in front of the patrons were seized. No photos were taken of the patrons and what they did possess.

15. Exhibit 23 is the photo of the items in front of manager Albana. Although a sample was taken into custody, it was never submitted for testing. In any event, there is no

evidence that there was any sales, service or consumption of alcoholic beverages after 11:00 p.m.

PENALTY

The Department requested that the Respondent's license be suspended for a period of 20 days. The Respondent more or less conceded to the sealed unopened bottles being distilled spirits on the premises, but objected to the others because they were never proven to be distilled spirits. Respondent argued that the Department did not prove the condition violations. Respondent did not recommend a penalty in the event that the accusation was sustained.

Respondent has been licensed since 2013 with no history of prior Departmental discipline. That is a mitigating factor. In aggravation we have a citizen complaint and numerous bottles of distilled spirits. Applying discretion to the totality of the evidence presented at the hearing, the penalty recommended herein complies with Rule 144². Reasonable minds may differ as to penalties. In this case a more thorough investigation and presentation of evidence would have resulted in a more severe penalty recommendation.

ORDER

Counts 1A, 1C, 1D, 1E, 1F, 1G, 1J, 1K, 1L, 1M and 1N are sustained.

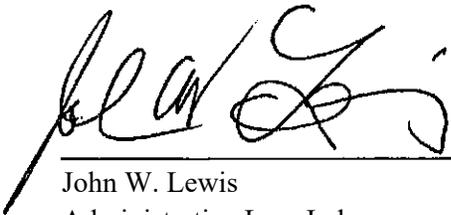
Counts 1C, 1H and 1I are dismissed.

Count 2 is dismissed.

Count 3 is sustained.

Respondent's on-sale beer and wine public premises license is hereby suspended for 15 days.

Dated: September 10, 2018



John W. Lewis
Administrative Law Judge

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

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Jacob A. Applegate</u>
Date: <u>1/13/18</u>