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

AB-9808
File: 48-543484; Reg: 18087324

THE CARPENTER GROUP, LLC,
dba Page 71 Lounge
11916 Ventura Boulevard
Studio City, CA 91604-2606,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 7, 2019
Los Angeles, CA

ISSUED NOVEMBER 19, 2019

Appearances: *Appellant:* Roger Jon Diamond, as counsel for The Carpenter Group, LLC,

Respondent: Joseph J. Scoleri III, as counsel for the Department of Alcoholic Beverage Control.

OPINION

The Carpenter Group, LLC, doing business as Page 71 Lounge, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 25 days (with 5 days conditionally stayed for a period of one year provided no further cause for discipline arises during that time) because appellant's employee permitted entertainment to be audible beyond the area under the control of the licensee, in violation of a condition on the license and Business and Professions Code section

[1]The decision of the Department under Government Code section 11517(c), dated May 14, 2019, is set forth in the appendix.

23804.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on June 24, 2014. There are two prior instances of departmental discipline against the license.

On August 3, 2018, the Department instituted a five-count accusation against appellant charging that: (1) appellant's employee permitted entertainment to be audible beyond the area under the control of the licensee, in violation of a condition on the license and Business and Professions Code section 23804 [counts 1-4]; and (2) appellant's employee sold alcohol to an obviously intoxicated person, in violation of Business and Professions Code section 25602, subdivision (a) [count 5]. Count 5 was subsequently dismissed and is not part of this appeal.

The condition at issue in the sustained counts states:

> Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 3/26/14.

(Petition for Conditional License, Condition #6; Exh. 4.)

At the administrative hearing held on October 30, 2018, documentary evidence was received and testimony concerning the violations charged was presented by Los Angeles Police Department (LAPD) Officer Gabriel Subia; Thomas Nash, manager of the licensed premises; and Mario Guddemi, one of the owners of appellant Carpenter Group, LLC.

Testimony established that on four separate occasions LAPD Ofcr. Subia visited the licensed premises to investigate complaints about noise.

Count 1: On March 9, 2018, Ofcr. Subia heard music emanating from the

premises from a distance of approximately 40 to 50 feet. (RT at p. 22.)

Count 2: On March 23, 2018, Ofcr. Subia heard music coming from the premises again from a distance of approximately 40 to 50 feet. (RT at p. 29.)

Count 3: On April 6, 2018, Ofcr. Subia heard music originating from the premises from a distance of approximately 100 feet. (RT at p. 30.) He and another officer could also hear music coming from the premises while standing on the sidewalk on the opposite side of Ventura Boulevard from the licensed premises. (RT at p. 31.)

Count 4: On April 27, 2018, Ofcr. Subia heard music coming from the premises again from a distance of approximately 40 to 50 feet. (RT at p. 37.)

The administrative law judge (ALJ) issued a proposed decision on November 29, 2018, sustaining counts 1 through 4, dismissing count 5, and recommending a 25-day suspension with 5 days stayed.

The Director initially declined to adopt the proposed decision and issued a Notice Pursuant to Government Code section 11517(c)(2)(E)(i) on February 11, 2019, advising the parties of their right to submit written argument to the Department, including, but not limited to three specific questions:

> 1. Is the Department authorized to consider as an aggravating factor prior violations of conditions, statutes, or regulations that are different from those at issue in an accusation pending before the Department?
>
> 2. If the answer to Question 1 is in the affirmative, is it reasonable for the Department to do so in this case?
>
> 3. What is the appropriate level of discipline in this matter?

Counsel for the Department and the appellant both submitted written argument. Thereafter, on May 14, 2019, the Director issued his Decision Under Government Code

section 11517(c) sustaining counts 1 through 4, dismissing count 5, and recommending a 25-day suspension with 5 days conditionally stayed for one year (provided no further cause for discipline arises during that time).

Appellant then filed a timely appeal raising the following issues: (1) the Department's finding that condition #6 was violated is not supported by substantial evidence, and (2) the penalty is excessive.[2]

DISCUSSION

I

ISSUE CONCERNING SUBSTANTIAL EVIDENCE

Appellant contends the Department's finding that condition #6 was violated is not supported by substantial evidence. (AOB at pp. 12-13.) It maintains:

> The record established the purpose of Condition No. 6 was to protect the residents to the south, not pedestrians walking on Ventura Boulevard to the north. Obviously the condition should only be enforced if the purpose of the condition is being furthered by such enforcement.

(*Id.* at p. 12.)

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:

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[2] Appellant also raised numerous procedural issues for the first time at oral argument. Since these issues were neither raised at the administrative hearing nor in appellant's opening brief, this Board must consider these issues waived. (*Paulus v. Bob Lynch Ford, Inc*. (2006) 139 Cal.App.4th 659, 685 [43 Cal.Rptr.3d 148]; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-766 [60 Cal.Rptr.2d 770]; see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444 & § 616, pp. 647- 648.)

Raising new issues at such a late date, with no opportunity for the Department to prepare a response, is unfair to both the Department and this Board. We cannot consider new issues raised so belatedly.

> 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, 112 [28 Cal.Rptr.74].)

Therefore, the Appeals Board examines the issue of substantial evidence when raised by an appellant, in light of the whole record, to determine 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.)

Appellant signed a Petition for Conditional License agreeing to seven conditions on its license on May 23, 2014. Condition #6 states: "Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 3/26/14." (Exh. 4.) Appellant maintains the condition was not violated because there was no evidence presented that the music was audible in the residential area behind the premises — only on the busy street in front of the premises. (AOB at p. 12.) Appellant offers no authority, however, for its position that the music need only be audible in a particular location in order to violate the condition.[3]

In the decision, the Department identifies evidence supporting the violation, rebutting appellant's theory. Appellant's contention that the music was not audible in the residential area is clearly acknowledged and identified as irrelevant:

> 8. The petition for conditional license clearly states that the conditions were added to the license to protect the quiet enjoyment of nearby residences. There is no evidence that the music was audible in the residential area. **Nevertheless, the condition applies to the entire License Premises, not just the south side of the Licensed Premises where the residences are located.** Ofcr. Subia's testimony established that , on March 9, 2018, March 23, 2018, April 6, 2018, and April 27. 2018, music from the Licensed Premises was audible on the public sidewalk up the street from [the] Licensed Premises.

(Conclusions of Law, ¶ 8, emphasis added.)

The condition in question, "[e]ntertainment provided shall not be audible beyond the area under control of the licensee," is found in many of the licenses issued by the Department, and is no stranger to this Board. (See, e.g., *Lakanukis Enterprises, Inc.* (2018) AB-9681; *Wayde Eldon Troxell* (2017) AB-9596; Big *Billy, Inc.* (2010) AB-9006;

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[3] This Board is powerless to modify an existing condition on a license. Should appellant wish to challenge condition #6 (and request that it only apply to music which is audible in the residential area behind the premises) it should petition the Department to amend or remove the condition.

Pittera (1999) AB-7170; *Fahime, Martin, etc.* (1997) AB-6650; *Wichman* (1997) AB-6637.) The condition is straightforward and unambiguous — if the sound of entertainment reaches beyond the area under the control of the premises, the condition is violated.

The decision clearly establishes the violation of condition #6 — based on substantial evidence in the record that music emanating from the premises was audible up the street from the establishment on four separate occasions. The Board may not re-weigh the evidence to make contrary findings on this point.

II

ISSUE CONCERNING PENALTY

Appellant contends the penalty is excessive because this is the first time appellant has violated this specific condition. (AOB at pp. 11-12.)

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].)

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:**
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> 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 Director addresses the issue of penalty at length:

> PENALTY
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> The Department requested that the Respondent’s license be suspended for 30 days. In making this request, the Department noted that the Respondent has two prior disciplinary actions against it, both for violating

the conditions attached to its license (albeit different conditions than the one at issue here). The Respondent argued that, if the accusation were not dismissed, a stayed suspension along with a requirement to install a second door would be appropriate.

The prior disciplinary actions, as noted above, involved violations of different license conditions than that at issue in this matter. Because of this, Respondent argued that the Department is without authority to aggravate discipline here because there has been no prior violation of the specific condition at issue. In contrast, the Department noted that Rule 144[fn.] provides for aggravation of discipline based upon, among other things, a licensee's prior disciplinary history and a continuing course or pattern of conduct. The Rule does not specify that the prior discipline or the continuing course or pattern must be for the exact same conduct before an aggravated penalty may be imposed. Whether or not it is appropriate in any given case to aggravate the penalty based upon these factors requires consideration of the totality of the circumstances, an evaluation of whether it is reasonable to impose a higher level of discipline, and, if so, what that aggravated discipline should be. Such factors to consider include the nature of the prior violations, the similarity to the current coalitionist, and closeness in time between violations.

Rule 144 provides that, for a first-time violation of conditions, a 15-day suspension with 5 days stayed is appropriate. The Rule also specifies that discipline may be aggravated based upon various factors, as discussed above. The "Policy Statement" in the Rule provides, among other things, that the goal of discipline is to encourage and reinforce voluntary compliance with the law. One of the purposes for aggravating a penalty is in furtherance of progressive discipline, with the ultimate goal of achieving this voluntary compliance.

Applying these principles to this case, several factors support aggravation of the discipline here. The license was issued in 2014 pursuant to a petition for conditional license. In 2015, Respondent violated two conditions on the license. In 2016, Respondent again violated a condition on the license (notably, one of the same conditions previously violated). Now, two years after the second condition violation, and less than four years after the license was issued, Respondent is again in violation of a condition on its license. That is three condition violations within approximately four years, and within a relatively short amount of time after the license was first issued. In accordance with Rule 144, this is evidence of both prior disciplinary history and a continuing course or pattern of conduct. In addition, this is strong evidence that Respondent does not take its responsibility to comply with all of the conditions on its license seriously and has not taken the lesson from the prior discipline imposed for not doing so.

> Given that this is the third condition violation case filed against the Respondent, an aggravated penalty is warranted. Conversely, the violations appear to be minor—the officer indicated that the noise was not particularly loud and there is no evidence that the noise was audible in the residential area. Balancing all of these considerations, the penalty herein complies with Rule 144.

(Decision at pp. 6-7.)

The Board may not disturb a penalty order unless it is so clearly excessive that any reasonable person would find it to be an abuse of discretion in light of all the circumstances. "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].)

Appellant states the penalty is "harsh" (AOB at p. 12), but its disagreement with the penalty imposed does not mean the Department abused its discretion. 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 penalty here is within the bounds of the Department's discretion. "[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. [Citations.]" (*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 — and substitute its own judgment — when, as here, the penalty is reasonable and the underlying decision is supported by substantial evidence.

ORDER

The decision of the Department is affirmed.[4]

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

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

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST: The Carpenter Group LLC dba Page 71 Lounge 11916 Ventura Blvd. Studio City, California 91604-2606 Respondent(s).	**File No.: 48-543484** **Reg. No.: 18087324**

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on May 14, 2019, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on October 30, 2018, before Administrative Law Judge Matthew G. Ainley, and the written argument of the parties, and good cause appearing, the following decision is hereby adopted:

The Department seeks to discipline the Respondent's license on the grounds that on March 9, 2018, March 23, 2018, April 6, 2018, and April 27, 2018, the Respondent failed to comply with a condition attached to its license in violation of Business and Professions Code section 23804.[1] The Department also seeks to discipline the Respondent's license on the grounds that, on or about April 28, 2018, the Respondent, through its agent or employee, sold, furnished, or gave, or caused to be sold, furnished, or given, an alcoholic beverage to Tyler Johnson, a person who was obviously intoxicated, in violation of Business and Professions Code section 25602(a). (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 30, 2018. On January 10, 2019, the Director of the Department rejected the proposed decision of the Administrative Law Judge.

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

FINDINGS OF FACT

1. The Department filed the accusation on August 3, 2018.

2. The Department issued a type 48, on-sale general public premises license to the Respondent for the above-described location on June 24, 2014 (the Licensed Premises).

3. The Respondent's license has been the subject of the following discipline:

Date Filed	Reg. No.	Violation	Penalty
8/19/2016	16084613	BP §23804	15-day susp. w/5 days stayed
2/26/2016	16083869	BP §23804	15-day susp. w/5 days stayed

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

4. On May 23, 2014, the Respondent signed a petition for conditional license. (Exhibit 4.) One of the conditions contained therein provides that

> "Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 date 3/26/14."

The petition for conditional license states that the conditions were imposed to protect nearby residents' quiet enjoyment of their property.

5. On March 9, 2018 at approximately 10:30 p.m., Ofcr. Gabriel Subia, LAPD, went to the Licensed Premises. He and his partners met up at the corner of Ventura Blvd. and Carpenter Ave. They began walking toward the Licensed Premises using the public sidewalk. Ofcr. Subia heard music emanating from the Licensed Premises. At that time of day, there was not much traffic. Ofcr. Subia testified that if traffic had been heavier, he would not have been able to hear the music. Ofcr. Subia entered the Licensed Premises. The same music he had been hearing was playing inside.

6. On March 23, 2018, Ofcr. Subia and his partners were dropped off at the corner of Ventura Blvd. and Carpenter Ave. It was between 11:00 and 11:30 p.m., and traffic was light. Ofcr. Subia heard music emanating from the Licensed Premises. Ofcr. Subia described the music as an ambient sound that was just loud enough for him to hear it. Ofcr. Subia entered the Licensed Premises and heard the same music playing inside.

7. On April 6, 2018, Ofcr. Subia and his partners returned to the intersection of Ventura Blvd. and Carpenter Ave. Approximately 100 feet from the Licensed Premises, he was able to hear music emanating from the Licensed Premises, particularly the loud thump of bass. It was louder than on previous evenings, but not so loud that they had to raise their voices. Ofcr. Subia

walked toward the Licensed Premises and entered. Unlike on previous visits, the front door had been propped open. The same music was playing inside the Licensed Premises.

8. Ofcr. Subia walked through the Licensed Premises and out on to the patio. He could hear the music while on the patio. The music was muffled when the patio door was closed, but could be heard clearly when it was opened. Various residences are located on the hillside south of the patio, with the closest being approximately 60 feet away.

9. On April 27, 2018, Ofcr. Subia and his partners gathered at the intersection of Ventura Blvd. and Carpenter Ave. As they approached the Licensed Premises, Ofcr. Subia heard the thump of bass from dance music being played inside the Licensed Premises. The music was audible from a distance of 40 to 50 feet, although it was not loud enough to interfere with normal conversation. Ofcr. Subia entered the Licensed Premises and heard the same music playing.

10. Ofcr. Subia noticed Taylor Johnson sitting in a booth with some other people. Various bottles and glasses were on the table in front of them. Johnson was slouched over with his arm around one of the females in the group. Ofcr. Subia opined that Johnson's "composure seemed to be impaired." The other people at the table left, leaving Johnson by himself. Johnson was unable to sit up or maintain good composure.

11. Johnson got up and walked to the restroom. His gait was unsteady and he walked from side to side. He had bloodshot, watery eyes, and a flushed face. He bumped into other patrons and almost bumped into one of Ofcr. Subia's partners.

12. Johnson returned to the booth and sat down, slouching as he did so. Thomas Nash, the on-duty manager, came to the table and began to clean up. Ofcr. Subia did not hear Johnson and Nash speak to one another, although he was told by his partners that they did so. Ofcr. Subia's partners also told him that Nash said that Johnson needed some water. Ofcr. Subia opined that Nash must have concluded that Johnson needed water because he was intoxicated and needed hydration. Nash denied making any such statement. Nash returned to the bar counter.

13. Johnson remained at the booth for a few more minutes, then got up and walked, with an unsteady gait, toward the center of the room. He placed his arms around two women, both of whom seemed uncomfortable. Johnson then made his way to the bar counter.

14. Johnson placed an arm on the bar counter, although Ofcr. Subia could not tell if he did this to help him stand or not. Nash approached and asked Johnson what he wanted. Johnson ordered six shots of Patron. Nash pulled out six glasses and filled them up with tequila.[2] This took place in the early morning hours of April 28, 2018. Johnson paid for the drinks. He drank one glass of tequila, then tried to share the remaining glasses with other patrons. No one accepted.

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[2] Ofcr. Subia did not describe any symptoms of intoxication during the time Johnson was standing at the bar counter. Nash testified that Johnson was not stumbling, was not mumbling, and his eyes were not glassy.

15. Johnson returned to the bar counter and spoke to a man with whom he had been sitting earlier. He appeared to have a hard time walking and, when he spoke to his companion, slurred his words. Eventually, Johnson exited.

16. A DJ plays music inside the Licensed Premises at night. Both Nash and Mario Guddemi, one of the Respondent's owners, opined that music could not be heard on the sidewalk as described by Ofcr. Subia.

17. There is a glass door between the DJ and patio. The glass door is thick and is designed to keep noise in. Because music can be heard when the door to the patio is open, the Respondent hired an architect. The architect proposed installing a second door inside the Licensed Premises to trap the sound. (Exhibit A.) The Respondent intends to construct this inner door once the necessary permits have been obtained to prevent music from escaping through the back door when it is opened.

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 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.

4. Section 25602(a) provides that "[e]very 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.

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 March 9, 2018, March 23, 2018, April 6, 2018, and April 27, 2018, entertainment (music) provided by the Respondent was audible beyond the area under the control of the licensee in violation of a condition on its license in violation of section 23804. (Findings of Fact ¶¶ 4-9.)

6. The petition for conditional license clearly provides that entertainment shall not be audible beyond the area under the control of the licensee as defined on the ABC-257 dated March 26, 2014. Yet the Department did not introduce the ABC-257 into evidence at the hearing. Accordingly, it is impossible to determine the area beyond which entertainment cannot be audible.

7. Normally, the failure to introduce such a key document would be fatal to the Department's case. In this case, however, the testimony of Ofcr. Gabriel Subia indicated that he could hear music emanating from the Licensed Premises while he was located on the public sidewalk. It is reasonable to infer that a public sidewalk is not part of the Licensed Premises. It is not reasonable to make the same inference about the patio.

8. The petition for conditional license clearly states that the conditions were added to the license to protect the quiet enjoyment of nearby residences. There is no evidence that the music was audible in the residential area. Nevertheless, the condition applies to the entire Licensed Premises, not just the south side of the Licensed Premises where the residences are located. Ofcr. Subia's testimony established that, on March 9, 2018, March 23, 2018, April 6, 2018, and April 27, 2018, music from the Licensed Premises was audible on the public sidewalk up the street from Licensed Premises.

9. Cause for suspension or revocation of the Respondents' license does **not** exist for the violation of Business and Professions Code section 25602(a) alleged in count 5.

10. There is no evidence that Thomas Nash or any of the Respondent's other employees observed the symptoms described by Ofcr. Subia from the moment he first saw Johnson until he returned to the table from the bathroom. (Findings of Fact ¶¶ 10-11.) There also is no evidence that Nash or any of the Respondent's other employees observed the symptoms described by Ofcr. Subia from the moment Johnson got up from the table and went to the bar counter. (Finding of Fact ¶ 13.)

11. Ofcr. Subia's testimony that Nash said that Johnson needed some water (Finding of Fact ¶ 12) is hearsay. Under Government Code section 11513(d), hearsay cannot be used as the basis for a finding unless supported by other evidence. There is no such evidence in this case, particularly in light of Nash's testimony in which he denied making such a statement. (Finding of Fact ¶ 12.) Accordingly, neither this portion of Ofcr. Subia's testimony nor his opinion derived therefrom help establish the violation.

12. Finally, Ofcr. Subia did not describe any symptoms Johnson displayed while he was at the bar counter, either before he was served the tequila or before he consumed it. All other symptoms described by Ofcr. Subia occurred after Nash served the tequila to him. (Findings of

Fact ¶¶ 14-15.) In short, there is no evidence that Nash observed any of the symptoms displayed by Johnson before serving him an alcoholic beverage.

PENALTY

The Department requested that the Respondent's license be suspended for 30 days. In making this request, the Department noted that the Respondent has two prior disciplinary actions against it, both for violating the conditions attached to its license (albeit different conditions than the one at issue here). The Respondent argued that, if the accusation were not dismissed, a stayed suspension along with a requirement to install a second door would be appropriate.

The prior disciplinary actions, as noted above, involved violations of different license conditions than that at issue in this matter. Because of this, Respondent argued that the Department is without authority to aggravate discipline here because there has been no prior violation of the specific condition at issue. In contrast, the Department noted that Rule 144[3] provides for aggravation of discipline based upon, among other things, a licensee's prior disciplinary history and a continuing course or pattern of conduct. The Rule does not specify that the prior discipline or the continuing course or pattern must be for the exact same conduct before an aggravated penalty may be imposed. Whether or not it is appropriate in any given case to aggravate the penalty based upon these factors requires consideration of the totality of the circumstances, an evaluation of whether it is reasonable to impose a higher level of discipline, and, if so, what that aggravated discipline should be. Such factors to consider include the nature of the prior violations, the similarity to the current violations, and closeness in time between violations.

Rule 144 provides that, for a first-time violation of conditions, a 15-day suspension with 5 days stayed is appropriate. The Rule also specifies that discipline may be aggravated based upon various factors, as discussed above. The "Policy Statement" in the Rule provides, among other things, that the goal of discipline is to encourage and reinforce voluntary compliance with the law. One of the purposes for aggravating a penalty is in furtherance of progressive discipline, with the ultimate goal of achieving this voluntary compliance.

Applying these principles to this case, several factors support aggravation of the discipline here. The license was issued in 2014 pursuant to a petition for conditional license. In 2015, Respondent violated two conditions on the license. In 2016, Respondent again violated a condition on the license (notably, one of the same conditions previously violated). Now, two years after the second condition violation, and less than four years after the license was issued, Respondent is again in violation of a condition on its license. That is three condition violations within approximately four years, and within a relatively short amount of time after the license was first issued. In accordance with Rule 144, this is evidence of both prior disciplinary history and a continuing course or pattern of conduct. In addition, this is strong evidence that

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

Respondent does not take its responsibility to comply with all of the conditions on its license seriously and has not taken the lesson from the prior discipline imposed for not doing so.

Given that this is the third condition violation case filed against the Respondent, an aggravated penalty is warranted. Conversely, the violations appear to be minor—the officer indicated that the noise was not particularly loud and there is no evidence that the noise was audible in the residential area. Balancing all of these considerations, the penalty herein complies with Rule 144.

ORDER

Counts 1, 2, 3, and 4 are sustained. With respect to these violations, the Respondent's on-sale general public premises license is hereby suspended for a period of 25 days, with execution of 5 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his or her discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Count 5 is dismissed.

Sacramento, California

Dated: May 14, 2019

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.