

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

AB-9829

File: 47-369810; Reg: 18088259

ZARCO HOTELS, INC.,
dba Hollywood Hotel
1160 North Vermont Avenue
Los Angeles, CA 90029,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 6, 2020
Los Angeles, CA

ISSUED FEBRUARY 18, 2020

Appearances: *Appellant:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Zarco Hotels, Inc.,

Respondent: Sean Klein, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Zarco Hotels, Inc., doing business as Hollywood Hotel, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15 days for failing to operate as a bona fide eating establishment while serving alcoholic beverages other than beer, in violation of Business and Professions Code sections 23038 and 23396, and because it failed to permit the Department to inspect its records, in violation of Business and Professions Code section 25616.

¹ The decision of the Department, dated July 16, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on October 18, 2001. There is one prior instance of discipline against the license.

On November 15, 2018, the Department instituted a three-count accusation charging that appellant served alcohol while failing to operate as a bona fide eating establishment, and failed to permit the inspection of its records.

At the administrative hearing held on March 19, 2019, documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Kayla Bertsch and Duc Hoang. Kian Zarrinnam, an officer of Zarco Hotels, Inc., testified on behalf of appellant.

Count 1:

Testimony established that Department agents entered the licensed premises — a boutique hotel — on January 19, 2018, at approximately 7:40 p.m. They went past a closed bar and proceeded to a meeting room called the Pickford Salon which contained tables, couches, a stage with comedians performing on it, and a portable bar. Agent Hoang ordered and was served a Jack Daniels whiskey and Coke. He asked the bartender if they had a menu or food service and the bartender said that the kitchen was closed.

Count 2:

On April 5, 2018, Department agents returned to the licensed premises at approximately 6:30 p.m. They went to the bar where Agent Hoang took a seat at a table. Agent Bertsch approached the bartender. She ordered and was served a vodka and cranberry juice. She asked the bartender for a menu but was told they did not have any food.

On June 7, 2018, the agents returned to the licensed premises and spoke to the food and beverage manager. He indicated they did not have lunch or dinner service, they did not have a menu, and the kitchen was undergoing a remodel. An inspection of the kitchen area by the agents revealed no food. Kian Zarrinnam testified the premises has always had a menu and submitted food and beverage totals for the dates in question.

Count 3:

On March 27, 2018, Agent Bertsch sent a notice to appellant to produce records, with a deadline of ten days. (Exh. 3.) The Department did not receive any records in response to this request. Kian Zarrinnam testified that he called Agent Bertsch four times to discuss the notice, and left messages each time, but never received a return call. The agent did not recall receiving these messages and, as of the date of the administrative hearing (March 19, 2019) had not received a response from appellant.

The administrative law judge (ALJ) issued his proposed decision on April 4, 2019, sustaining all three counts of the accusation and recommending, as to counts one and two, the license be suspended for 15 days (or indefinitely thereafter until appellant establishes that it is in compliance with the meal requirement). As to count three, the ALJ recommended that the license be suspended for 15 days (or indefinitely thereafter until appellant provides the requested records). The suspensions are to run concurrently.

The Department adopted the proposed decision on June 18, 2019 and a certificate of decision was issued on July 16, 2019.

Appellant then filed a timely appeal raising the following issues: (1) the ALJ

erred by holding that section 23038 requires that food be made available during “normal meal times” and abused his discretion by applying this standard; and (2) the ALJ abused his discretion by failing to consider evidence of mitigation and by imposing an excessive penalty.

DISCUSSION

I

ISSUE CONCERNING SERVICE OF ALCOHOL

Appellant contends the ALJ erred by holding that § 23038 requires that food be made available during “normal meal times” and abused his discretion by applying this standard. (AOB at pp. 7-10.)

Business and Professions Code section 23038 provides:

“Bona fide public eating place” means a place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods which may be required for ordinary meals, the kitchen of which must be kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health. “Meals” means the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement. “Guests” shall mean persons who, during the hours when meals are regularly served therein, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein. Nothing in this section, however, shall be construed to require that any food be sold or purchased with any beverage.

Business and Professions Code section 23396 provides in pertinent part:

[. . .] No alcoholic beverages, other than beers, may be sold or served in any bona fide public eating place for which an on-sale license has been issued unless the premises comply with the requirements prescribed in section 23038

Case law also provides:

A restaurant is not bona fide if it is created or operated as a mere subterfuge in order to obtain the right to sell liquor. There must not only be equipment, supplies, and personnel appropriate to a restaurant, together with a real offer or holding out to sell food whenever the premises are open for business, but there must also be actual and substantial sales of food.

(*Covert v. State Board of Equalization* (1946) 29 Cal.2d125, 129 [173 P.2d 545, 547].)

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, 112 [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*, 212 Cal.App.2d at p. 114.)

The ALJ made the following findings on this issue:

3. Section 23396 provides that no alcoholic beverages, other than beer, may be sold or served in any bona fide public eating place for which an on-sale license has been issued unless the premises complies with the requirements prescribed in Section 23038, 23038.1, or 24045.1.
4. Section 23038 is a definitional section which provides that a bona fide public eating place is one which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking and an assortment of foods which may be required for ordinary meals, the kitchen of which must be kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health.

This section goes on to define meals as the usual assortment of foods commonly ordered at various hours of the day and provides that the service of such food and victuals as sandwiches or salads only shall not be deemed compliance with this requirement. Finally, it defines guests as people who, during the hours when meals are regularly served therein, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein.

¶ . . . ¶

6. 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 or about January 19, 2018 and April 5, 2018, the Respondent, the holder of an on-sale general

eating place license, served distilled spirits, whiskey and vodka, respectively, at a time when the Licensed Premises was not regularly and in a bona fide manner used and kept open for the serving of meals to guests for consumption in violation of section 23038 and 23396. (Findings of Fact ¶¶ 4-5 & 7-10.)

7. With respect to count 1, on January 19, 2018 a Department agent ordered a Jack Daniels whiskey and Coke at the Licensed Premises, which he was served. He attempted to order food, but was told that none was available. With respect to count 2, on April 5, 2018 a Department agent ordered and was served a vodka and cranberry juice, which she was served. She attempted to order food, but was told that none was available.

8. The Respondent argued that it is a hotel, not a restaurant, and that food and beverage service is incidental to its business of providing rooms. In making this argument, the Respondent noted that it is a small operation.

There are clear differences between the operation of a hotel, even one with a restaurant inside it, and the operation of a restaurant. There are also clear differences between a small hotel and a large resort. Nonetheless, the holder of an on-sale general eating place license must comply with the terms of section 23038. This does not mean that food must be served with every drink or that an extensive menu be available, but rather that food be available during normal meal times. The evidence in this case established that no food at all was available during dinnertime.

(Conclusions of Law, ¶¶ 3-8.)

Appellant complains the ALJ abused his discretion by finding a violation when food was not available during “normal meal times,” even though no specified hours are attached as a condition on its license during which food must be served. Appellant declares, “[t]his new requirement that a bona fide eating place conform to the Department’s notion of when particular mealtimes may be is unsupported by statute or caselaw.” (AOB at p. 7.)

Appellant ignores the language of section 23038 which specifically defines meals and guests:

[. . .] “Meals” means the usual assortment of foods commonly ordered at

various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement. “Guests” shall mean persons who, **during the hours when meals are regularly served therein**, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein. . . .

(Bus. & Prof. Code section 23038.) The ALJ has simply used the language of the statute. He did not create a new standard. Rather, the ALJ found that alcohol (other than beer) was being served during the early evening hours but that the premises was not serving the meals commonly expected at that time. This clearly violates the express dictate of section 23396 which provides:

[. . .] No alcoholic beverages, other than beers, may be sold or served in any bona fide public eating place for which an on-sale license has been issued unless the premises comply with the requirements prescribed in section 23038

We see no error or abuse of discretion.

II

ISSUE CONCERNING PENALTY

Appellant contends the ALJ abused his discretion by failing to consider evidence of mitigation — specifically that the appellant attempted to reach the Department agent but did not receive a return call — and by imposing an excessive penalty. (AOB at p. 10.)

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* (1966) 240 Cal.App.2d 659, 666-667 [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. (*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 addresses the issue of penalty:

PENALTY

With respect to counts 1 and 2, the Department requested that the Respondent's license be suspended for a period of 15 days and indefinitely thereafter until food service is provided and evidence of such is presented to the Department. With respect to count 3, the Department requested that the Respondent's licence be suspended for a period of 15 days and indefinitely thereafter until the requested records are produced. The Respondent did not recommend a penalty in the event that the accusation were sustained.

An indefinite suspension is typically used to ensure compliance. In the present case, the Respondent has demonstrated a general unwillingness to produce records to the Department except on its own terms. Accordingly, an indefinite suspension is warranted. Cases involving the failure to provide food can be broken down into tow broad categories—licensees who do not have the capability to provide food (e.g., have no kitchen facilities) and licensees who have the capability but chose not to use it. This case falls in to the second category. As with the failure to produce records, an indefinite suspension is appropriate to ensure compliance.

The penalty recommended herein complies with rule 144.^[fn.]

(Decision at p. 6.)

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, supra* at p. 594.)

Appellant claims that the decision fails to take into account significant evidence of mitigation such as its discipline-free history, and appellant’s efforts to reach Agent Bertsch. However, the penalty imposed is within the bounds of the Department’s discretion, regardless of mitigating evidence, and is amply explained in the decision. Simply because the appellant believed the records to be confidential and thus would have preferred for the agent to view them at the premises does not release it from compliance with Business and Professions Code sections 25753² and 25616.³

Appellant’s 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. “[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 not empowered to reach a contrary conclusion from that of the Department — and substitute its own judgment — when, as here, the penalty is

² “The department may make any examination of the books and records of any licensee or other person and may visit and inspect the premises of any licensee it may deem necessary to perform its duties under this division.” (Cal Bus & Prof Code § 25753.)

³ “. . . any person who refuses to permit the department or any of its representatives to make any inspection or examination for which provision is made in this division . . . is guilty of a misdemeanor” (Cal Bus & Prof Code § 25616.)

reasonable and the underlying decision is supported by substantial evidence. We see no error.

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:**

ZARCO HOTELS INCORPORATED
HOLLYWOOD HOTEL
1160 N. VERMONT AVE.
LOS ANGELES, CA 90029

ON-SALE GENERAL EATING PLACE - LICENSE

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

CERRITOS ENFORCEMENT OFFICE

File: 47-369810

Reg: 18088259

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 June 18, 2019. 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 August 26, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: July 16, 2019

RECEIVED

JUL 17 2019

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:

Zarco Hotels Incorporated	}	File: 47-369810
dba Hollywood Hotel	}	
1160 N. Vermont Ave.	}	Reg.: 18088259
Los Angeles, California 90029	}	
	}	License Type: 47
Respondent	}	
	}	Word Count: 14,000
	}	
	}	Reporter:
	}	Marie C. Sanchez
	}	Kennedy Court Reporters
	}	
<u>On-Sale General Eating Place License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on March 19, 2019.

Sean D. Klein, Attorney, represented the Department of Alcoholic Beverage Control.

Kian Zarrinnam, secretary of respondent Zarco Hotels Incorporated, represented the Respondent.

The Department seeks to discipline the Respondent's license on the grounds that, on January 19, 2018 and April 5, 2018, the Respondent, the holder of an on-sale general eating place license, sold alcoholic beverages other than beer for consumption on the licensed premise while the licensed premises were not regularly and in a bona fide manner used and kept open for the serving of meals to guests for consumption in violation of Business and Professions Code sections 23038 and 23396.¹ (Exhibit 1.)

The Department also seeks to discipline the Respondent's license on the grounds that, on April 5, 2018, the Respondent knowingly or willfully filed a false license fee report with the department, or refused to permit the department or its representatives to make an inspection or examination of the books or records required to be kept or maintained, or altered, cancelled, or obliterated an entry in such books of account for the purpose of falsifying the records of sales of alcoholic beverages in violation of section 25616. (Exhibit 1.)

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

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 March 19, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on November 15, 2018.
2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on October 18, 2001 (the Licensed Premises).
3. The Respondent's license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
5/26/2005	05059793	H&S §§ 110545, 110560 & 110620 & PC §347(b)	5-day susp. w/5 days stayed

The foregoing disciplinary matter is final. (Exhibit 2.)

4. On January 19, 2018, Agent K. Bertsch entered the Licensed Premises at approximately 7:40 p.m. with Agent D. Hoang and Agent Holland. They passed a bar, which was closed, and proceeded to one of the meeting rooms, the Pickford Salon. The seating area for the restaurant was gated off and darkened.
5. The agents entered the Pickford Salon. It was set up with tables, couches, a stage, and a portable bar. A number of comedians were performing on the stage. Agent Hoang ordered a Jack Daniels whiskey and Coke, which he was served. Agent Hoang asked the bartender if they had any menu or food service. The bartender told him that the kitchen was closed. The agents did not see any food being served, nor did they see any utensils or plates.
6. On March 27, 2018, Agent Bertsch sent a notice to produce records to the Respondent. The notice specified that the records should be produced within 10 days. (Exhibit 3.) The Department did not receive any records in response to this request. Kian Zarrinnam testified that he called Agent Bertsch four times (on April 2, 2018, April 9, 2018, June 8, 2018, and June 15, 2018) to discuss the notice to produce. He left messages each time, but never received a return call. Agent Bertsch testified that she did not recall receiving any such messages.

7. On April 5, 2018, Agent Bertsch and Agent Hoang returned to the Licensed Premises. They arrived at approximately 6:30 p.m. They entered and went to the bar. Agent Hoang took a seat at a table while Agent Bertsch approached the bartender. Agent Bertsch asked the bartender for a menu. The bartender replied that they did not have any food. Agent Bertsch ordered a vodka and cranberry juice, which she was served. The agents did not go to the restaurant or the Pickford Salon.

8. On June 7, 2018, Agent Bertsch and Agent Hoang went to the Licensed Premises. They spoke to the Food and Beverage Manager, Jonathan Child about food service. Child indicated that they did not have lunch or dinner service. They asked to see a menu, but Child indicated that they did not have one. Child indicated that the kitchen had been undergoing a remodel for the last seven months. He further indicated that the Respondent was trying to set up food service, which should be occurring soon.

9. The agents inspected the kitchen area. They did not locate any food, although the kitchen was equipped with food prep tables, utensils, plates, a refrigerator, a freezer, and stoves. (Exhibits 4-5 & A.)

10. The agents visited the Licensed Premises a number of times during the morning hours. Each time, the restaurant area had a number of food stations set up in a manner similar to a breakfast buffet. A variety of foods, such as waffles, pastries, and beverages were available.

11. Zarrinam testified that the Licensed Premises has always had a menu. He did not understand why Child would state otherwise. He also testified that food sales on January 19, 2018 were \$1,710, while beverage sales were only \$421, and that food sales on April 5, 2018 were \$2,410, which beverage sales were only \$188.

12. 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 23396 provides that no alcoholic beverages, other than beer, may be sold or served in any bona fide public eating place for which an on-sale license has been issued unless the premises complies with the requirements prescribed in Section 23038, 23038.1, or 24045.1.

4. Section 23038 is a definitional section which provides that a bona fide public eating place is one which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking and an assortment of foods which may be required for ordinary meals, the kitchen of which must be kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health.

This section goes on to define meals as the usual assortment of foods commonly ordered at various hours of the day and provides that the service of such food and victuals as sandwiches or salads only shall not be deemed compliance with this requirement. Finally, it defines guests as people who, during the hours when meals are regularly served therein, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein.

5. Section 25616 provides that, "[a]ny person who knowingly or willfully files a false license fee report with the department, and any person who refuses to permit the department or any of its representatives to make any inspection or examination for which provision is made in this division, or who fails to keep books of account as prescribed by the department, or who fails to preserve such books for the inspection of the department for such time as the department deems necessary, or who alters, cancels, or obliterates entries in such books of account for the purpose of falsifying the records of sales of alcoholic beverages made under this division is guilty of a misdemeanor."

6. 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 or about January 19, 2018 and April 5, 2018, the Respondent, the holder of an on-sale general eating place license, served distilled spirits, whiskey and vodka, respectively, at a time when the Licensed Premises was not regularly and in a bona fide manner used and kept open for the serving of meals to guests for consumption, in violation of sections 23038 and 23396. (Findings of Fact ¶¶ 4-5 & 7-10.)

7. With respect to count 1, on January 19, 2018 a Department agent ordered a Jack Daniels whiskey and Coke at the Licensed Premises, which he was served. He attempted to order food, but was told that none was available. With respect to count 2, on April 5, 2018 a Department agent ordered and was served a vodka and cranberry juice, which she was served. She attempted to order food, but was told that none was available.

8. The Respondent argued that it is a hotel, not a restaurant, and that food and beverage service is incidental to its business of providing rooms. In making this argument, the Respondent noted that it is a small operation.

There are clear differences between the operation of a hotel, even one with a restaurant inside it, and the operation of a restaurant. There are also clear differences between a small hotel and a large resort. Nonetheless, the holder of an on-sale general eating place license must comply with the terms of section 23038. This does not mean that food must be served with every drink or that an extensive menu be available, but rather that food be available during normal meal times. The evidence in this case established that no food at all was available during dinnertime.

9. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that the Respondent refused to permit the Department or its representative inspect or examine its books and records in violation of section 25616.² (Finding of Fact ¶ 6.)

10. On March 27, 2018, the Department sent a notice to produce records to the Respondent. The notice indicated that the records should be produced within 10 days, i.e., on or before April 6, 2018.³ The Respondent did not produce any records in response to this notice.

11. The Respondent expressed an unwillingness to simply turn over its records to the Department. Rather, it argued such records were confidential and that it would make them available for inspection if an agent came to the Licensed Premises during normal business hours. There is nothing in section 25616 which limits the Department's authority in such a manner. The Respondent was under an obligation to produce the records on or before April 6, 2018, notwithstanding its desire to discuss the matter first. Its failure to do so—up to and including the date of the hearing—violates section 25616.

² Count 3 is broadly phrased such that it alleges that the Respondent "knowing[ly] or willfully filed a false license fee report with the department, or refused to permit the department or its representatives to make an inspection or examination of the books and records required to be kept or maintained, or altered, cancelled or obliterated an entry in such books of account for the purposes of falsifying records of sales of alcoholic beverages." There is no evidence the Respondent filed a false license fee report or altered, cancelled or obliterated an entry in its books and records for the purposes of falsifying records of sales of alcoholic beverages. Rather, the crux of the Department's case is that the Respondent failed to produce its books or records to the Department for inspection or examination.

³ It is unclear why the accusation uses the date April 5, 2018 as the date of the violation, which is only 9 days from the date of the notice. The Respondent did not fail to comply with the Department's request until 10-day period elapsed without a response—on April 6, 2018. Since the accusation indicates that the violation took place "[o]n or about April 5, 2018," and the evidence established that the records were never produced, the date has been sufficiently pled.

PENALTY

With respect to counts 1 and 2, the Department requested that the Respondent's license be suspended for a period of 15 days and indefinitely thereafter until food service is provided and evidence of such is presented to the Department. With respect to count 3, the Department requested that the Respondent's license be suspended for a period of 15 days and indefinitely thereafter until the requested records are produced. The Respondent did not recommend a penalty in the event that the accusation were sustained.

An indefinite suspension is typically used to ensure compliance. In the present case, the Respondent has demonstrated a general unwillingness to produce records to the Department except on its own terms. Accordingly, an indefinite suspension is warranted. Cases involving the failure to provide food can be broken down into two broad categories—licensees who do not have the capability to provide food (e.g., have no kitchen facilities) and licensees who have the capability but chose not to use it. This case falls into the second category. As with the failure to produce records, an indefinite suspension is appropriate to ensure compliance.

The penalty recommended herein complies with rule 144.⁴

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

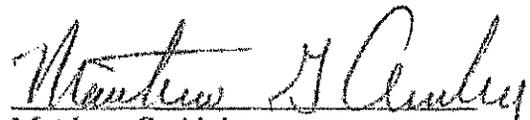
ORDER

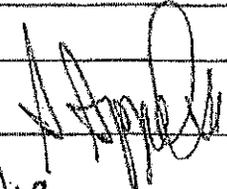
With respect to counts 1 and 2, the Respondent's on-sale general eating place license is hereby suspended for 15 days and indefinitely thereafter until the Respondent can establish that it is in compliance with the meal requirements of section 23038.

With respect to count 3, the Respondent's on-sale general eating place license is hereby suspended for 15 days and indefinitely thereafter until the Respondent provides the records requested by the March 27, 2108 letter to the Department.

The suspensions are to run concurrently.

Dated: April 4, 2019


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  
Date: <u>4/18/19</u>