

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

AB-9882

File: 20-387375; Reg: 19089348

LEU SOUKSEUM and SYDA SOUNAKHENE,
dba Gas Mart
1005 West Florida Avenue
Hemet, CA 92543,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: November 6, 2020
Telephonic

ISSUED NOVEMBER 12, 2020

Appearances: *Appellants:* Jeffrey S. Kravitz, of Kravitz and Chan, LLP, as counsel
for Leu Soukseum and Syda Sounakhene,

Respondent: Alanna K. Ormiston, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Leu Soukseum and Syda Sounakhene, doing business as Gas Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control (Department)¹ revoking their license because appellants bought or received property, believing it to be stolen; and sold or furnished drug paraphernalia.

¹ The decision of the Department, dated April 30, 2020, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 7, 2002. There are two prior instances of departmental discipline against the license for sales of alcohol to minors in 2006 and 2010.

On October 4, 2019, the Department instituted a six-count accusation² against appellants charging that on three separate occasions — February 22, 2019, February 26, 2019, and March 27, 2019 — appellants attempted to purchase and receive distilled spirits, believing them to have been stolen, in violation of Article XX, section 22 of the California Constitution; Business and Professions Code section 24200, subdivisions (a) and (b); and Penal Code sections 664/496(a); and possessed drug paraphernalia (as defined in Health and Safety Code section 11014.5) for sale, in violation of Health and Safety Code section 11364.7(d).

Both Article XX, section 22 of the California Constitution, and Business and Professions Code 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.

Business and Professions Code section 24200(b) provides that a licensee's 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.

Penal Code section 664 provides that a person who attempts to commit any crime, but fails, or who is prevented or intercepted in its perpetration, shall nevertheless be punished. Penal Code section 496 makes it unlawful to buy or receive property

² The accusation was amended at the administrative hearing, on March 3, 2020, to correct typographical errors.

which has been stolen, knowing it to have been stolen. The two Penal Code provisions, in combination, embrace the conduct involved here.

Health and Safety Code section 11014.5, provides, in pertinent part:

(a) “Drug paraphernalia” means all equipment, products and materials of any kind which are designed for use or marketed for use, in . . . ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this division. . . .

[¶ . . . ¶]

(b) For the purposes of this section, the phrase “marketed for use” means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances.

(c) In determining whether an object is drug paraphernalia, a court or other authority may consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use.

(2) Instructions, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body.

[¶ . . . ¶]

(CA Health & Safety Code § 11014.5.)

Health and Safety Code section 11364.7(a) provides:

(a) Except as authorized by law, any person who delivers, furnishes, or transfers, possesses with intent to deliver, furnish, or transfer, or manufactures with the intent to deliver, furnish, or transfer, drug paraphernalia, *knowing, or under circumstances where one reasonably should know*, that it will be used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance, except as provided in subdivision (b), in violation of this division, is guilty of a misdemeanor.

(CA Health & Safety Code § 11364.7(a), emphasis added.)

At the administrative hearing held on March 3, 2020, documentary evidence was received and testimony concerning the violations charged was presented by Department Agent Mike Patel. Both appellants testified on their own behalf, appearing without legal counsel, and speaking through a Laotian interpreter.³

Counts 1 and 2:

Testimony established that on February 22, 2019, Agents Patel and Holsapple conducted a city-wide investigation in Hemet, California to ensure compliance with the ABC Act. The investigation sought to ensure that retail licensees are purchasing alcohol from distributors and not from unauthorized individuals, as well as to ensure that premises are complying with all aspects of the ABC Act.

The agents entered the licensed premises in an undercover capacity carrying a backpack filled with alcohol — including four 200 ml. bottles of Hennessy V.S. Cognac, one 750 ml. bottle of Hennessy V.S.O.P. Cognac, and one 750 ml. bottle of Malibu Rum. (Exh. 4.) The licensees, Leu Soukseum and Syda Sounakhene were both observed in the premises. Agent Patel asked Ms. Sounakhene if they had any hard liquor and she said they did not. He told her, in the presence of Mr. Soukseum, that he had some in his backpack available for sale if she was interested. The agent showed her the 750 ml. bottle of Hennessy, told her that it was stolen, and told her that he worked in the back at Walmart where it was easy to steal. She confirmed that he was selling it, and ultimately purchased the bottle for \$25 with money out of the register. (Exh. 5A.) Mr. Soukseum was present during the transaction. (Finding of Fact, ¶ 7.)

³ Although appellants spoke through an interpreter at the administrative hearing, all conversations at the licensed premises took place in English.

During the interaction, Ms. Sounakhene expressed interest in “Blue Label,” which Agent Patel understood to mean Johnny Walker Blue Label, as well as Bailey’s Irish Cream. Agent Patel told her he could easily conceal it in his lunch bag. Agent Holsapple told the licensees he could also steal cigarettes. Ms. Sounakhene said the cartons would have to have a California stamp in case “the board” came by. She said the agents could come by any time but that they did not work on Sundays. (Finding of Fact, ¶ 8.)

Agent Patel asked if they carried any meth pipes, which is street vernacular for methamphetamine. Ms. Sounakhene retrieved a pipe from under the sales counter, from an area not visible to customers. The pipe was a clear, cylindrical glass pipe which had a bulbous end with a small hole used to smoke methamphetamine. She told Agent Patel that the pipe was known as a “candy bar” in the licensed premises. Agent Holsapple paid for the pipe. (Finding of Fact, ¶ 10.)

Agent Patel asked Ms. Sounakhene if they carried a rose pipe for crack, which is street vernacular for crack cocaine. Ms. Sounakhene retrieved a rose pipe from under the counter. It was a clear cylindrical glass pipe, with openings at both ends, and had an artificial rose inside the pipe. She also offered Agent Patel, without being asked, a copper ball, commonly known as a “chore boy,” used by drug users as a filter while smoking crack cocaine through the rose pipe. She told the agents that the pipe and copper ball were known together as a “set.” (Finding of Fact, ¶ 11.)

Agent Patel purchased the rose pipe and copper ball from Ms. Sounakhene while being observed by Mr. Soukseum (exh. 5B). After purchasing the two pipes, Agent Holsapple talked to Mr. Soukseum and he confirmed the licensed premises sold the meth pipe as a “candy bar” and the rose pipe with copper ball as a “set.” (Exh. 6.)

The agents asked the appellants what their names were and Mr. Soukseum said he went by the name "Lee" while Ms. Sounakhene went by the name "C" (for Syda).

(Finding of Fact, ¶ 12.)

Counts 3 and 4:

On February 26, 2019, Agents Patel and Holsapple returned to the licensed premises in a plain clothes capacity, with Agent Patel wearing a recording device. Both appellants were present in the premises as well as an unidentified third party behind the sales counter. The agents went to the coolers and selected a 16-ounce bottle of Bud Light beer and took it to the sales counter. Agent Patel noticed that Ms. Sounakhene seemed anxious as they approached the register, looking deliberately at the unidentified person and then back at the agents. She asked Agent Patel for his identification and completed the sale. She made eye contact with him, then looked at the unidentified person again as she said she would see the agents later. Agent Patel understood these gestures to mean she wanted the agents to leave and return later when the unidentified person was no longer in the premises. The agents exited the store. (Findings of Fact, ¶ 13.)

Later that day the agents returned to the licensed premises. Agent Patel was wearing a backpack containing 750 ml. bottle of Bailey's Irish Cream and a carton of Marlboro Red shorts. (Exh. 7.) The unidentified person was no longer present. The agents were approached by Ms. Sounakhene, who asked what was in the backpack. Agent Patel showed her the Bailey's and Marlboro cigarettes and told her he had stolen them from Walmart. Mr. Soukseum was sitting nearby and could see and hear the interaction. Agent Patel told them he was able to successfully remove a security locking device without damaging the bottle of Bailey's. Ms. Sounakhene initially did not

understand, so the agent showed her a security device that was inside his backpack. As she examined the cigarettes, Agent Holsapple took photographs inconspicuously from another part of the premises (exh. 8A, 8B, 8C & 8D). After negotiating, Ms. Sounakhene purchased the Bailey's and Marlboro cigarettes for \$55 — obtaining the money from the cash register. (Findings of Fact, ¶¶ 14-16.) Agent Patel asked if he could bring in the Johnny Walker Blue Label at some time in the future, and both appellants agreed. (Finding of Fact, ¶ 17.)

Agent Patel asked for crack and meth pipes and Ms. Sounakhene obtained two pipes from behind the sales counter — one of each type (exh. 9B). She offered the pipes to him at a price of two for \$7 or one for \$4. Agent Holsapple paid for the two pipes and Ms. Sounakhene provided him with a copper ball without it being requested. (Exh. 11; Finding of Fact, ¶ 18.)

Counts 5 and 6:

On March 27, 2019, Agents Patel and Holsapple returned to the licensed premises in a plain clothes capacity, with Agent Patel wearing a recording device and carrying a backpack containing a 750 ml. bottle of Johnny Walker Blue Label Scotch and a carton of Marlboro Red 100's (exh. 12). Both appellants were present in the premises. They selected two 16-ounce bottles of Bud Light beer and Agent Holsapple took them to the sales counter. (Finding of Fact, ¶ 20.)

Ms. Sounakhene was behind the register. Without being asked, she retrieved a glass pipe with a bulbous end from under the counter and asked if Agent Holsapple wanted to purchase it. Agent Holsapple asked if the pipe was good for meth. She replied that he should just put it away because she did not want anyone to walk into the store and hear the conversation. He paid for the beers then asked Ms. Sounakhene for

a rose pipe for crack. Ms. Sounakhene told him not to say that. Instead, Agent Holsapple asked for a “set” and “candy bar.” Ms. Sounakhene retrieved a rose pipe from under the counter and a chore boy copper ball. Agent Holsapple paid \$6 for the two pipes (exh. 13A). (Findings of Fact, ¶ 21.)

Agent Patel told Ms. Sounakhene he had the Johnny Walker Blue Label she requested in his backpack. She directed him to another part of the store where they would be less conspicuous. Agent Patel opened his backpack and showed her the 750 ml. bottle of Johnny Walker Blue Label and a carton of Marlboro Red 100's cigarettes. Agent Holsapple took photographs of the interaction (exhs. 14A, 14B, 14C & 14D). They negotiated a price after which Ms. Sounakhene paid Agent Patel \$150 which she retrieved from the cash register. The agents then exited the premises. (Findings of Fact, ¶ 22-23.)

The agents returned to the licensed premises with a team of agents and conducted a search of the premises. Numerous articles of drug paraphernalia were found in the premises, including over 150 methamphetamine pipes (exhs. 15A & 15B). In addition, when searched, Mr. Soukseum was found to have a methamphetamine pipe on his person. (Findings of Fact, ¶ 26.)

An audio recording of the device worn by Agent Patel on February 26, 2019 and March 27, 2019 was later transcribed onto pleading paper (exh. 10) and a flash drive of the recording was also provided (exh. 16.) (Finding of Fact, ¶ 19.)

Both appellants subsequently pled guilty to a single count of attempting to unlawfully receive stolen property and, in lieu of sentencing, attended a misdemeanor deferred entry of judgment (DEJ) program which they completed on October 30, 2019. (Exhs. A-D.) Based on appellants' completion of the DEJ program, their guilty pleas

were set aside and the complaints against them were dismissed. (Finding of Fact, ¶ 29.)

On March 19, 2020, the administrative law judge (ALJ) submitted a proposed decision sustaining all six counts of the accusation and recommending revocation of the license. The Department adopted the proposed decision in its entirety on April 23, 2020 and a certificate of decision was issued on April 30, 2020.

Appellants then filed a timely appeal making the following contentions: (1) the Department created the crime and appellants were victims of entrapment, and (2) the alleged actions do not constitute grounds for revocation.

DISCUSSION

I

ENTRAPMENT

Appellants contend the Department created the crime by offering the purportedly stolen goods to them, and contend that they were victims of entrapment because there was no evidence they had ever engaged in such activity before. (AOB at pp. 1-3.)

Appellants cite no legal authority for their position, nor do they reference citations to the record in claiming error. We are presented only with their opinion. To demonstrate error, appellants must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or support for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing authority. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) Nevertheless, we will address this issue.

This Board looks to the teachings of *People v. Barraza* (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459] in assessing whether a licensee has been the victim of entrapment. In that case, the court held that the test was whether “the conduct of the law enforcement agent [was] likely to induce a normally law-abiding person to commit the offense.” (*Id.* at pp. 689-690.) The court continued:

For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect — for example, a decoy program — is therefore permissible; but it is impermissible for the police or their agents to pressure the subject by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.

(*Id.* at p. 690.) In California, entrapment is an affirmative defense; the burden of proof therefore falls on the party raising it. (*People v. Schwartz* (1952) 109 Cal.App.2d 450, 455 [240 P.2d 1024].) The defense is available in administrative proceedings. (*Arellanes v. Civil Service Com.* (1995) 41 Cal.App.4th 1208, 1215-1216 [49 Cal.Rptr.2d 73].)

In *Barraza*, the court specifically rejected the subjective approach to an entrapment defense favored in federal jurisprudence, which removes the focus from the conduct of the officers and places it instead on the character of the defendant. The court observed:

Even though California courts do not permit introduction of the highly prejudicial evidence of subjective predisposition allowed in jurisdictions following the federal rule, our more limited focus on the character and intent of the accused is still misplaced and impairs our courts in their task of assuring the lawfulness of law enforcement activity.

Commentators on the subject have overwhelmingly favored judicial decision of the issue by application of a test which looks only to the nature and extent of police activity in the criminal enterprise.

(*Barraza, supra*, 23 Cal.3d at pp. 688-689.) This objective approach focuses solely on the conduct of law enforcement officers, and not on the character or propensities of the defendant. According to the court, “under this test such matters as the character of the suspect, his predisposition to commit the offense, and his subjective intent are irrelevant.” (*Id.* at pp. 690-691.)

Under the *Barraza* test, a court must evaluate officers’ conduct based on whether it would induce an otherwise law-abiding person — not the specific defendant on trial — to engage in illicit activity. A court will “presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully.” (*Barraza, supra* at p. 690.)

The court noted that “the determination of what police conduct is impermissible must to some extent proceed on an *ad hoc* basis,” but offered two guiding principles:

First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established. . . . Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment.

(*Barraza, supra* at p. 690.)

As a matter of law, we must examine the officers’ conduct only, and not that of appellants, to determine whether appellants were entrapped. In doing so we are bound by the findings in the Department’s decision, provided those findings are supported by substantial evidence.

This Board’s review is limited to determining, in light of the entire administrative record, whether substantial evidence exists — even if contradicted — to reasonably support the Department’s factual findings, and whether the decision is supported by

those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*.) The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74] (*Harris*.) A factual finding of the Department may not be disregarded merely because a contrary finding would have been equally or more reasonable. (*Boreta, supra*, at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve evidentiary conflicts in favor of the Department's decision and view the whole record in a light most favorable to the decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board must accept all reasonable inferences from the evidence which support the Department's decision. (*Harris*, at p. 113.)

The ALJ made the following findings on this issue:

14. The Respondents further argued, while in layman's terms, they were entrapped and, therefore, the accusation should be dismissed. The basis of this argument was that Mrs. Sounakhene's decision to engage in unlawful conduct was "clouded by my emotions when faced with undercover agents who appeared to look as though they were struggling and at a difficult place in life . . . ," "in my mind I thought I was helping. . ." "when the agent approached me he seemed like he was very tired and hungry and homeless and so I just want to help out." Mrs. Sounakhene claimed that "Agent Patel continued to entice me even after my refusal which forced me to behave in a way that I would not normally behave." These claims, unsupported by other evidence, and contradicted by the record, are insufficient to establish the defense of entrapment.

15. Under California law, the test for entrapment is whether "the conduct of the law enforcement agent [was] likely to induce a normally law-abiding person to commit the offense . . . Official conduct that does no more than offer [an] opportunity to the suspect is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other

affirmative acts likely to induce a normally law-abiding person to commit the crime."^[fn.]

16. The Respondents failed to make such a showing in this case. Agent Patel's words or actions did not constitute badgering, cajoling, importuning, or other overbearing conduct. Agent Patel merely asked the Respondents if they wanted the goods, to which they agreed. Agent Patel credibly maintained he never begged or pleaded for either Respondent to buy anything. He further credibly testified he never indicated he was homeless, hungry or needed money for food. Respondents' testimony otherwise is not credible. During each interaction, the Respondents could easily have said, "No," and continued working.

(Conclusions of Law, ¶¶ 14-16.)

We have carefully reviewed the entire record and agree with the ALJ's assessment that the agents' conduct did not meet the *Barraza* test for entrapment. As noted in the Department's decision: "[o]fficial conduct that does no more than offer that opportunity to the suspect . . . is therefore permissible; but it is impermissible for the police or their agents to pressure the subject by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (Conclusions of Law, ¶ 15, quoting *Barraza, supra* at p. 690.) The agents here merely offered an opportunity, and did not entrap appellants.

II

PENALTY

Appellants contend the actions alleged in the accusation do not constitute grounds for revocation because the alleged offenses did not involve the use of the license and the purportedly stolen goods were not resold. (AOB at pp. 3-4.)

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. “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

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

(Cal. Code Regs., tit. 4, § 144.)

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

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

Penalty Policy Guidelines:

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

(Ibid.)

In the decision, the ALJ addresses the issue of penalty:

The Department requested the Respondents' license be revoked based on (1) both Respondents' direct involvement in multiple violations, (2) the Respondents' two prior disciplinary matters, (3) a continuing course or pattern of conduct, (4) Syda Sounakhene's attempts to conceal the illicit activity, and (5) the amount of drug paraphernalia found in the Licensed Premises.

The Respondents did not recommend a penalty should the accusation be sustained. The Respondents argued for mitigation based on their having received two ABC-243 forms for having successfully prevented sales to minors, in addition to completing the DEJ theft program.

Rule 144^[fn.] provides for revocation for single incidents of the Respondent/Licensee's receiving stolen property, and Health and Safety Code section violations involving transactions on licensed premises. Revocation stayed for three years and a 20-day suspension is recommended for Health and Safety Code section violations involving drug paraphernalia, possession for sale.

Little, if no, mitigation is warranted. While it is commendable the Respondents attended the DEJ program, it was court-ordered in lieu of their being sentenced and to obtain a dismissal of the charges filed against them in the Superior Court. While the two prior violations are somewhat remote, they are evidence the Licensed Premises is not discipline-free, and evidence that the Respondents graduated from sales to minor violations to the violations at hand. Aggravation is warranted for

both licensees' direct involvement in the violations, Syda Sounakhene's attempts to conceal their criminal conduct and her ease with engaging in such criminal conduct. Further aggravation is warranted for the volume of drug paraphernalia seized in the Licensed Premises, not to mention the drug paraphernalia found on Leu Soukseum's person during the search incident to his arrest. While the Respondents attempted to promise to never engage in similar violations again, their promises were not credible based on the above. The penalty recommended herein complies with rule 144.

(Decision, at pp. 14-15.)

As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The *extent* to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion. Abuse of discretion has not been demonstrated in this case.

Revocation is entirely within the Department's discretion where, as here, rule 144 recommends revocation. Furthermore, as previously noted, both Article XX, section 22 of the California Constitution, and Business and Professions Code section 24200(a) provide that a license to sell alcoholic beverages may be revoked if continuation of the license would be contrary to public welfare or morals, as has been determined here. Finally, Business and Professions Code section 24200(b) provides that a licensee's violation of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for revocation of the license. We find no error in the Department's decision to revoke the license.

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:**

LEU SOUKSEUM & SYDA SOUNAKHENE
GAS MART
1005 W FLORIDA AVENUE
HEMET, CA 92543

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-387375

Reg: 19089348

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 April 23, 2020. 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 June 10, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 30, 2020



Matthew D. Botting
General Counsel

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APR 30 2020

Alcoholic Beverage Control
Office of Legal Services

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Leu Soukseum, and Syda Sounakhene
Dbas: Gas Mart
1005 West Florida Avenue
Hemet, California 92543

Respondents

} File: 20-387375

} Reg.: 19089348

} License Type: 20

} Word Count: 18,749

} Reporter:

} Jacqueline Garcia

} Kennedy Court Reporters

} Lao Interpreter:

} Srinapha Vasunilashorn

Off-Sale Beer and Wine License

PROPOSED DECISION

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Riverside, California, on March 3, 2020.

Alanna Ormiston, Attorney, represented the Department of Alcoholic Beverage Control (hereinafter the Department).

Respondents, Leu Soukseum and Syda Sounakhene, were present in propria persona/not represented by counsel.

The Department seeks to discipline the Respondents' license on the grounds that:

- (1) On February 22, 2019, and March 27, 2019, the Respondent-Licensee, Syda Sounakhene, at the premises, bought, received, withheld or concealed property, to-wit: one 750 milliliters (ml) Hennessy Cognac V.S.O.P., and one 750 ml Johnny Walker Blue Label Scotch and one carton of Marlboro Reds cigarettes (on respective dates), believing the same to have been stolen, in violation of Penal Code sections 664/496(a).
- (2) On February 26, 2019, the Respondent-Licensee, Leu Soukseum, at the premises, bought, received, withheld or concealed property, to-wit: one 750 ml Baileys Original Irish Creme and one carton of Marlboro Reds cigarettes, believing the same to have been stolen, in violation of Penal Code sections 664/496(a).
- (3) On February 22, 2019, February 26, 2019, and March 27, 2019, while upon the licensed premises, Respondent-Licensee, Syda Sounakhene, sold, furnished or

transferred drug paraphernalia, as defined in Health and Safety Code section 11014.5, in violation of Health and Safety Code section 11364.7(a)(1); and that on February 22, 2019, February 26, 2019, and March 27, 2019, Respondents-Licensees held Alcoholic Beverage Control License number 20-387375, within the meaning of Health and Safety Code section 11364.7(d).
(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 March 3, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on October 4, 2019. During the hearing the Department requested to amend the accusation, without objection by Respondent, in count 2, third paragraph, to change the day from "15" to "22;" and on the third page of the accusation, under "Viol Date" to change the first day listed from "4" to "14," and to place an arrow on each violation date to indicate that the first date listed should read, "05/26/2006" and the second date listed should read, "07/14/2010." The accusation was so amended.

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on June 7, 2002 (the Licensed Premises).

3. Respondents have been the subject of the following discipline:

<u>Dates of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
May 26, 2006	06063440	BP§§25658(a), 24200(a&b)	POIC in lieu of 15-day suspension;
July 14, 2010	10073747	BP§§25658(a), 24200(a&b)	15-day suspension

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

(February 22, 2019 – Counts 1 and 2)

4. On February 22, 2019, Department Agents Patel and Holsapple were part of a city-wide operation investigating licensed premises throughout the city of Hemet to ensure licensees were in compliance with the ABC Act. The agents focused on ensuring retail licensees were purchasing alcohol from distributors, since Hemet City had various incidents involving violations of the ABC Act with agents observing people entering

licensed premises with backpacks within the city at various locations. The latter scenario was indicative that the premises may be involved in receiving or purchasing stolen property.

5. On February 22, 2019, as part of the said investigation Agents Patel and Holsapple entered the Licensed Premises in a plain clothes capacity with Agent Patel carrying a backpack filled with alcohol, including four 200 milliliters (ml) of Hennessy V.S. Cognac, one 750 ml Hennessy V.S.O.P. Cognac, and one 750 ml Malibu Rum. (Exhibit 4.)

6. Upon entering the Licensed Premises the agents proceeded to the center of the store and saw co-licensees, Leu Soukseum and Syda Sounakhene (hereinafter referred to as Leu and Syda). Leu was seated on what appeared to be crates of beverages near the cash register. (Exhibit 5B.) Syda was near the cash register. (Exhibit 5A.)

7. Agent Patel asked Syda if the store carried any hard liquor bottles, to which Syda replied they did not. Agent Patel informed Syda, in the presence of Leu, that Agent Patel had alcohol bottles in his backpack if they were interested in buying any. Agent Patel placed his backpack on a floor display, opened the backpack and displayed to Leu and Syda the 750 ml Hennessy V.S.O.P. Cognac. Syda confirmed with Agent Patel that he was selling the Hennessy bottle, which he acknowledged. Agent Patel informed Leu and Syda that such a bottle of Hennessy V.S.O.P Cognac retails for approximately \$60 in the store. Agent Patel said he would sell the Hennessy bottle for between \$25 and \$30. Agent Patel explained that he worked in the back of Walmart where he had stolen the said Hennessy bottle. Syda confirmed, in English, that Agent Patel had stolen the Hennessey bottle from Walmart, to which Agent Patel confirmed he did. Agent Patel further explained that it was easy to steal the Hennessy bottle because he worked in the back of Walmart. Syda asked the agent whether he had Blue Label, to which Agent Patel understood Syda to mean Johnny Walker Blue Label, which based on his training and experience is scotch alcohol. After some counter offer Leu and Syda agreed to pay \$25 to Agent Patel for the said Hennessy bottle. While Agent Holsapple was purchasing two beers from Syda at the cash register and while the cash register drawer was open Syda took \$25 directly from the cash register and handed it to Agent Patel. (Exhibit 5A.) Agent Patel relinquished possession of the Hennessy alcohol bottle to Syda.¹ Agent Patel asked Syda not to tell anyone he had stolen the Hennessy bottle, to which Syda told the agent not to worry because they were not like that. Leu was present during the entire transaction between Syda and Agent Patel for the allegedly stolen alcohol.

¹ Exhibit 4, depicts a red arrow which points to the 750 ml Hennessy V.S.O.C. Cognac bottle which Syda purchased for \$25 from Agent Patel on February 22, 2019.

8. Agent Holsapple said to the Respondents that he and Agent Patel could steal cigarettes. Syda advised she needed to make sure the cartons had the California stamp in addition to making sure that those stamps were present if the board were to visit. Syda also inquired about obtaining a bottle of Baileys Irish Crème, a dessert alcoholic beverage which contains whiskey. Agent Patel said he could steal a bottle of Baileys Irish Crème from the back of Walmart, that it would be easy to conceal in his lunch bag, and he could bring it to the Licensed Premises. Syda mentioned Walmart must lose a lot of money because of the agents. Syda told the agents they could stop by the Licensed Premises at any time, however Sundays they generally did not work.

9. During the agents' interactions with the co-licensees patrons were coming and going from the Licensed Premises.

10. Agent Patel asked if the Respondents carried any meth pipes, which is street vernacular for methamphetamines. Syda immediately obtained a pipe from under the sales counter, which was not visible for sale to patrons. The pipe was a clear, cylindrical glass pipe which had a bulbous end with a small hole. Agent Patel was familiar with the pipe based on his training and experience, as a pipe used by drug users to smoke methamphetamine.² Syda instructed Agent Patel that the pipe was known as a "candy bar" in the Licensed Premises. Agent Holsapple paid for the methamphetamine pipe.

11. Agent Patel asked Syda if they carried a rose pipe for crack, which is street vernacular for crack cocaine. Syda retrieved, from underneath the sales counter to her right side, the rose pipe along with a copper ball. The rose pipe Syda provided to Agent Patel was a clear, cylindrical glass pipe which had an artificial rose inside the pipe, and both ends of the pipe had openings. The rose pipe was one of the various drug paraphernalia covered in Agent Patel's narcotics training course he received. Based on his training and experience, he knew it is common to refer to the crack pipe as a rose pipe, which is used by illicit drug users to ingest or smoke crack cocaine. Syda voluntarily offered to Agent Patel, without his requesting it, a small ball of copper, commonly referred to as a chore boy. Agent Patel knew from his training and experience that the copper ball is used by drug users as a filter while ingesting or smoking crack cocaine through the rose pipe. Syda instructed the agents that the said pipe and copper ball were known in the Licensed Premises as a "set."

12. Agent Patel purchased the crack/rose pipe and copper ball from Syda. Leu was still seated on the beverage crate near the cash register observing all of the above-referenced transactions. (Exhibit 5B.) After the purchase of the meth and crack pipes (and copper ball), Agent Holsapple talked to Leu about the pipes. Leu confirmed the Licensed

² Agent Patel attended an 80-hour narcotics investigation course, which covered various types of drug paraphernalia.

Premises sold the meth pipe as a “candy bar” and the rose pipe with copper ball as a “set.” Exhibit 6 depicts the meth pipe and crack cocaine pipe with copper ball purchased by the agents at the Licensed Premises on February 22, 2019. The agents asked Leu what their names were and Leu informed the agents that he went by the name Lee, and Syda went by name C. After the introductions the agents exited the premises.

(February 26, 2019 – Counts 3 and 4)

13. On February 26, 2019, Agents Patel and Holsapple returned to the Licensed Premises in a plain clothes capacity with Agent Patel wearing a recording device. Upon entering the Licensed Premises Agent Patel recognized Leu and Syda and observed an unidentified person behind the sales counter, who appeared to the agents to be either a government employee or vendor. The agents walked to the beer coolers, selected a 16-ounce Bud Light beer bottle, which they took to the cash register. Agent Patel noticed Syda appeared visibly anxious as the agents approached the sales counter. Agent Patel observed Syda to deliberately look to her right at the unidentified person and to look at the agents. Syda then asked Agent Holsapple for his identification (ID) for the beer purchase. Agent Holsapple provided his ID and paid for the beer. Syda made eye contact with Agent Patel, then looked to her right and said in a very deliberate manner that she would see the agents later. Agent Patel understood Syda to mean that she wanted the agents to leave and return to the store at a later time when the unidentified person was not in the Licensed Premises. The agents then exited the store.

14. At some later point on February 26, 2019, Agents Holsapple and Patel, the latter of whom was carrying a backpack, returned to the Licensed Premises in a plain clothes capacity. The backpack contained one 750 ml of Baileys Irish Crème alcoholic beverage and a carton of Marlboro Reds-shorts. (Exhibit 7.) Upon entering the Licensed Premises Agent Patel noticed the suspected government employee/vendor was not in the store. The agents proceeded to the center of the store. Agent Patel observed patrons entering and exiting the premises while he was inside the store.

15. At some point Syda approached the agents in the center of the store and asked them if she could see what they had before anyone else came into the store. Agent Patel placed his backpack on a floor display, opened the backpack and displayed the Baileys Irish Crème and carton of Marlboro cigarettes. Agent Patel informed Syda he had stolen the items from Walmart as he had with the prior items. Agent Patel spoke to Syda in the presence of Leu, who was within a reasonable distance away at the same location as depicted in Exhibit 5B, able to observe and hear the conversations between Syda and agent(s). Agent Patel informed Syda he was able to remove a security locking device from the bottle of Baileys without damaging the bottle. Syda did not understand to what he was referring. Leu explained the security locking device was an alarm device, to which Agent Patel confirmed, and during which time Agent Patel displayed to Syda a

security locking device that was inside his backpack. Syda later took possession of the Marlboro carton and examined it. Agent Holsapple inconspicuously took photographs of Syda in the Licensed Premises while she spoke to Agent Patel with his backpack opened up on floor displays and Syda examining the Marlboro carton; one photograph, Exhibit 8D depicts Syda smiling as she has the Marlboro carton in her possession. (Exhibits 8A, 8B, 8C and 8D.)

16. Syda engaged in negotiations of the Baileys Irish Crème and Marlboro cigarette carton, offering both items for \$50. Leu and Syda ultimately agreed to pay \$55 for both said alleged stolen items. Leu obtained \$55 from the cash register and handed it to the agents. Exhibit 9A depicts Leu retrieving the said \$55 from the cash register to pay for the Baileys Irish Crème and Marlboro carton.

17. Agent Patel asked both Licensees, Leu and Syda, whether it would be okay with them if he brought in the Johnny Walker Blue Label in the future, to which both Leu and Syda agreed.

18. Agent Patel asked for crack and meth pipes. Syda obtained the pipes from behind the sales counter, which Exhibit 9B depicts. Syda provided to Agent Holsapple two pipes, one was a clear, cylindrical glass pipe that had a bulbous end with a hole in the bulbous end, and the second pipe was a clear, cylindrical pipe which had an artificial rose inside with openings on each end of the pipe. Syda offered the said pipes, two for \$7 or one for \$4. Agent Holsapple paid for a meth and crack/rose pipe and received in addition a copper ball, which Syda had automatically provided without the agents requesting it. (Exhibit 11 depicts both glass pipes.) The clear glass pipe with the bulbous end is commonly used to smoke methamphetamine and is depicted as the top glass pipe in Exhibit 11. The bottom glass pipe depicted in Exhibit 11 is the clear glass pipe with the artificial rose inside and the chore boy copper ball.

19. Agent Patel was controlling the audio recording device he wore on his body during the above-referenced conversations. Agent Patel later transcribed the device's audio recording onto pleading paper, both of which he provided to the Department counsel. Exhibit 10 is the said transcription. Exhibit 16 is a flash drive of the recording.³ At the end of the recording glass objects are heard clinking, which objects are the meth and crack pipes Syda sold to Agent Holsapple.

³ Excerpts of the recording were played at the hearing, while off the record; file name 190226_001 from approximately 2:55 to 7:50.

(March 27, 2019 – Counts 5 and 6)

20. On March 27, 2019, Agents Holsapple and Patel, the latter of whom wore an audio recording device on his person and was carrying a backpack, entered the Licensed Premises in a plain clothes capacity. The backpack contained one sealed 750 ml Johnny Walker Blue Label Scotch bottle and a Marlboro Reds 100's cigarette carton. (Exhibit 12.) Agent Patel recognized Syda near the cash register and Leu on the sales floor. The agents walked to the beer coolers, and each selected a 16-ounce Bud Light beer bottle. Agent Holsapple took possession of both beers and walked to the sales counter, followed by Agent Patel.

21. Syda, who was standing behind the sales counter at the cash register, immediately retrieved from under the sales counter and presented to Agent Holsapple a glass pipe with a bulbous end and asked if he wanted to purchase one. Agent Holsapple asked if the pipe was good for meth, street vernacular for methamphetamine. Syda instructed him he did not need to say anything, just to put it away, he did not need to explain what it is used for. Syda did not want anyone to walk into the store and hear the conversation. Agent Holsapple paid for the beers first. Agent Holsapple asked Syda for a rose pipe for crack. Syda reprimanded him, "Don't say that!" Agent Holsapple acquiesced with Syda's instruction and thereafter used the code words, of which Syda and Leu had advised the agents on their prior visit, as used in the Licensed Premises. Agent Holsapple then asked for a "set" and "candy bar." Syda obtained from under the sales counter, not visible to public view, a clear, cylindrical glass pipe with an artificial rose inside and a chore boy copper ball to go along with the glass pipe. Agent Holsapple paid Syda \$6 for the said pipes. (Exhibit 13A depicts Syda, while inside the Licensed Premises behind the sales counter, presenting to Agent Holsapple a bulbous glass pipe. Exhibit 13B depicts Agent Holsapple retrieving money from his wallet to pay for the said pipes.) Agent Holsapple also asked for a Bic lighter, explaining he would use the lighter in conjunction with the pipes. Agent Holsapple paid Syda \$1.50 for the Bic lighter.

22. Agent Patel informed Syda he had the Johnny Walker Blue Label she requested in his backpack. Syda instructed the agents to go to a less conspicuous area of the store behind some tall floor displays, to which area the agents and Syda walked. Agent Patel opened his backpack and displayed to Syda the 750 ml bottle of Johnny Walker Blue Label and a carton of Marlboro Reds 100's cigarettes. Syda examined the cigarette carton. Agent Holsapple took photographs in that less conspicuous area of the store of Agent Patel displaying the purportedly stolen items to Syda, and Syda assisting Agent Patel and examining the items. (Exhibits 14A, 14B, 14C, and 14D.)

23. Syda asked about the Johnny Walker Blue Label bottle, to which Agent Patel said \$110 was the bare minimum he would take because he believed the retail price of the bottle was \$230. Agent Patel explained it took him a while to steal the Johnny Walker

Blue Label bottle from Walmart because it was locked up. Syda offered Agent Patel \$130 for both the Marlboro cigarette carton and Johnny Walker Blue Label bottle. After negotiations Syda spoke with Leu and the Respondents agreed to pay Agent Patel \$150 for both purportedly stolen items. Syda retrieved \$150 from the cash register and paid Agent Patel for the purportedly stolen Johnny Walker Blue Label bottle and Marlboro cigarette carton. Thereafter the agents exited the premises.

24. During the agents interactions with Syda in the Licensed Premises there were patrons entering and exiting the premises, who were interrupting Syda and the agents' negotiations and causing them to postpone their discussions until after the patrons exited the store.

25. Agent Patel was controlling the audio recording device he wore on his body during the above-referenced conversations. Agent Patel later transcribed the audio recording of the device onto pleading paper, both of which he provided to the Department counsel. Exhibit 10 is the said transcription. Exhibit 16 is a flash drive of the recording.⁴

26. Agents Patel and Holsapple returned to the Licensed premises with a team of agents, who conducted an inspection/search of the premises. The agents found inside the Licensed Premises numerous amounts of other drug paraphernalia items, with many drug paraphernalia pipes located inside a backpack hanging on the wall behind the sales counter and other drug paraphernalia underneath the sales counter. Photographs were taken of the drug paraphernalia found during the search of the premises. (Exhibit 15A depicts what is referred to in the Licensed Premises as the "set" which includes the clear, cylindrical glass pipe containing the artificial rose - commonly used for smoking crack cocaine. Exhibit 15B depicts at the left of the photograph the chore boy copper balls, and in the remaining portions of the photograph are depicted multiple packages containing over 150 methamphetamine pipes with bulbous ends. One of the agents searched Leu, incident to his arrest, and found Leu possessed on his person a methamphetamine glass pipe with bulbous end.

27. During all three dates in which Leu and Syda purchased allegedly stolen goods Agent Patel never begged or pleaded with them to buy anything from him. Agent Patel further never indicated he was homeless, hungry or in need of money or food. There was never any indication or evidence that either Leu or Syda did not understand the English spoken or what was discussed during each of the said interactions and transactions. There was never any indication or evidence that Leu or Syda did not understand that Agent Patel stole the said items that were purchased.

⁴ Excerpts of the recording were played at the hearing, while off the record; file name 190327_001 from approximate time stamps 2:45 to 4:30, from 7:00 to 8:00, and from approximately 9:05 to 11:20.

28. During all of the transactions and conversations in English between the Respondents and Department Agents on February 22, 26, and March 27, 2019, there was no evidence the Respondents did not understand what was discussed in English.

(Respondents' Witnesses)

29. Syda Sounakhene appeared and testified at the hearing. Mrs. Sounakhene is the co-Respondent/Licensee with her husband, Leu Soukseum. Mrs. Sounakhene has lived in the United States since 1980. She speaks and understands English. Mrs. Sounakhene admitted to the violations alleged in the accusation at hand. She and her husband, Leu Soukseum, pled guilty to a single count of attempting to unlawfully receive stolen property and in lieu of sentencing attended, on October 27, 2019, pursuant to order of the Superior Court of California, Riverside County, a misdemeanor deferred entry of judgment (DEJ) theft 1 program, which they completed on October 30, 2019. (Exhibits A and B – copies of Notice of Completion of Riverside County's DEJ Theft 1 program by Respondents. Exhibit C and D – copies of Superior Court of California, Riverside County case printout showing that based on Respondents' completion of the DEJ program their guilty pleas as to the single counts were set aside and the complaints/cases against them dismissed.) Mrs. Sounakhene acknowledged the violations she committed were wrong. She claimed ignorance of the law and promised to never commit the violations again.

30. The Respondents received from the Hemet Police Department, ABC-341 forms dated September 26, 2019, and February 21, 2020, for having successfully prevented minor decoys from attempting to purchase alcoholic beverages at the Licensed Premises. (Exhibits F1 and F2.) Mrs. Sounakhene said she and her husband's Gas Mart, the Licensed Premises, has become referred to in the community as "mom and pop's" because the Respondents are connected with the neighborhood.

31. Leu Soukseum appeared and testified at the hearing. Mr. Soukseum has been living in the United States since 1980. In 1981 he took an English course for 18 months. He claims he speaks "very little" English and understands a "little bit" of English. Mr. Soukseum also claimed ignorance of the law and promised not to break the law again. Mr. Soukseum has been operating the Licensed Premises with his wife, Syda Sounakhene, for well over 17 years.

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Penal Code section 496(a) provides that every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.
4. Penal Code section 664 criminalizes the act of attempting to commit any crime, but fails, or is prevented or intercepted in its perpetration.
5. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that the Respondents-Licensees on February 22, 26, and March 27, 2019, at the Licensed Premises, bought, received, withheld or concealed property, to-wit: one 750 milliliters (ml) Hennessy Cognac V.S.O.P., one 750 ml Johnny Walker Blue Label Scotch, two cartons of Marlboro Reds cigarettes, and one 750 ml Baileys Original Irish Crème, believing the same to have been stolen, in violation of section 496 of the Penal Code. (Counts 1, 3 and 5.) (Findings of Fact ¶¶ 4-9, 12-17, 19-28.)
6. Since the property was not, in fact, stolen, the question is whether the provisions of attempt pursuant to Penal Code section 664 apply. Under the facts of this case, the purchases that occurred on the respective dates, were clearly attempts by the Respondents to receive stolen property. Within the Respondents' knowledge, they believed they completed the purchases (at discounts) of alcoholic beverages and cigarette cartons which were stolen from a Walmart by a purported employee. Beyond Respondents' control and knowledge was the fact the said merchandise and the "seller" were law enforcement props in an undercover investigation.
7. Health and Safety Code section 11364.7(a) provides, in part, that "any person who delivers, furnishes, or transfers, possesses with intent to deliver, furnish, or transfer, or manufactures with the intent to deliver, furnish, or transfer, drug paraphernalia, knowing,

or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance . . . in violation of this division, is guilty of a misdemeanor.”

8. Health and Safety Code section 11364.7(d) provides that “[t]he violation, or the causing or the permitting of a violation, of subdivision (a), (b), or (c) by a holder of a business or liquor license issued by a city, county, or city and county, or by the State of California, and in the course of the licensee’s business shall be grounds for the revocation of that license.”

9. Health and Safety Code section 11014.5(a) contains a broad definition of drug paraphernalia as “all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this division.” A non-exclusive list of items is set forth immediately after this definition

10. Health and Safety Code section 11014.5(b) provides that “the phrase ‘marketed for use’ means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances.”

11. Health and Safety Code section 11014.5(c) provides that, “[i]n determining whether an object is drug paraphernalia, a court or other authority may consider, in addition to all other logically relevant factors, the following: (1) Statements by an owner or by anyone in control of the object concerning its use. (2) Instructions, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body. (3) Descriptive materials accompanying the object which explain or depict its use. (4) National and local advertising concerning its use. (5) The manner in which the object is displayed for sale. (6) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products. (7) Expert testimony concerning its use.

12. Cause for suspension or revocation of the Respondents’ license exists for the violation of sections 11364.7(a)(1) and 11364.7(d) alleged in counts 2, 4, and 6 of the accusation. (Findings of Fact ¶¶ 4-6, 9-14, 18-21, and 24-28.) At the outset, Mrs. Sounakhene was fully aware the agents were asking for a methamphetamine and crack

cocaine pipes to be used to ingest those controlled substances. Upon request she immediately reached beneath the sales counter and pulled out the requested items. Mrs. Sounakhene even offered, without either agent requesting, a chore boy copper ball to be sold with the rose/crack cocaine pipe, promoting the use of the copper ball with the crack pipe, sold as a "set." Continuance of the license without imposition of discipline would be contrary to public welfare and morals.

13. The Respondents' claimed they did not know their conduct was a violation of the law. This argument is rejected. It is well settled case law that, ignorance of the law is not a defense.

14. The Respondents further argued, while in layman's terms, they were entrapped and, therefore, the accusation should be dismissed. The basis of this argument was that Mrs. Sounakhene's decision to engage in unlawful conduct was "clouded by my emotions when faced with undercover agents who appeared to look as though they were struggling and at a difficult place in life..." "in my mind I thought I was helping..." "when the agent approached me he seemed like he was very tired and hungry and homeless and so I just want to help out." Mrs. Sounakhene claimed that "Agent Patel continued to entice me even after my refusal which forced me to behave in a way that I would not normally behave." These claims, unsupported by other evidence, and contradicted by the record, are insufficient to establish the defense of entrapment.

15. Under California law, the test for entrapment is whether "the conduct of the law enforcement agent [was] likely to induce a normally law-abiding person to commit the offense . . . Official conduct that does no more than offer [an] opportunity to the suspect is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."⁵

16. The Respondents failed to make such a showing in this case. Agent Patel's words or actions did not constitute badgering, cajoling, importuning, or other overbearing conduct. Agent Patel merely asked the Respondents if they wanted the goods, to which they agreed. Agent Patel credibly maintained he never begged or pleaded for either Respondent to buy anything. He further credibly testified he never indicated he was homeless, hungry or needed money for food. Respondents' testimony otherwise is not credible. During each interaction, the Respondents could easily have said, "No," and continued working.

⁵ *People v. Barraza*, 23 Cal. 3d 675, 689-90, 153 Cal. Rptr. 459, 467 (1979); *People v. Holloway*, 47 Cal. App. 4th 1757, 1763-64, 55 Cal. Rptr. 2d 547, 550 (1996).

(Credibility)

17. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the witness' capacity to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness' testimony at the hearing, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

18. Respondents' contentions that (1) they did not understand the English spoken to them during the investigation, (2) they did not know their actions were illegal, and (3) they were enticed or forced (entrapped) by the agents to commit the violations and the agent(s) appeared "as though they were struggling and at a difficult place in life..." "seemed like he was very tired and hungry and homeless" is not credible and disbelieved. The Respondents presented inconsistent testimony which conflicted with prior statements made during the transactions. They further presented a bias in the presentation of their testimony as the co-licensees of the Licensed Premises, subject to revocation/discipline.

19. The evidence and record established the Respondents spoke and understood English, willingly engaged in and at times controlled the interactions, and knew full well Agent Patel had purportedly stolen the merchandise they negotiated and purchased. There was no evidence Respondents were pressured or the agents used overbearing, badgering conduct. In fact, it was Mrs. Sounakhene who was in control of the interactions. At one point she reprimanded Agent Holsapple for using the terms "rose pipe for crack," and on another occasion instructed the agents that in the Licensed Premises they use the code words, "candy bar" for a methamphetamine pipe, and "set" for the a crack cocaine pipe sold with a chore boy copper ball; Leu Soukseum confirmed the same when speaking with the agents. On other days Mrs. Sounakhene instructed the agents to make sure no one was following them, and to go to a less conspicuous area of the store behind some tall floor displays, to conceal her criminal conduct, knowing it was wrong.

20. Mrs. Sounakhene, on numerous occasions, engaged, with skill, in negotiations with Agent Patel to lower the prices he offered for the purportedly stolen goods. The fact Mrs. Sounakhene skillfully negotiated the pricing negates and conflicts with her claim she was just trying to help the agents. The evidence established she was trying to benefit herself by obtaining a cheaper price for the already largely reduced offers Agent Patel made, given the known retail fair market value of the goods.

21. The evidence also established that Leu Soukseum overheard and engaged in the discussions and interactions on the respective dates. At one point, Mr. Soukseum

interjected to explain to his wife that the security locking device Agent Patel spoke of removing from the purportedly stolen Baileys alcoholic beverage bottle was an alarm device.

22. In applying the factors of Evidence Code section 780, the undersigned found Agent Patel to present wholly credible, consistent testimony, and to have a clear recollection of material matters about which he testified. There was no evidence Agent Patel had any motive to fabricate his testimony. Agent Patel credibly maintained there was never any indication that either Respondent did not understand the English spoken or what was discussed during each of the interactions, and there was never any indication the Respondents did not understand Agent Patel had purportedly stolen the items which Respondents purchased. In fact, Mrs. Sounakhene confirmed on multiple occasions that the merchandise was stolen. At one point, when Agent Patel asked Syda not to tell anyone he had stolen the Hennessy bottle, Mrs. Sounakhene assured the agent not to worry because they were not like that. On another occasion, when Agent Holsapple mentioned he and Agent Patel could steal cigarettes, Mrs. Sounakhene advised she needed to make sure the cartons had the California stamp in addition to making sure that those stamps were present if the board were to visit. At another point she mentioned Walmart must lose a lot of money because of the agents theft of merchandise. Mrs. Sounakhene, even at one point, inquired if Agent Patel could get her a Johnny Walker Blue Label after Agent Patel explained it was easy for him to steal the Hennessy bottle because he worked in the back of Walmart.

PENALTY

The Department requested the Respondents' license be revoked based on (1) both Respondents' direct involvement in multiple violations, (2) the Respondents' two prior disciplinary matters, (3) a continuing course or pattern of conduct, (4) Syda Sounakhene's attempts to conceal the illicit activity, and (5) the amount of drug paraphernalia found in the Licensed Premises.

The Respondents did not recommend a penalty should the accusation be sustained. The Respondents argued for mitigation based on their having received two ABC-243 forms for having successfully prevented sales to minors, in addition to completing the DEJ theft program.

Rule 144⁶ provides for revocation for single incidents of the Respondent/Licensee's receiving stolen property, and Health and Safety Code section violations involving transactions on licensed premises. Revocation stayed for three years and a 20-day

⁶ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

suspension is recommended for Health and Safety Code section violations involving drug paraphernalia, possession for sale.

Little, if no, mitigation is warranted. While it is commendable the Respondents attended the DEJ program, it was court-ordered in lieu of their being sentenced and to obtain a dismissal of the charges filed against them in the Superior Court. While the two prior violations are somewhat remote, they are evidence the Licensed Premises is not discipline-free, and evidence that the Respondents graduated from sales to minor violations to the violations at hand. Aggravation is warranted for both licensees' direct involvement in the violations, Syda Sounakhene's attempts to conceal their criminal conduct and her ease with engaging in such criminal conduct. Further aggravation is warranted for the volume of drug paraphernalia seized in the Licensed Premises, not to mention the drug paraphernalia found on Leu Soukseum's person during the search incident to his arrest. While the Respondents attempted to promise to never engage in similar violations again, their promises were not credible based on the above. The penalty recommended herein complies with rule 144.

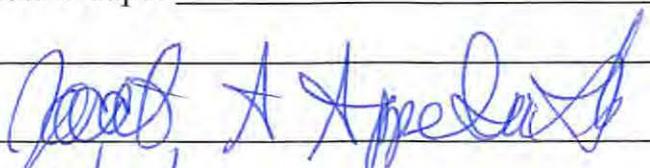
ORDER

Counts 1 through 6 are sustained. In light of these violations, the Respondents' off-sale beer and wine license is hereby revoked.

Dated: March 19, 2020



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 4/23/20