

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

AB-9991

File: 47-181428; Reg: 22092630

CARMELA SURIAN & GINO SURIAN,
dba T & A Cocktail Lounge
2101 Main Street
Susanville, CA 96130,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 12, 2024
Sacramento, CA / Videoconference

ISSUED APRIL 16, 2024

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Carmela Surian and Gino Surian,

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

OPINION

Carmela Surian and Gino Surian, doing business as T & A Cocktail Lounge (appellants), appeal from a decision of the Department of Alcoholic Beverage Control (Department)¹ revoking their license because they kept or permitted a disorderly house, in violation of Business and Professions Code section 25601;² knowingly permitted the sale of controlled substances in the licensed premises, in violation of section

¹ The decision of the Department, dated October 31, 2023, is set forth in the appendix.

² All statutory references are to the California Business and Professions Code unless otherwise noted.

24200.5(a) and Health and Safety Code section 11352(a); their employee permitted an individual to remain inside the licensed premises while under the influence of an intoxicating liquor and/or drug, such that he was unable to exercise care for his own safety or the safety of others, in violation of Penal Code section 647(f), and, the employee aided and abetted this behavior.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general eating place license was issued on January 1, 1986.

There is no record of prior departmental discipline against the license.

On October 18, 2022, the Department instituted a five-count accusation against appellants charging:

Count 1:

On or about and between September 26, 2020 and July 23, 2022, respondent-licensees kept or permitted, in conjunction with the licensed premises, a disorderly house, or place in which people abide or to which people resort to the disturbance of the neighborhood, or in which people abide or resort to for purposes injurious to the public safety, health, convenience, or morals, in violation of Business and Professions Code Section 25601.

[Count 1 also lists 12 incidents/calls for service alleged to have occurred at or near the premises during this time period.]

Count 2:

On or about February 23, 2022, respondent-licensees knowingly permitted the illegal sale, or negotiations for sales, of controlled substances upon the licensed premises, to wit: oxycodone, in violation of Business and Professions Code Section 24200.5(a).

Count 3:

On or about February 23, 2022, respondent-licensees' agent or employee, Eric Moore, sold or furnished, within the premises, a controlled substance, to-wit: oxycodone, in violation of Health and Safety Code Section 11352(a).

Count 4:

On or about February 23, 2022, respondent-licensees' agent or employee, Eric Moore, was within the licensed premises an aider or abettor, as defined in Section 31 of the California Penal Code, in the public offense of Benjamin Wheeler being drunk in public, in violation of Penal Code Section 647(f).

Count 5:

On or about February 23, 2022, respondent-licensees and respondent-licensee's agents or employees, permitted Benjamin Wheeler, to remain in the licensed premises while he was under the influence of an intoxicating liquor or drug or combination thereof, such that he was unable to exercise care for his own safety or the safety of others, in violation of Penal Code Section 647(f).

In each of the five counts the accusation further contends:

There is cause for suspension or revocation of the license(s), in accordance with Section 24200 and 24200(a) and (b) of the Business and Professions Code. It is further alleged that continuance of the license would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and Sections 24200(a) and (b) of the Business and Professions Code.

(Exh. 1.)

At the administrative hearing held on February 24, April 18, April 19, and April 20, 2023, documentary evidence was received and testimony was presented by Susanville Police Department (SPD) officers Frederick Foulk, Kevin Singletary, Richard Warner, Michael Hoover, Kevin Stafford, Michael Bengoa-Bollinger, and Cameron Monahan; as well as Lassen County Sheriff's Office (LCSO) deputies Michael Loflin and Megan Monahan. Testimony was also received from appellants' family members/employees Brian Keith Rose Jr., Christina Rose, and Ivanna Rose Orozco, as well as employee Carissa Ridgeway. Community members and patrons testifying on appellants' behalf included: Thomas Herrera, Kimberly Erb, Kevin Camacho, Scott

Bollinger, Patrick Matsce, Lawrence Sanson, Salvador Gonzalez, Daniel Christensen, and Daniel Curtis Cox Jr. Appellant and co-licensee Gino Surian also testified.

Testimony established that on September 26, 2020, a patron named Salvador Gonzalez arrived at the licensed premises with a female companion. Shortly thereafter, he was hit by another patron, Cesar Gonzalez (no relation), the ex-boyfriend of his companion. Rowdy, the bartender, tried to break things up and told them both to leave. Salvador attempted to leave on a motorcycle, but the incident spilled over into a nearby parking lot, and he eventually fled on foot. SPD Officer Foulk received a call for service at approximately 12:40 a.m. He responded and met Salvador at a gas station. Salvador sustained injuries to his face and left ear, but he declined to press charges. Various witnesses were interviewed, but they too declined to press charges. (Findings of Fact (FF) ¶¶ 4-6.)

On January 23, 2021, SPD Officer Kevin Singletary was parked near the licensed premises, and saw patron Sylvia Carrillo dragging another female out of the premises by her hair. He intervened, and found Carrillo to be heavily intoxicated and unwilling to talk to him. Officer Singletary entered the premises and spoke to two employees who said that they tried to eject Carrillo. Carrillo was subsequently arrested for public intoxication. (FF ¶¶ 7-8.)

On May 9, 2021, SPD Detective Richard Warner, was dispatched to the licensed premises after a reported fight. SPD Officer Cameron Monahan was already on the scene, surrounded by fifteen people, with more people on the street. Detective Warner spoke to patron Wendel Davenport, who reported that upon exiting the premises, an unknown person took a swing at him. He pointed out Alex Buckmaster, who was across the street, as his attacker. Another person, Simon McClellan, indicated that he

came to Davenport's aid because he appeared to be overwhelmed. Video evidence confirmed a general free-for-all outside the premises. (FF ¶¶ 9-10.)

On June 15, 2021, SPD Officer Cameron Monahan responded to a call at the licensed premises at approximately 10:00 p.m. He spoke to patron Damon Moore, who said that he had been involved in an altercation during which he was knocked unconscious, and, while he was on the floor, someone hit him with a barstool. This resulted in bruising underneath his eyes, a bloody lip, and a punctured lung. He was airlifted to the hospital for medical attention. (Exhs. D93a-b.) Officer Monahan contacted appellants' daughter and employee, Christy Rose, who arrived at the premises at approximately the same time as the police. She provided video of the incident showing two groups of people inside the premises, initially talking to each other, but then getting into a brawl involving approximately ten people. Ms. Rose's son, Keith Rose, closed the premises after this incident, and everyone involved was banned from the premises. (FF ¶¶ 11-13.)

On June 25, 2021, SPD Officer Michael Hoover and other officers were dispatched to the licensed premises because of a reported altercation. Officer Hoover spoke to a heavily intoxicated woman who stated that she was exiting the licensed premises when James McCastle hit her with the door and she fell to the ground. Officer Hoover asked employee Christy Rose if he could view the video to confirm what happened. Upon viewing it, he determined there was no criminal behavior and that the woman had been hit accidentally by the door. As such, he closed the case. (FF ¶ 14.)

On August 15, 2021, SPD Officer Monahan responded to a report of a fight at the bar. He arrived at approximately 2:00 a.m., and spoke to Brearra Dixon, who stated that she had been choked and that her neck and the side of her head had been

injured in an attack inside the licensed premises. After viewing video provided by an employee, Officer Monahan determined that an altercation involving Dixon's brother had occurred, and that she was pulled to the ground by her hair when she tried to intervene. (Exhs. D94a-c; FF ¶¶ 15-16.)

On November 8, 2021, Officer Michael Hoover responded to the licensed premises concerning a fight between several people which had spread out into the street by the time he arrived. He tried to get everyone to disperse. Officer Hoover contacted patron Lawrence Sanson, who was bleeding and had a laceration on his head as a result of hitting his head when shoved to the ground. Sanson and his wife stated that an unidentified man had been bothering him inside the premises. An argument ensued between various individuals, and when Sanson attempted to break it up he was thrown to the ground by the unidentified man. (FF ¶¶ 17-18.)

On February 15, 2022, Detective Warner received a call for service around 10:00 p.m. concerning a hit and run involving a vehicle parked across the street from the premises. Warner spoke to employee Christy Rose and asked to see video from their outdoor cameras. It showed a man get into a truck, back out of the parking lot and onto Sacramento Street, hitting the parked car and inflicting visible damage. (FF ¶ 19.)

On February 23, 2022, Benjamin Wheeler entered the Licensed Premises shortly after 8:00 a.m., and ordered an alcoholic beverage from the bartender, Michael Gibbs. Throughout the morning Wheeler ordered a total of eleven drinks — some served by Gibbs and some by Eric Moore, another bartender. Between 10:00 and 10:30 a.m., Wheeler and Moore engaged in a conversation, after which Moore walked over to his tote bag, removed something from it in a clear plastic baggie, and placed it either in or under Wheeler's wallet so that it was not visible. Wheeler obtained some

money from the ATM and placed the money on the counter next to his wallet and Moore picked up the money. Wheeler took the item into the restroom. Later, while seated at the bar counter, Wheeler removed something from the wallet, placed it in his mouth, and took a drink.

Around noon, Wheeler left the Licensed Premises to go to lunch. He returned approximately 1½ hours later. The evidence established that he had one large mug of beer at lunch. There is no evidence that anyone connected to the licensed premises was aware that Wheeler consumed this drink. Upon his return to the premises, Wheeler was more animated and his balance was off. Moore served Wheeler two more drinks. Wheeler took out the baggie, placed it on the bar counter, removed something from it, and swallowed it. Moore covered up the baggie while it was on the counter. (Exhs. D49, D51 & D74; FF ¶¶ 20-24.)

Employee Carisa Ridgeway worked a couple of hours in the morning and returned to the premises later as a patron. She testified that Wheeler was not intoxicated before lunch, but that sometime after he returned from lunch his demeanor had changed. Employee Keith Rose, who was collecting recycling outside the licensed premises, testified that Wheeler appeared to be intoxicated when he saw him around 2:30 p.m. Cody Glines, one of Wheeler's friends, testified that shortly before Wheeler exited, he thought Wheeler was "too drunk" and then got a lot worse over the next twenty to thirty minutes. (FF ¶ 25.)

Wheeler began swaying and needed help walking. His friend, Sherman Idip, put his arm around Wheeler and escorted him out around 2:20 p.m. Idip escorted Wheeler to a white truck, steadying him the entire time, but Wheeler fell over near the truck. Idip tried to get Wheeler into the truck. (Exhs. D76 & D85-D88; FF ¶ 26.)

Glines called Wheeler's son, Elijah, who drove his father back home. At some point during the drive, Wheeler died. The cause of death was acute oxycodone and ethanol toxicity. (Exh. D92.) LCSO Deputy Megan Monahan interviewed Glines. Based on his description of the pills, she used a pharmaceutical database and determined that the pills in question were Percocet — a combination of oxycodone and acetaminophen. (FF ¶ 27.)

When Wheeler exited the premises, Idip ended up with the baggie. He took it to the restroom and left it there. He later told employee Keith Rose. Keith went to the restroom, obtained the baggie, and disposed of it. (FF ¶ 28.)

Employee Christy Rose testified that Moore had broken his neck sometime before 2014, and therefore had a prescription for Percocet. She believed he kept his medication at home and, to her knowledge, never brought it to the premises.

Co-licensee Gino Surian testified that he was unaware that Moore used painkillers. If he had known, he would not have allowed Moore to take them at work. (FF ¶ 33.)

On July 14, 2022, SPD Sergeant Kevin Stafford was flagged down by Timothy Baker, who stated that while playing pool in the licensed premises he had been jumped by various individuals inside the premises and sustained injuries to his face. Video evidence confirmed that Baker was assaulted by three people. An employee tried to intervene, but Baker was forced to flee. (FF ¶¶ 29-30.)

On July 23, 2022, Officer Monahan responded to a call at the licensed premises about two females fighting. One of the women, Tiffany Ridgebear, was found to be very intoxicated, uncooperative, and had a bloody nose. Employee Christy Rose stated that Ridgebear had been causing problems all night and had been the aggressor. Ridgebear was banned from the premises after this incident. (FF ¶ 31.)

Numerous witnesses testified on behalf of appellants, their community involvement, and their support of community groups and events. These witnesses opined that the community would be worse off without the licensed premises. Employees and other various other witnesses testified that appellants do not permit drugs in the premises. (FF ¶ 32.)

Following the four days of hearing, on September 7, 2023, the administrative law judge (ALJ) issued a proposed decision sustaining counts one, two and three, dismissing counts four and five, and recommending that the license be revoked. The Department adopted the proposed decision in its entirety on October 25, 2023, and a certificate of decision was issued six days later.

Appellants then filed a timely appeal contending: (1) the Department's holding, that appellant's bartender sold or provided pills to a patron, is not supported by the findings; (2) the decision erred by sustaining a disorderly house count based on four or five incidents occurring over a period of twenty-two months; (3) the penalty is excessive and constitutes an abuse of discretion; and (4) the Department erred by sustaining two counts arising from the same conduct.

CODE SECTIONS CITED IN THIS MATTER
PROVIDED FOR REFERENCE

- (1) **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. (Cal. Const. Art. XX, § 22; Bus. and Prof. Code § 24200, subd. (a).)

- (2) **Business and Professions Code 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. (Bus. and Prof. Code § 24200, subd. (b).)

(3) **Business and Professions Code section 25601** provides:

Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor. (Bus. and Prof. Code § 25601.)

(4) **Health and Safety Code section 11352(a)** provides:

(a) Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years. (Health and Safety Code section 11352, subd. (a).)

(5) **Penal Code section 647(f)** provides:

Except as provided in paragraph (5) of subdivision (b) and subdivision (k), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(f) [A person] who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that they are unable to exercise care for their own safety or the safety of others, or by reason of being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way. (Penal Code section 647, subd. (f).)

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellants contend the Department's holding, that appellants' bartender sold or provided pills to a patron, is not supported by the findings. (Appellants' Opening Brief (AOB) at pp. 1-2; 7-8.) Appellants further allege that the decision fails to comply with the requirement in *Topanga* "that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (*Topanga*) (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12].)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

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.)

Appellants maintain the findings of fact in this matter do not support the conclusions drawn regarding the pills sold to Wheeler by bartender Moore. As such, appellants contend the decision should be reversed. Specifically, appellants complain about the findings of fact, stating: “the ALJ and Department do not make any Findings of Fact identifying the contents of the bag as either pills or oxycodone” (AOB at p. 5), referencing the following findings:

21. Between 10:00 a.m. and 10:30 a.m., Wheeler and Moore engage in a conversation. Shortly thereafter, Moore walked over to his tote bag and removed something from it. Moore took the item and placed it either in or under Wheeler's wallet. He then adjusted the wallet such that the item was not visible. Wheeler obtained some money from the ATM. He counted out some bills and set them on the counter next to his wallet. Moore picked up the money.

22. Wheeler took the item, a clear plastic baggie, from his wallet and manipulated it. He then carried it with him into the restroom. Later, while seated at the bar counter, Wheeler removed something from the wallet, placed it in his mouth, and took a drink.

¶ . . . ¶

24. Upon his return to the Licensed Premises, Wheeler was more animated and his balance was off. Moore served Wheeler two more drinks. Wheeler took out the baggie, placed it on the bar counter, removed something from it, and swallowed it. Moore covered up the baggie while it was on the counter. (Exhibits D49, D51 & D74.)

¶ . . . ¶

28. When Wheeler exited, Idip ended up with the baggie. He took it to the restroom and left it there. He later told K. Rose, who went to the restroom, obtained the baggie, and disposed of it. K. Rose testified that he saw Wheeler while he was collecting the recycling and that he appeared intoxicated.

(FF ¶¶ 21, 22, 24, 28, footnote omitted.) Appellants assert that these findings do not support the following conclusions of law:

9. These two violations, alleged in counts 2 and 3, arise from the same incident-the sale of oxycodone by Eric Moore to Benjamin Wheeler. The evidence established that Moore was a bartender at the Licensed Premises and was working behind the bar counter when he and Wheeler had a discussion. Wheeler subsequently placed a pile of money on the counter. Moore obtained some pills and placed them with Wheeler's wallet. He also picked up the money.

10. Later, when Wheeler placed the pills on the bar counter, Moore purposefully covered them up. After Wheeler left the Licensed Premises, Sherman Idip took the pills and left them in the restroom. He told Keith Rose what he had done; K. Rose took the pills and disposed of them. Dep. M. Monnahan, Lassen County Sheriffs Department, interviewed a number of witnesses who were able to describe the pills. Their description matched the appearance of Percocet, according to a pharmaceutical reference guide. Moore had a prescription for Percocet, a drug which contains oxycodone.

(Conclusions of Law (CL) ¶¶ 9-10.)

Appellants would have this Board reverse the decision, based on cherry-picked findings which, by themselves, might not suffice to support the ALJ's conclusions. However, when read in its entirety, the decision includes the missing link to support those conclusions, taken from the testimony of Wheeler's friend, Cody Glines:

27. Glines called Wheeler's son, Elijah. Elijah drove his father back home. At some point during the drive, Wheeler died. The cause of death was acute oxycodone and ethanol toxicity. (Exhibit D92.) Dep. M. Monnahan, Lassen County Sheriffs Department, interviewed Glines. Based on his description of the pills, she used a pharmaceutical database and determined that the pills in question were Percocet. Percocet is a combination of oxycodone and acetaminophen.

(FF ¶ 27.) Appellants fail to reference this finding, or the evidence in the record that the cause of death was identified as oxycodone, or that there was testimony about the description of the pills sold to Wheeler which identified them as Percocet — a drug containing oxycodone. These facts, taken together, allowed the ALJ to make the permissible inference, in his conclusions of law, that the exchange between Moore and Wheeler was the purchase of these pills.

Appellants' reliance on *Topanga* is misplaced. This Board has rejected countless previous attempts to stretch *Topanga* to somehow require an explanation of the ALJ's thought process, as appellants ask for here. *Topanga* addressed the total absence of findings. It is of no relevance in a case such as this, where the ALJ *did* make findings. And, as we have said many times, those findings need not be explained.

Counts two and three were properly sustained as being supported by substantial evidence.

II

DISORDERLY HOUSE

Appellants contend the Department erred by sustaining a disorderly house count against the premises, “based on four or five incidents occurring over a period of twenty-two months.”³ (AOB at pp. 8-11.) They claim that in order to be found to be a disorderly house, as defined by section 25601, there must have been a greater number of law enforcement incidents than four or five. (*Ibid.*)

A licensed premises which presents a law enforcement problem is defined in section 25601 as: “[a] place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety . . .” (Bus. and Prof. Code § 25601.)

Under controlling legal authority, licensees have an affirmative duty to maintain and operate their premises in accordance with law. (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779] [“A licensee has a general, affirmative duty to maintain a lawful establishment.”]; see also *Ballesteros v. Alcoholic Bev. Control Appeals Bd.* (1965) 234 Cal.App.2d 694, 700 [44 Cal.Rptr. 633] [“[A]n on-sale licensee has an affirmative duty to maintain a properly operated premises”]; *Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405] [“The holder of a liquor license has the affirmative duty to make sure that the licensed premises are not used in violation of the law”]; *Munro v. Alcoholic Bev. Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527] [“The owner of a liquor license has the

³ The accusation actually lists twelve incidents in count one to substantiate this charge. (Exh. 1.)

responsibility to see to it that the license is not used in violation of law"]; *Mack v. Dept. of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629] ["The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license"].)

Furthermore, the California Constitution provides, "The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." (Cal. Const., art. XX, § 22.)

The Business and Professions Code further provides that a license may be suspended or revoked if continuance of the license would be contrary to public welfare or morals, or, if a licensee has violated, or caused or permitted a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages. (Bus. & Prof. Code, § 24200(a) and (b).)

California courts have long found that "[w]here premises licensed for the sale of alcoholic beverage are operated in such a manner as to make them a law enforcement problem for the police, public welfare and morals are directly involved and affected." (*Harris, supra* at p.118 [holding that a premises presenting law enforcement problems merited license revocation].) As the *Harris* court wrote:

If the law enforcement problem emerges, as it does here, from repeated instances of intoxicated patrons found on the premises in violation of a local ordinance, it is fatuous to maintain that these conditions of doing business do not offend public welfare or morals . . .

(*Ibid.*)

No particular number of incidents in connection with a licensed premises are required before it can be classified as a law enforcement problem or disorderly house.

In past appeals, as appellants note, some cases presented to the Board have included more incidents than alleged in this matter. This, however, is irrelevant. As noted in the decision's conclusions of law, it is *both the number and type of incidents*, where police time and resources are expended at a premises, that determine whether that premises is found to be a disorderly house:

11. 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, between January 23, 2021 and July 14, 2022, the Respondents kept or permitted, in conjunction with the Licensed Premises, a disorderly house, or place in which people abide or to which people resort to the disturbance of the neighborhood, or in which people abide to or resort to for purposes injurious to the public safety, health, convenience, or morals in violation of section 25601. (Findings of Fact ¶¶ 7-8, 11-13, 15-16 & 20-30.)

12. To prove that a licensed premises is a disorderly house, the Department must offer evidence of specific incidents of misconduct. Unlike a law-enforcement-problem count, a disorderly house is established based on the incidents themselves, not by the mere fact that a police response was required, although the number and type of incidents which require a police response have a bearing on whether a licensed establishment is operated as a disorderly house.

13. In this case, the evidence established a disturbing pattern of patrons being assaulted inside the Licensed Premises. On January 23, 2021 . . . , a heavily intoxicated patron inside the Licensed Premises who, although asked to leave, returned and assaulted another patron. On June 15, 2021 . . . , an argument broke out between two groups of people inside the Licensed Premises. The argument escalated into a brawl, during which one man was seriously injured. Similarly, on August 15, 2021 . . . , an altercation between two patrons escalated, resulting in a female patron being pulled to the ground by her hair and attacked. Finally, on July 14, 2022 . . . , a man was assaulted inside the Licensed Premises. Although an employee of the Licensed Premises intervened, the assault continued. As described above, the evidence also established the sale of oxycodone to Wheeler . . .

14. It is clear from the evidence that the Respondents are not taking proper precautions to prevent patrons from being assaulted inside the Licensed Premises and, further, does not have enough personnel to stop

such assaults when they happen. The Respondents also failed to prevent one of its bartenders from selling illegal drugs while working.

(CL ¶¶ 11-14.)

Furthermore, as the Department points out in its Reply Brief (DRB at pp. 11-12), the record of those “other cases” is not before this Board, and courts have repeatedly rejected such requests to compare penalties imposed in outside-the-record cases — citing the following passages from *Rosales* and *Coleman*:

[A]ppellants claim that at the same time revocation of their license was ordered the department found in favor of a nearby licensee upon like charges and comparable evidence. This, they say, requires reversal as to them. Appellants cite no authority for the view that this circumstance, if true, would require reversal in the present case. But even if this were the rule they have not brought themselves within it. The proceedings against the nearby licensee are not before us. The record in our case contains nothing to show what charges were made or what evidence produced in the other case. Thus the claim affords no possible ground for reversal here.

(*Rosales v. Department of Alcoholic Beverage Control* (1959) 171 Cal.App.2d 624, 626 [341 P.2d 366].)

Neither is there any merit to appellants' contention that the revocation of their license was arbitrary because “legions” of similar violations have resulted in penalties much less severe. Since the proceedings against the other licensees are not a part of the record before this court, there is nothing to show what charges were made or what evidence produced in the other cases. [Citation.] Moreover, there is no requirement that charges similar in nature must result in identical penalties. [Citation.]

(*Coleman v. Harris* (1963) 218 Cal.App.2d 401, 404 [32 Cal.Rptr. 486].)

There is substantial evidence in the record to support the ALJ's conclusion that “it is clear from the evidence that [appellants] are not taking proper precautions to prevent patrons from being assaulted inside the Licensed Premises.” (Decision at p. 9.) Accordingly, the Department's finding, that appellants' premises constitutes a disorderly house, such that continuance of the license would be contrary to public welfare and

morals as set forth in the California Constitution and in section 24200, subdivisions (a) and (b), is also supported by substantial evidence. We cannot reweigh the evidence to reach a contrary conclusion.

III

PENALTY

Appellants contend the penalty of revocation is excessive, and constitutes an abuse of discretion, because the decision fails to consider the factors in mitigation which were presented by appellants. (AOB at pp. 2; 11-12.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) “‘Abuse of discretion’ in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]” (*Brown v. Gordon* (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.*)

The ALJ found as follows in regards to the penalty:

PENALTY

The Department requested that the Respondents' license be revoked, arguing that, not only had the Licensed Premises been operated as a disorderly house, but an employee had provided oxycodone to a patron

who subsequently died. The Respondents argued that the Licensed Premises had not been operated as a disorderly house, noting that there were only a handful of incidents, all of which the Respondents dealt with quickly. The Respondents also emphasized that the percipient witnesses did not believe that Wheeler appeared intoxicated. Accordingly, they argued that revocation was too harsh.

Section 24200.5 provides that "the [D]epartment shall revoke a license" for any violation thereof. Caselaw provides that this section requires some form of revocation, i.e., outright revocation or stayed revocation is appropriate depending upon the circumstances. Similarly, rule 144 provides that the term "'revocation' includes a period of stayed revocation as well as outright revocation of the license. For drug-related offenses, both under section 24200.5(a) and under the various Health and Safety Code sections, the recommended penalty pursuant to rule 144 is revocation.

For violations of section 25601, rule 144 provides for a penalty of 30 days (for occasional or isolated offenses) up to revocation (for recurring/ aggravated offenses). The violations in this case are serious and appear to be ongoing-four incidents in which patrons were assaulted over the course of 18 months. Some of these incidents involved multiple patrons. A significant penalty is warranted.

The penalty recommended herein complies with rule 144.

(Decision at p. 11, footnotes omitted.)

Appellants fault the Department for failing to discuss the evidence presented by appellants of their penalty-free operation over a period of thirty-six years, and documented training of employees. However, 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, which has not been shown here. We find the decision in regards to the penalty to be entirely reasonable.

IV

PROCEDURAL ISSUE

Appellants contend the Department erred by sustaining two alternative counts (counts 2 and 3) arising from the same conduct. (AOB at pp. 5; 12-13.) Appellants allege, “the stacking of two functionally-identical charges for the same conduct has still resulted in a harsh penalty - likely harsher than would have been imposed had only one count been sustained.” (*Id.* at p. 13.)

The counts in question charge that appellants “knowingly permitted the illegal sale, or negotiations for sales, of controlled substances upon the licensed premises, to wit: oxycodone, in violation of Business and Professions Code Section 24200.5(a).” (Exh. 1, Count 2.) And, that their “agent or employee, Eric Moore, sold or furnished, within the premises, a controlled substance, to-wit: oxycodone, in violation of Health and Safety Code Section 11352(a).” (Exh. 1, Count 3.)

Appellants’ contention, that charging violations under both the Business and Professions Code as well as the Health and Safety Code likely resulted in a higher penalty than if only one of these charges had been brought, is directly contradicted by the decision which clearly states: “[f]or drug-related offenses, both under section 24200.5(a) and under the various Health and Safety Code sections, the recommended penalty pursuant to rule 144 is revocation.” (Decision, at p. 11.) In other words, no matter how it was charged, the penalty for drug-related offenses is revocation.

Furthermore, as the Department points out, appellants are asking the Board to apply criminal case law principles to an administrative proceeding, when the two are entirely different:

A criminal statute related to procedures governing criminal cases is not relatable to this administrative case. An accusatory pleading in an administrative case is governed by the Administrative Procedure Act, not the Penal Code. California Government Code section 11503 is the APA provision that governs accusations, and it does not contain any of the same limiting language of Penal Code section 954.

(DRB at p. 15.) We must decline to apply this novel approach.

This is not the abuse of discretion situation appellants warn of, where the Department has ginned up “arbitrarily-large penalties with no rational relationship to the actual underlying conduct simply by charging, and sustaining, multiple alternative counts describing the same unlawful behavior but alleging violation of multiple different statutes and regulations.” (AOB at p. 13.) As the decision makes clear, either charge would result in revocation — the two together did not result in a higher penalty.

We find no error.

ORDER

The decision of the Department is affirmed.⁴

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

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

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

CARMELA SURIAN & GINO SURIAN
T & A COCKTAIL LOUNGE
2101 MAIN ST.
SUSANVILLE, CA 96130

ON-SALE GENERAL PUBLIC EATING PLACE -
LICENSE

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

REDDING DISTRICT OFFICE

File: 47-181428

Reg: 22092630

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 October 25, 2023. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 400 R St, Suite 320, Sacramento, CA 95811. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after December 11, 2023, a representative of the Department will contact you to arrange to pick up the license certificate.



https://abcab.ca.gov/abcab_resources/

Sacramento, California

Dated: October 31, 2023

RECEIVED

OCT 31 2023

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:

Carmela Surian & Gino Surian
dba T & A Cocktail Lounge
2101 Main St.
Susanville, California 96130

Respondents

} File: 47-181428
}
} Reg.: 22092630
}
} License Type: 47
}
} Word Count: 21,000 (2/24/23),
} 27,000 (4/18/23), 33,000 (4/19/23), &
} 42,000 (4/20/23)
}
} Reporter:
} Hanna Jenkin, Patty Lindsey &
} Shelby Maaske
} Kennedy Court Reporters

On-Sale General Eating Place License

PROPOSED DECISION

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at by videoconference on February 24, April 18, April 19, and April 20, 2023.

Matthew S. Gaughan and Bryan D. Rouse, Attorneys, represented the Department of Alcoholic Beverage Control.

Adam N. Koslin, attorney-at-law, represented respondents Carmela Surian and Gino Surian, the latter of whom was present.

The Department seeks to discipline the Respondents' license on the grounds that, between September 26, 2020 and July 23, 2022, the Respondents kept or permitted, in conjunction with the licensed premises, a disorderly house or place in which people abide or to which people resort to the disturbance of the neighborhood, or in which people abide or resort to for purposes which are injurious to the public safety, health, convenience, or morals, in violation of section 25601.¹ (Exhibit 1.)

The Department also seeks to discipline Respondents' license on the grounds that, on or about February 23, 2022, the Respondents knowingly permitted the illegal sale, or

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

negotiations for the sales, of controlled substances or dangerous drugs upon the licensed premises in violation of Business and Professions Code section 24200.5(a). (Exhibit 1.)

The Department further seeks to discipline Respondents' license on the grounds that, on February 23, 2022, its agent or employee sold, furnished, or offered to sell or furnish a controlled substance, oxycodone, upon the licensed premises in violation of California Health and Safety Code section 11352(a). (Exhibit 1.)

Finally, the Department seeks to discipline the Respondents' license on the basis that, on or about February 23, 2022, the Respondents' agent or employee permitted Benjamin Wheeler to remain inside the licensed premises while under the influence of an intoxicating liquor or drug or combination thereof such that he was unable to exercise care for his own safety or the safety of others in violation of Penal Code section 647(f) and, further, was an aider and abettor therein. (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on April 20, 2023.

FINDINGS OF FACT

1. The Department filed the accusation on October 18, 2022.
2. The Department issued a type 47, on-sale general eating place license to the Respondents for the above-described location on January 13, 1986 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. S. Gonzalez testified that, on September 26, 2020, he arrived at the Licensed Premises with a female friend. Shortly after entering, another patrón hit him. The other patron was Cesar Gonzalez (no relation), who was a friend of his and also was the ex-boyfriend of the woman. Rowdy, the bartender, intervened immediately and tried to break things up. Rowdy also told the bartender to cut off C. Gonzalez. Rowdy advised S. Gonzalez to leave.
5. S. Gonzalez exited and tried to get on a motorcycle to drive away. C. Gonzalez and other patrons followed him out. Rowdy continued to try to break things up as the incident spilled over into a nearby parking lot. S. Gonzalez finally fled on foot. Rowdy did not further engage the patrons because the incident had moved beyond the Licensed Premises' property.

6. Ofcr. F. Foulk, Susanville P. D., received a call for service at approximately 12:40 a.m. He responded to a gas station and met S. Gonzalez. The left side of S. Gonzalez's face was red and swollen and his left ear injured. S. Gonzalez did not want to press charges. He interviewed various witnesses, none of whom wanted to press charges.

7. On January 23, 2021, Ofcr. K. Singletary, Susanville P. D., was parked near the Licensed Premises. He noticed Sylvia Carrillo dragging a female out of the Licensed Premises by her hair. He intervened. Carrillo appeared to be heavily intoxicated and did not want to talk to him; she only wanted to leave. Carrillo had an unsteady gait, smelled of alcohol, slurred her words, stumbled, and forgot what she was telling him.

8. Ofcr. Singletary entered the Licensed Premises and spoke to two employees. They indicated that they tried to eject Carrillo.² Carrillo was arrested for public intoxication. Ofcr. Singletary did not investigate how Carrillo had become intoxicated or who might have served her.

9. On May 9, 2021, Det. R. Warner, Susanville P. D., was dispatched to the Licensed Premises based on the report of a fight. Ofcr. C. Monahan was already there. Ofcr. Monahan was surrounded by 15 people; more were on the street.

10. Det. Warner spoke to Wendel Davenport, who stated that he had been at the Licensed Premises for some time. After exiting, a person he did not know took a swing at him. He pointed out Alex Buckmaster, who was across the street, as his attacker. Another person, Simon McClellan, indicated that he came to Davenport's aid because he appeared to be overwhelmed. Video of the incident showed a melee outside the Licensed Premises.

11. On June 15, 2021, Ofcr. C. Monahan was called to the Licensed Premises around 10:00 p.m. He spoke to Damon Moore, who said that he had been involved in an altercation. He had bruising underneath one of the eyes and blood oozing from his lip.

12. Ofcr. Monahan contacted the Respondents' daughter, Christy Rose, who also worked at the Licensed Premises. She showed him video of the incident and later provided the video to the police. The video shows two groups of people inside the Licensed Premises, talking to each other. The conversation began to get more heated, after which it turned into a brawl. Approximately ten people were involved, during which Moore was knocked unconscious. While Moore was on the floor, someone picked up a barstool and hit him with it. Moore had a punctured lung and needed to be airlifted out. (Exhibits D93a-b.)

² No percipient witness to the employees' attempt to eject Carrillo were presented. Ofcr. Singletary testified both that (1) the employees had ejected her, but that she returned and (2) that they tried to eject her, but she did not leave.

13. C. Rose had arrived at approximately the same time as the police. The fight was pretty much over by then and Keith Rose, her son, had closed the Licensed Premises. Everyone involved in the fight was banned from the Licensed Premises.

14. On June 25, 2021, Ofcr. M. Hoover, Susanville P. D., was one of a number of officers dispatched to the Licensed Premises concerning an altercation. He spoke to a woman who was heavily intoxicated. She stated that she was exiting the Licensed Premises when James McCastle hit her with the door. She fell to the ground. Ofcr. M. Hoover asked C. Rose if he could view the video. She showed it to him. He did not see any criminal behavior; rather, it showed that the door accidentally hit her. Accordingly, he closed the case.

15. On August 15, 2021, Ofcr. Monahan responded to a report of a fight at the bar. He arrived at approximately 2:00 a.m. and spoke to Brearrah Dixon. Dixon stated that she had been attacked while inside the Licensed Premises. She stated that she had been choked and that her neck and the side of her head had been injured.

16. Ofcr. Monahan obtained video from an employee. The video showed Dixon's brother getting into an altercation. When Dixon tried to intervene, she was pulled to the ground by her hair. (Exhibits D94a-c.)

17. On November 8, 2021, Officer M. Hoover responded to the Licensed Premises concerning an altercation. When he arrived, several people were spread out across the street, fighting with each other. He tried to get everyone to disperse. Ofcr. Hoover contacted Lawrence Sanson, who was bleeding and had a laceration on his head. He stated that he hit his head when shoved to the ground.

18. Ofcr. Hoover spoke to Sanson and his wife. They indicated that an unidentified man had been bothering him inside the Licensed Premises. After they left the Licensed Premises, some of their family members began arguing with one another. Sanson attempted to break it up, at which point the unidentified man attacked him and threw him to the ground.

19. On February 15, 2022, Det. Warner received a call for service around 10:00 p.m. concerning a hit and run. A vehicle parked across the street from the Licensed Premises had been hit and showed visible damage. Det. Warner spoke to C. Rose and asked to see video from the Licensed Premises' outdoor cameras. The video showed a man get into a truck, back out of the parking lot and onto Sacramento St., hitting the parked car.

20. On February 23, 2022, Benjamin Wheeler entered the Licensed Premises at shortly after 8:00 a.m. He sat on a barstool and ordered an alcoholic beverage from the

bartender, Michael Gibbs. He ordered a second alcoholic beverage 10 to 15 minutes later. Wheeler continued to order alcoholic beverages throughout the morning, ordering 11 drinks total. Some of the drinks were served by Gibbs, some by Eric Moore, another bartender.

21. Between 10:00 a.m. and 10:30 a.m.,³ Wheeler and Moore engage in a conversation. Shortly thereafter, Moore walked over to his tote bag and removed something from it. Moore took the item and placed it either in or under Wheeler's wallet.⁴ He then adjusted the wallet such that the item was not visible. Wheeler obtained some money from the ATM. He counted out some bills and set them on the counter next to his wallet. Moore picked up the money.

22. Wheeler took the item, a clear plastic baggie, from his wallet and manipulated it. He then carried it with him into the restroom. Later, while seated at the bar counter, Wheeler removed something from the wallet, placed it in his mouth, and took a drink.

23. Around noon, Wheeler left the Licensed Premises to go to lunch. He returned approximately 1½ hours later. The evidence established that he had one large mug of beer at lunch. There is no evidence that anyone connected to the Licensed Premises was aware that Wheeler consumed this drink.

24. Upon his return to the Licensed Premises, Wheeler was more animated and his balance was off. Moore served Wheeler two more drinks. Wheeler took out the baggie, placed it on the bar counter, removed something from it, and swallowed it. Moore covered up the baggie while it was on the counter. (Exhibits D49, D51 & D74.)

25. Carisa Ridgeway, an employee, worked a couple of hours in the morning. She left, then returned later as a patron. She testified that Wheeler was not intoxicated before lunch, but that sometime after he returned his demeanor had changed and he looked "f***d up."⁵ K. Rose, who was collecting recycling outside the Licensed Premises, testified that Wheeler appeared to be intoxicated when he saw him around 2:30 p.m. Cody Glines, one of Wheeler's friends, testified that, shortly before Wheeler exited, he thought Wheeler was "loose" and "too drunk." He also testified that Wheeler got a lot worse over the next 20-30 minutes.

³ Wheeler's interaction with Moore was captured by the Licensed Premises' security system, which includes multiple interior cameras. The interaction is spread across multiple exhibits, but generally consist of exhibits D24-D28, D30, D58, and D60.) The time stamps on these videos are off by one hour.

⁴ It is unclear from the video whether it was placed in or under the wallet; regardless, Moore adjusted the wallet to cover the item he placed down.

⁵ The time stamp on Exhibit D75 indicates that Ridgeway interacted with Wheeler around 2:15 p.m.

26. Wheeler began swaying and needed help walking. Wheeler's friend, Sherman Idip, put his arm around Wheeler and escorted him out around 2:20 p.m.⁶ Idip escorted Wheeler to a white truck, steadying him the entire time. Wheeler fell over near the truck. Idip tried to get Wheeler into the truck. (Exhibits D76 & D85-D88.)

27. Glines called Wheeler's son, Elijah. Elijah drove his father back home. At some point during the drive, Wheeler died. The cause of death was acute oxycodone and ethanol toxicity. (Exhibit D92.) Dep. M. Monnahan, Lassen County Sheriff's Department, interviewed Glines. Based on his description of the pills, she used a pharmaceutical database and determined that the pills in question were Percocet. Percocet is a combination of oxycodone and acetaminophen.

28. When Wheeler exited, Idip ended up with the baggie. He took it to the restroom and left it there. He later told K. Rose, who went to the restroom, obtained the baggie, and disposed of it. K. Rose testified that he saw Wheeler while he was collecting the recycling and that he appeared intoxicated.

29. On July 14, 2022, Ofcr. K. Stafford was flagged down by Timothy Baker. Baker stated that he had been jumped by various individuals inside the Licensed Premises while he was playing pool. Baker had injuries to his face.

30. Ofcr. Stafford reviewed video of the incident. It showed Baker and others playing pool. Three people began to assault Baker. One of the employees intervened and tried to separate people, but the fight resumed. Baker fled.

31. On July 23, 2022, Ofcr. Monahan was again called to the Licensed Premises, this time in response to a report of two females fighting. One of the women, Tiffany Ridgebear, was very intoxicated—her speech was slurred and her breath smelled of alcohol. She had a substantial amount of blood coming from her nose. She was irate and uncooperative. C. Rose stated that Ridgebear had been causing problems all night and had been the aggressor. C. Rose testified that Ridgebear was banned from the Licensed Premises after this incident.

32. A number of witnesses testified that the Respondents are involved in the local community and support various community groups. They also support and participate in community events. Most of these witnesses opined that the community would be worse off without the Licensed Premises. C. Rose and most of these witnesses testified that the Respondents do not permit drugs on the Licensed Premises.

⁶ This time is based on the time stamp shown in Exhibit D76, adjusted by one hour as described above.

33. C. Rose testified that Moore had broken his neck sometime before 2014. As a result, he had a prescription for Percocet. He kept his medication at home and, to her knowledge, never brought them to the Licensed Premises. Co-licensee Gino Surian testified that he was unaware that Moore used painkillers. If he had known, he would not have allowed Moore to take them at work.

34. 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 25601 provides that, "[e]very licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

4. Section 24200.5(a) provides that the Department shall revoke a license "[i]f a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises." It further provides that "[s]uccessive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission."

5. Health & Safety Code section 11352 makes it a felony to transport, import into this state, sell, furnish, administer, or give away, or offer to transport, import into this state, sell, furnish, administer, or give away, or attempt to import into this state or transport any controlled substance

(1) specified in

(a) subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054,

(b) paragraph (14), (15), or (20) of subdivision (d) of Section 11054,

(c) subdivision (b) or (c) of Section 11055, or

(d) subdivision (h) of Section 11056, or

(2) classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state.

6. Penal Code section 647(f) provides that it is a misdemeanor for any person to be in a public place while under the influence of an intoxicating liquor such that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor, interferes with, obstructs, or prevents the free use of any street, sidewalk, or other public way.

7. 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, on February 23, 2022, the Respondents' employee, Eric Moore, sold or furnished, within the Licensed Premises, a controlled substance, oxycodone, in violation of Health & Safety Code section 11352(a) (Findings of Fact ¶¶ 20-28.)

8. 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, on February 23, 2022, the Respondents knowingly permitted the illegal sale or negotiations for sale inside the Licensed Premises of a controlled substance, oxycodone, in violation of section 24200.5(a). (Findings of Fact ¶¶ 20-28.)

9. These two violations, alleged in counts 2 and 3, arise from the same incident—the sale of oxycodone by Eric Moore to Benjamin Wheeler. The evidence established that Moore was a bartender at the Licensed Premises and was working behind the bar counter when he and Wheeler had a discussion. Wheeler subsequently placed a pile of money on the counter. Moore obtained some pills and placed them with Wheeler's wallet. He also picked up the money.

10. Later, when Wheeler placed the pills on the bar counter, Moore purposefully covered them up. After Wheeler left the Licensed Premises, Sherman Idip took the pills and left them in the restroom. He told Keith Rose what he had done; K. Rose took the pills and disposed of them. Dep. M. Monnahan, Lassen County Sheriff's Department, interviewed a number of witnesses who were able to describe the pills. Their description matched the appearance of Percocet, according to a pharmaceutical reference guide. Moore had a prescription for Percocet, a drug which contains oxycodone.

11. 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, between January 23, 2021 and July 14, 2022, the Respondents kept or permitted, in conjunction with the Licensed Premises, a disorderly house, or place in which people abide or to which people resort to the disturbance of the neighborhood, or

in which people abide to or resort to for purposes injurious to the public safety, health, convenience, or morals in violation of section 25601. (Findings of Fact ¶¶ 7-8, 11-13, 15-16 & 20-30.)

12. To prove that a licensed premises is a disorderly house, the Department must offer evidence of specific incidents of misconduct. Unlike a law-enforcement-problem count, a disorderly house is established based on the incidents themselves, not by the mere fact that a police response was required, although the number and type of incidents which require a police response have a bearing on whether a licensed establishment is operated as a disorderly house.

13. In this case, the evidence established a disturbing pattern of patrons being assaulted inside the Licensed Premises. On January 23, 2021 (count 1(2)), a heavily intoxicated patron inside the Licensed Premises who, although asked to leave, returned and assaulted another patron. On June 15, 2021 (count 1(4)), an argument broke out between two groups of people inside the Licensed Premises. The argument escalated into a brawl, during which one man was seriously injured. Similarly, on August 15, 2021 (count 1(6)), an altercation between two patrons escalated, resulting in a female patron being pulled to the ground by her hair and attacked. Finally, on July 14, 2022 (count 1(11)), a man was assaulted inside the Licensed Premises. Although an employee of the Licensed Premises intervened, the assault continued. As described above, the evidence also established the sale of oxycodone to Wheeler (count 1(10)).

14. It is clear from the evidence that the Respondents are not taking proper precautions to prevent patrons from being assaulted inside the Licensed Premises and, further, does not have enough personnel to stop such assaults when they happen. The Respondents also failed to prevent one of its bartenders from selling illegal drugs while working.

15. Not all of the incidents alleged in count 1, however, had a sufficient nexus to the Licensed Premises. The following subcounts are not part of the findings above; instead, they are dismissed.

16. On September 26, 2020, (count 1(1)), the evidence established that, although the incident in question started inside the Licensed Premises, it clearly started because C. Gonzalez was upset over his ex-girlfriend and attacked S. Gonzalez without warning. An employee intervened immediately and tried (with only limited success) to break things up. The altercation did not arise from the operation of the Licensed Premises—it simply happened to be the location where the parties converged. (Findings of Fact ¶¶ 4-6.)

17. For the incident on May 9, 2021 (count 1(3)), there was no connection to the Licensed Premises. The mere fact that the victim had been inside the Licensed Premises earlier that night is insufficient to establish that the incident was connected to the

Licensed Premises. Video confirms that the entire incident took place outside the Licensed Premises and beyond the Respondents' control. (Findings of Fact ¶¶ 9-10.)

18. The same is true for the incident which took place on November 8, 2021 (count 1(8)). The incident took place outside the Licensed Premises. The mere fact that some of the parties involved had been inside the Licensed Premises earlier that night does not establish that the incident arose from the operation of the Licensed Premises. (Findings of Fact ¶¶ 17-18.)

19. Also beyond the Respondents' control are traffic accidents such as the one alleged in count 1(9). (Finding of Fact ¶ 19.)

20. On June 25, 2021 (count 1(5)), although the incident happened inside the Licensed Premises, there was no evidence of an altercation—only a woman being accidentally hit by a door. Such an accident is not evidence of a disorderly house. (Finding of Fact ¶ 14.)

21. No evidence was presented in connection with the incident alleged in count 1(7).

22. Finally, with respect to count 1(12), the evidence established that an intoxicated woman, who was bleeding, had been the aggressor in some undescribed incident. The evidence also established that an employee had escorted her outside and waited with her until police arrived. (Findings of Fact ¶¶ 31.)

23. Cause for suspension or revocation of the Respondent's license does **not** exist for the violations of Penal Code section 647(f) alleged in counts 4 and 5. (Findings of Fact ¶¶ 25-27.)

24. The evidence established that Wheeler was not under the influence for the majority of the time he was inside the Licensed Premises. This changed around 2:15 p.m., according to the percipient witnesses—Wheeler began show symptoms of intoxication such that he had a hard time taking care of himself. Wheeler's companions escorted him from the Licensed Premises and arranged for his son to come and pick him up.

25. There is no evidence, however, that the Respondents *permitted* Wheeler to remain inside the Licensed Premises while intoxicated. Ridgeway was not on duty, but was sitting at the bar counter as a patron. K. Rose did not see Wheeler until he was outside the Licensed Premises. Although video shows Wheeler's behavior inside the Licensed Premises, it does **not** show any employees interacting with him after he became intoxicated (i.e., roughly the last half hour he was inside the Licensed Premises). In fact, the last two drinks served to him were at 1:30 p.m. and 1:47 p.m., roughly 45 minutes and 30 minutes, respectfully, before he showed signs of intoxication.

26. By the same token, there is no evidence that Moore aided and abetted in a violation of section 647(f). There is no evidence that Wheeler was intoxicated when Moore served him any drinks. The bulk of the drinks served to Wheeler were in the morning, hours before he became intoxicated. Although Moore provided Wheeler with oxycodone as set forth above, he did so hours before Wheeler became intoxicated. There is some evidence that Wheeler may have taken some pills shortly before he became intoxicated, but nothing definitive.

PENALTY

The Department requested that the Respondents' license be revoked, arguing that that, not only had the Licensed Premises been operated as a disorderly house, but an employee had provided oxycodone to a patron who subsequently died. The Respondents argued that the Licensed Premises had not been operated as a disorderly house, noting that there were only a handful of incidents, all of which the Respondents dealt with quickly. The Respondents also emphasized that the percipient witnesses did not believe that Wheeler appeared intoxicated. Accordingly, they argued that revocation was too harsh.

Section 24200.5 provides that "the [D]epartment shall revoke a license" for any violation thereof. Caselaw provides that this section requires some form of revocation, i.e., outright revocation⁷ or stayed revocation⁸ is appropriate depending upon the circumstances. Similarly, rule 144⁹ provides that the term "revocation" includes a period of stayed revocation as well as outright revocation of the license. For drug-related offenses, both under section 24200.5(a) and under the various Health and Safety Code sections, the recommended penalty pursuant to rule 144 is revocation.

For violations of section 25601, rule 144 provides for a penalty of 30 days (for occasional or isolated offenses) up to revocation (for recurring/aggravated offenses). The violations in this case are serious and appear to be ongoing—four incidents in which patrons were assaulted over the course of 18 months. Some of these incidents involved multiple patrons. A significant penalty is warranted.

The penalty recommended herein complies with rule 144.

⁷ See, e.g., *Greenblatt v. Martin*, 177 Cal. App. 2d 738, 2 Cal. Rptr. 508 (1960) (outright revocation imposed for violations of section 24200.5).

⁸ See, e.g., *Harris v. Alcoholic Beverage Control Appeals Board*, 244 Cal. App. 2d 468, 36 Cal. Rptr. 697 (1964) (revocation stayed coupled with suspension imposed for violations of section 24200.5).

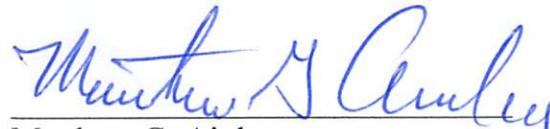
⁹ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

Counts 1, 2, and 3 are sustained. With respect to these violations, the Respondents' on-sale general eating place license is hereby revoked.

Counts 4 and 5 are dismissed.

Dated: September 7, 2023


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____ <i>J. McCullough</i>
Date: _____ <i>10/25/23</i>