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

AB-9677
File: 41-354600 Reg: 17085237

CARLOS ALBERTO ANTON,
dba La Furia Chalaca
310 Broadway,
Oakland, CA 94607,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: July 12, 2018
South San Francisco, CA

ISSUED AUGUST 2, 2018

Appearances: *Appellant*: Edward M. Higginbotham as counsel for Carlos Alberto Anton, doing business as La Furia Chalaca.
Respondent: Matthew Gaughan as counsel for the Department of Alcoholic Beverage Control.

OPINION

Carlos Alberto Anton (appellant), doing business as La Furia Chalaca, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending his license for 15 days because he possessed on the premises distilled spirits for which a license had not been issued, in violation of Business and Professions Code section 25607, and for a concurrent minimum of 15 days, with suspension extending indefinitely until the violation is remedied, because he made physical changes to the premises that

1. The decision of the Department, dated December 12, 2017, is set forth in the appendix.

resulted in a change of usage deviating from the plan on file with the Department without obtaining the Department's prior written assent, in violation of rule 64.2(b)(1).

FACTS AND PROCEDURAL HISTORY

Appellant is the holder of two licenses at two ostensibly separate but adjacent premises. The first premises, located at 310 Broadway and doing business as La Furia Chalaca, was issued an on-sale beer and wine license on July 30, 1999. The second premises, located at 428 Third Street and doing business as Club Anton LLC, was issued an on-sale general license on October 24, 2004.

On January 12, 2017, the Department filed two separate accusations, one against each of appellant's two licensed premises.

The accusation against La Furia Chalaca[2] contained two counts. The first count alleged that on or about June 17, 2016, appellant possessed on the licensed premises distilled spirits for which a license had not been issued. The second count alleged that on or about the same date, and for a period of time prior, appellant made physical changes to the licensed premises that resulted in a change of usage deviating from the plan contained in the diagram on file with the Department, and for which appellant failed to obtain the Department's prior written assent. (Exh. 1.)

The accusation against Club Anton LLC[3] contained one count. That count also alleged unauthorized changes to the licensed premises. (Exh. 2.)

The two accusations were later consolidated for purposes of hearing and decision. The second accusation, against Club Anton LLC, is not at issue in this appeal.

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2. File No. 41-354600, Reg. No. 17085237.
3. File No. 48-415825, Reg. No. 17085242.

At the administrative hearing held on September 28, 2017, documentary evidence was received, and testimony concerning the sale was presented by Officer Steve Vierra of the Oakland Police Department; by Supervising Agent Casey Tinloy of the Department of Alcoholic Beverage Control; and by Edward Higginbotham, counsel for appellant.[4]

Evidence and testimony established that when appellant applied for his on-sale beer and wine license at La Furia Chalaca, he submitted an ABC-257 Diagram of Licensed Premises as required by law. (Exh. 16.) The form included a diagram of the restaurant, its perimeter, rooms, entrances, exits, interior walls, and other features. The form indicated that "The diagram below is a true and correct description of the entrances, exits, interior walls and exterior boundaries of the premises to be licensed, including dimensions." Below the diagrammed area, at the bottom of the form, it stated that "It is hereby declared that the above-described boundaries, entrances and planned operation as indicated on the reverse side, will not be changed without first notifying and securing prior written approval of the Department of Alcoholic Beverage Control. I declare under penalty of perjury that the foregoing is true and correct." The form was signed by appellant and dated May 22, 1999.

On March 24, 2016, Officer Vierra, while assigned to the Alcoholic Beverage Abatement Team, inspected La Furia Chalaca. He observed the presence of a service bar counter that was stocked with various bottles of distilled spirits. A female bartender told him they used the distilled spirits there to make drinks for restaurant patrons.

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4. Higginbotham was examined by Conrad K. Wu, his co-counsel at the administrative hearing.

On April 21, 2016, Officer Vierra made a second visit to La Furia Chalaca. He again saw various bottles of distilled spirits stocked in its bar counter. He personally admonished appellant that he was not supposed to have distilled spirits in the restaurant. Appellant told Officer Vierra that since appellant's adjacent bar was connected to his restaurant, he could possess and serve distilled spirits in the restaurant under his bar license. Officer Vierra did not believe appellant was correct in his assertion. He therefore issued a nuisance abatement notice to appellant for improper possession of distilled spirits and wrote up a report that he forwarded to the Department of Alcoholic Beverage Control.

Officer Vierra later spoke with Supervising Agent Tinloy regarding appellant's assertion that he could serve distilled spirits in the restaurant. Agent Tinloy confirmed Officer Vierra's belief that appellant was wrong in his claim that just because the bar and restaurant businesses were physically connected, appellant could sell and serve distilled spirits in his restaurant. Officer Vierra and Agent Tinloy agreed to re-inspect the premises together.

On June 15, 2016, Agent Tinloy and Officer Vierra inspected appellant's restaurant and bar. Their inspection of the restaurant revealed that a hallway had been constructed along one portion of one side of the premises. It took the place of the premises restroom, a pantry, a refrigerator, and a storage area. The restaurant no longer had any restroom whatsoever. One end of the hallway opened into the dining area of the restaurant. As Officer Vierra proceeded down the hallway from the dining area, he found a doorway that led to the kitchen area. The entrance to the kitchen had previously been from the dining area. However, that opening had been walled over, and

the entrance to the kitchen was now via the newly constructed hallway. (Exhs. 9b and 9d.) At the end of the hallway was a doorway. Immediately on the opposite side of the doorway was appellant's bar premises. A person could traverse from appellant's restaurant to his bar merely by walking through the newly constructed connecting doorway. This doorway was not reflected in the ABC-257 for appellant's restaurant.

Appellant told Officer Vierra that the Department indicated he could retail in distilled spirits in his restaurant. Appellant indicated that he had altered the premises. He said there was a bathroom in the restaurant that he moved or eliminated. Restaurant patrons were directed to use the restroom located in the bar.

In the restaurant, Officer Vierra and Agent Tinloy saw a variety of bottled distilled spirits in the drink racks and shelves in a bar counter. Agent Tinloy and Officer Vierra seized 35 bottles of various distilled spirits from the restaurant's service bar. The bottles included distilled spirits such as vodka, tequila, rum, brandy, and liqueurs. Some bottles were sealed and some were open with pour spouts affixed in them.

Agent Tinloy seized a drink menu and a "happy hour" menu from the restaurant. Both listed the restaurant's name, La Furia Chalaca, its street address, and its phone number. (Exh. 11.) The menus listed a full assortment of cocktails made with distilled spirits. Many drinks listed on the menus specified the distilled spirits ingredient in the drink. Full bottles of distilled spirits were also listed for sale on one of the menus.

It was not established by either party when the restaurant's hallway and connecting doorway were constructed. These features were not included in appellant's original ABC-257 Diagram of Licensed Premises form. Appellant's counsel, Edward

Higginbotham, testified he was personally aware of the existence of the restaurant's hallway as of approximately 2008. Appellant did not testify at the hearing.

No evidence was presented that the Department had, at any time, given its written permission to appellant for the construction and installation of the restaurant's hallway, removal of the only restroom in the restaurant, or the newly constructed doorway directly connecting appellant's restaurant to his bar business.

With respect to appellant's bar, there was no evidence regarding any interior remodeling or changes made to that premises making it any different than the layout as diagrammed in the ABC-257 Diagram of Licensed Premises submitted for that site. (Exh. 3.) However, in the bar's ABC-257 diagram, there were three locations identified as exits. One of those exits was the doorway, or near the doorway, that connected into one end of the restaurant's hallway.

After the hearing, the Department issued a decision determining the violations charged against appellant's restaurant, La Furia Chalaca, were proved and no defense was established. The single-count accusation against appellant's bar, Club Anton LLC, was dismissed on the grounds that the Department failed to establish that any modifications were made to the bar premises.

Appellant then filed this appeal contending that the findings are not supported by the evidence. In particular, appellant contends (1) the ALJ ignored evidence that the Department knew of the alterations to the restaurant premises in 2008; (2) the evidence indicates Agent Tinloy was not a credible witness; and (3) the Department presented no evidence that distilled spirits were actually consumed on the restaurant premises.

DISCUSSION

I

Appellant contends the ALJ ignored evidence showing that the Department was aware of the alterations to the licensed premises. He directs this Board's attention to a purported "second drawing," which he claims shows either that the Department was aware of the alterations over a decade earlier, or, alternatively, that the Department had "received a drawing with the [*sic*] all of the alleged alterations at the time Appellants began to operate the restaurant." (App.Br., at p. 4.)

The Department responds that the purported second drawing was in fact prepared by Agent Tinloy in 2016 during the course of his investigation, in order to document the changes to the licensed premises. (Reply Br., at pp. 5-6; see also Exh. B.)

This Board is bound by the findings in the Department's decision as 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 omitted.] 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 omitted.] 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.

(*Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Department rule 64.2 states, in relevant part,

(a) Premises and Activity Diagram.

> (1) Prior to the issuance or transfer of a license, the applicant shall file with the department, on forms furnished by the department, a complete detailed diagram of the proposed premises wherein the license privileges will be exercised.

[¶ . . . ¶]

(b) Substantial Physical Changes of Premises or Character of Premises.

> (1) After issuance or transfer of a license, the licensees shall make no changes or alterations of the interior physical arrangements which materially or substantially alter the premises or the usage of the premises from the plan contained in the diagram on file with [the] application, unless and until prior written assent of the department has been obtained.

(Code Regs., tit. 4, § 64.2(a)(1), (b)(1).) There is nothing in the language of this rule to suggest that unauthorized alterations to the premises may be excused if the Department is aware of them for some period of time, or learns of them and fails to immediately pursue discipline. (See *ibid.*) Appellant cites no law supporting such an interpretation. (See generally App.Br.) As the rule clearly states, the Department's assent must be *written* and obtained *prior to* any alterations; it cannot be inferred later based on knowledge or inaction.

Alternatively, appellant suggests the Department received a second ABC-257 form prior to licensing that showed all the premises alterations. (App.Br., at p. 4.) The evidence belies this claim.

Agent Tinloy testified regarding the changes made to the licensed premises, based on his observations, as compared to the ABC-257 form on file with the Department. (RT at pp. 53-65.) Agent Tinloy verified the ABC-257 on file with the Department, which he reviewed before visiting the premises on June 17, 2016. (RT at pp. 56, 65; Exh. 16.) Based on the ABC-257 form, he was able to determine the

alterations made to the restaurant premises. (RT at p. 57; Exh. 16.) There was no testimony whatsoever, from Agent Tinloy or any other witness, indicating appellant submitted a second ABC-257 showing the alterations prior to licensure, or that any such document existed in the Department file. (See generally RT.)

Based on the testimony and documentary evidence, the ALJ made the following relevant factual findings:

> 15. It was not established by either party exactly when the restaurant's hallway and connecting doorway were constructed. These features were not included in Respondent's original ABC-257 Diagram of Licensed Premises form. Respondent's counsel, Edward Higgenbotham [*sic*], testified he was personally aware of the existence of the restaurant's hallway as of approximately 2008. Respondent did not testify at the hearing.
>
> 16. No evidence was presented that the Department had, at any time, given its written permission to Respondent for the construction and installation of the restaurant's hallway, removal of the only restroom in the restaurant, or the newly constructed doorway directly connecting Respondent's restaurant business to his bar business.

(Findings of Fact, ¶¶ 15-16.) Based on these findings, the ALJ found the violation was proved.

On appeal, appellant's contention that the Department received a second drawing of the premises is nothing more than unsupported innuendo. Appellant cites no specific piece of evidence when making this claim, but merely states that "[e]vidence was presented of an additional drawing that that [*sic*] was received by the Department" that purportedly depicted the alterations to the premises. Presumably, appellant is referring to his Exhibit B—a document which, on cursory review, appears to be a photocopy of the original ABC-257 form with the original layout partially obscured, the present alterations drawn in, and the words "PREPARED BY AGENT TINLOY" handwritten near the bottom. There is nothing either on the face of this document or in

testimony to support appellant's suggestion that this constitutes a "second drawing" establishing prior knowledge and assent on the part of the Department. In fact, Agent Tinloy testified that he had not visited the La Furia Chalaca premises prior to June of 2016. (RT at pp. 77-78.) His testimony on this point was unrefuted. The evidence therefore supports the Department's claim that Exhibit B was prepared by Agent Tinloy during his June 2016 visit to the premises in order to document how the altered premises deviated from the ABC-257 form on file with the Department. (Reply Br. at pp. 5-6.)

Suggestions and innuendo are not evidence. There is nothing in Exhibit B to indicate it constitutes a "second drawing" sufficient to undermine the ALJ's findings or legal conclusions.

II

Appellant argues—tentatively—that Agent Tinloy was not credible. He claims,

> Although not clear, it is believed and thereon alleged that [Agent] Tinloy testified that his first and only inspections of the subject matter premises were within the last few years. Only a close review of the oral record can determine the certainty of [Agent] Tinloy's testimony, but in the event his testimony is that he had not inspected the Business prior to 2016, then given the Department's record which evidence that [Agent] Tinloy inspected the Premises in 2008, all of [Agent Tinloy's] testimony in September of 217 [*sic*] needs to be, at a minimum, reconsidered.

(App.Br., at p. 4.) Appellant offers no specific citation to either the portion of Agent Tinloy's testimony he disputes or the portion of the Department's record that might refute it. (See generally App.Br.)

As noted in Part I, *supra*, we are bound by the findings below. (*Masani*, *supra*, at p. 1437.) Moreover, it is the province of the ALJ, as trier of fact, to make determinations

as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].)

The ALJ relied extensively on Agent Tinloy's testimony in determining that the Department had proved the violations alleged. (See Findings of Fact, ¶¶ 10-11, 13-14.) While he made no finding specifically crediting Agent Tinloy's testimony over other evidence or testimony, no such finding was necessary, as appellant offered nothing to refute Agent Tinloy's testimony. (See generally RT.)

On appeal, appellant suggests there might be a flaw in Agent Tinloy's testimony—specifically, that he might have inspected the restaurant premises in 2008. (App.Br., at p. 4.) Appellant offers no specifics as to the alleged 2008 inspection. (See *ibid.*) However, appellant does have a previous disciplinary action against his bar premises, Club Anton, located at 428 Third Street.[5] (See Exh. 4.) The investigations underlying that disciplinary action took place in 2007 and 2008. (*Ibid.*) We assume that appellant is referring to this prior investigation of, and the resulting disciplinary action against, the Club Anton bar license.

Agent Tinloy testified that he had not visited the restaurant premises—that is, the La Furia Chalaca premises located at 310 Broadway—before the instant inspection in 2016:

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5. File No. 48-415825, Reg. No. 08069256. The three-count accusation focused solely on the source and condition of bottles of distilled alcohol found at the premises located at 428 Third Street, operating under an on-sale general license. (Exh. 4.) The accusation was resolved by stipulation and waiver on January 30, 2009. (*Ibid.*) While both the accusation and the stipulation and waiver identify the premises at 428 Third Street as La Furia Chalaca, the ultimate decision identifies the same address as Club Anton. (*Ibid.*) The address, however, never varies, and in the present case it is undisputed that La Furia Chalaca is and has always been located at 310 Broadway, and Club Anton respectively at 428 Third Street. (See generally RT.)

BY MR. HIGGINBOTHAM:

Q. [P]rior to going to 3rd Street in June of 2016, had you been there prior?

A. I had never been to the location on Broadway, but I had been to the location on 3rd Street.

Q. Okay. So to be clear, the first time you had ever entered 310 Broadway, La Furia Chalaca was June, 2016, whatever date we have?

A. Yes.

(RT at pp. 77-78.)

There is nothing in the record that refutes Agent Tinloy's testimony. The prior investigation focused on bottle violations at appellant's bar premises, Club Anton, located at 428 Third Street. (Exh. 4.) It is not clear from testimony whether Agent Tinloy was involved in that investigation. (See generally RT.) If he was, however, that is not inconsistent with his testimony; it is perfectly plausible that he visited the bar premises in 2007 or 2008, but did not visit the adjacent restaurant premises until the present inspection in 2016. The ALJ's reliance on Agent Tinloy's unrefuted testimony was therefore reasonable, and appellant's assertions to the contrary lack merit.

III

Appellant contends count 1 must be reversed because there was no testimony indicating patrons had consumed distilled spirits on the licensed premises. (App.Br., at pp. 4-5.)

Section 25607 states, in relevant part,

> (a) Except as provided in subdivisions (b) and (c), it is unlawful for any person or licensee to have upon any premises for which a license has been issued any alcoholic beverages other than the alcoholic beverage which the licensee is authorized to sell at the premises under his or her license. It shall be presumed that all alcoholic beverages found or located upon premises for which licenses have been issued belong to the person or persons to whom the licenses were issued. Every person violating the

> provisions of this section is guilty of a misdemeanor. The department may seize any alcoholic beverages found in violation of this section.
>
> (b) A bona fide public eating place for which an on-sale beer and wine license has been issued may have upon the premises brandy, rum, or liqueurs for use solely for cooking purposes.

(Bus. & Prof. Code, §§ 25607(a) and (b).) Proof that a patron actually consumed the distilled spirits is not an element of the violation. (See *ibid.*) In the case of an on-sale beer and wine license, a violation is proved if the licensee is shown to "have upon [the] premises" any alcoholic beverages not authorized under the license. (*Ibid.*)

On appeal, appellant does not dispute that he had distilled spirits on the restaurant premises; he disputes only whether patrons were observed *consuming* the distilled spirits. Because proof of consumption is not an element of the violation, appellant's argument on this point is wholly meritless. Moreover, the argument is disingenuous: as the ALJ observed in his conclusions of law, the distilled spirits were on the premises "for the specific purpose of selling and serving distilled spirit drinks to restaurant customers as confirmed by the statements of Respondent and his bartender and the wide variety of distilled spirit drinks listed on two restaurant menus." (Penalty, ¶ 6.) The violation here was open and egregious.

ORDER

The decision of the Department is affirmed.[6]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST: CARLOS ALBERTO ANTON LA FURIA CHALACA 310 BROADWAY OAKLAND, CA 94607 ON-SALE BEER AND WINE - EATING PLACE - LICENSE	OAKLAND DISTRICT OFFICE File: 41-354600 Reg: 17085237 AB: 9677

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on February 7, 2018, in the City of Sacramento, County of Sacramento, State of California.

Office of Legal Services

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ABC APPEALS BOARD

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

IN THE MATTER OF THE ACCUSATION AGAINST: CARLOS ALBERTO ANTON LA FURIA CHALACA 310 BROADWAY OAKLAND, CA 94607 ON-SALE BEER AND WINE EATING PLACE – LICENSE	CONCORD DISTRICT OFFICE File: 41-354600 Reg: 17085237
AND	
CARLOS ALBERTO ANTON CLUB ANTON LLC 428 3RD STREET OAKLAND, CA 94607 ON-SALE GENERAL PUBLIC PREMISES - LICENSE	File: 48-415825 Reg: 17085242 **CERTIFICATE OF DECISION**

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

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. 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, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after January 22, 2018, a representative of the Department will contact you to arrange to pick-up the license.

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

IN THE MATTER OF THE ACCUSATION AGAINST: CARLOS ALBERTO ANTON LA FURIA CHALACA 310 BROADWAY OAKLAND, CA 94607 ON-SALE BEER AND WINE EATING PLACE – LICENSE	CONCORD DISTRICT OFFICE File: 41-354600 Reg: 17085237
AND	
CARLOS ALBERTO ANTON CLUB ANTON LLC 428 3RD STREET OAKLAND, CA 94607 ON-SALE GENERAL PUBLIC PREMISES - LICENSE	File: 48-415825 Reg: 17085242 **CERTIFICATE OF DECISION**

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

Sacramento, California

Dated: December 12, 2017

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATIONS AGAINST:	
Carlos Alberto Anton Dba: La Furia Chalaca 310 Broadway Oakland, CA 94607	File: 41-354600 Reg.:17085237 License Type: 41
Under A Type-41 On-Sale Beer and Wine Eating Place License Under the Alcoholic Beverage Control Act and State Constitution.	
And	
Carlos Alberto Anton Dba: Club Anton LLC 428 3rd Street Oakland, CA 94607	File: 48-415825 Reg: 17085242 License Type: 48
Under A Type 48 On-Sale General Public Premises License Under the Alcoholic Beverage Control Act And State Constitution	Court Reporter: Katherine Wyatt Est. Word Count: 19,460 California Reporting **Proposed Decision**

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Oakland, California, on September 28, 2017.

Matthew Gaughan, Attorney, Department of Alcoholic Beverage Control, appeared and represented the Department of Alcoholic Beverage Control. (hereafter,"the Department")

Edward M. Higginbotham, Esq. and Conrad Wu, Esq. represented licensee Carlos Alberto Anton. (hereafter "Respondent")

By accusation assigned Registration #17085237, the Department seeks to discipline Respondent's Type 41 license at 310 Broadway, Oakland, California, because he possessed distilled spirits on that premises in violation of Business and Professions Code section 25607, and because he made changes or alterations of the interior physical arrangements of the premises which materially or substantially altered the premises or its use from the plan

contained on file with the Department without first obtaining prior written assent from the Department in violation of California Code of Regulations, Title 4, Division 1, Article 11, section 64.2(b)(1). (Exhibit 1-pre-hearing pleadings) Hereafter, this licensed premises will be referred to as the "restaurant."

By accusation assigned Registration #17085242 the Department also seeks to discipline Respondent's Type-48 license at 428 3rd Street, Oakland, California, because he made changes or alternations of the interior physical arrangements of the premises which materially or substantial altered the premises or its use from the plan contained on file with the Department without first obtaining prior written consent from the Department in violation of California Code of Regulations Title 4, Division 1, Article 11, section 64.2(b)(1). (Exhibit 2- pre hearing pleadings). Hereafter, this premises will be referred to as the "bar".

The two accusations were ordered consolidated for purposes of a hearing and decision thereon. (Exhibit 3-Order)

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing regarding the accusations, both matters were argued by the parties and submitted for decision on September 28, 2017.

FINDINGS OF FACT

1. With respect to Respondent's Type-41 licensed restaurant, the Department filed the accusation on January 12, 2017. On March 15, 2017, the Department received Respondent's Notice of Defense requesting a hearing on the accusation. (Exhibit 1-pre-hearing pleadings)

2. With respect to Respondent's Type 48 licensed bar, the Department filed the accusation on January 12, 2017. Although the Department initially entered a default decision against Respondent, the Department later set that aside and directed the accusation be set for a hearing on the merits. (Exhibit 2-pre-hearing pleadings)

3. The Department issued Respondent a Type-41 license for his restaurant on July 30, 1999. That license permitted him to sell, serve, and permit consumption of beer and wine on the premises that must also operate as a bona-fide eating place as described in Business and Professions Code section 23038.[1] Since being licensed, Respondent has no record of disciplinary action under that license.

[1] Hereafter, all section references are to the California Business and Professions Code unless noted otherwise.

4. The Department issued Respondent a Type-48 license for his bar on October 24, 2004. That license permitted him to sell, serve, and permit consumption of beer, wine, and distilled spirits on the premises. With exceptions not relevant here, persons under 21 are not allowed to enter or remain on the bar's premises.[2]

5. Respondent suffered one prior disciplinary action under his bar license in 2008. That accusation was for a violation of Business and Professions Code sections 23402 (purchasing at retail for retail re-sale), Business and Professions Code section 25177 (refilling of distilled spirits), and Health and Safety Code violations for having contaminated alcoholic beverage bottles. That accusation resulted in a 20 day license suspension. (Exhibit 4-prior accusation pleadings and decision)

6. As part of Respondent's application for his Type-41 license for his restaurant, he submitted an ABC-257 Diagram of Licensed premises. (Exhibit 6) The form included a diagram of the restaurant, its perimeter, rooms, entrances, exits, interior walls, and other features. The form indicates that "The diagram below is a true and correct description of the entrances, exits, interior walls, and exterior boundaries of the premises to be licensed, including dimensions." Below the diagramed area, at the bottom of the form, it states that "It is hereby declared that the above described boundaries, entrances and planned operated as indicated on the reverse side will not be changed without first notifying and securing prior written approval of the Department of Alcoholic Beverage Control. I declare under penalty of perjury that the foregoing is true and correct." The form was signed by the Respondent and dated 5/22/99.

7. As part of Respondent's application for his Type-48 license for his bar, he signed and submitted an ABC form 257 that diagramed the licensed premises and its features, including exits, entrances, a stage area, service counter, bathrooms, and an office area. (Exhibit 5). The ABC form 257 for the bar contained identical language as the restaurant's ABC-257 certifying the accuracy of the diagram of the premises and its features and that there would be no changes without first obtaining the Department's approval. That form was signed by Respondent and dated 9/4/2004.

8. On March 24, 2016, Oakland Police Officer Steve Vierra (hereafter "Ofc. Vierra"), while assigned to the Alcoholic Beverage Abatement Team, inspected Respondent's restaurant. He observed the presence of a service bar counter that was stocked with various bottles of distilled spirits. A female bartender told him they used the distilled spirits there to make drinks for restaurant patrons.

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[2] Section 25665 states, "Any licensee under an on-sale license issued for public premises, as defined in Section 23039, who permits a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein is guilty of a misdemeanor. Any person under the age of 21 years who enters and remains in the licensed public premises without lawful business therein is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200), no part of which shall be suspended."

9. On April 21, 2016, Ofc. Vierra made a second visit to the restaurant. He again saw various bottles of distilled spirites stocked in its bar counter. He personally admonished Respondent that he was not supposed to have distilled spirits in the restaurant. Respondent told Ofc. Vierra that since Respondent's adjacent bar premises was connected to his restaurant, Respondent could possess and serve distilled spirits in the restaurant under his bar license. As Ofc. Vierra did not believe Respondent was correct in his assertion, he issued a nuisance abatement notice to Respondent for improper possession of distilled spirits and wrote up a report that he forwarded to the Department of Alcoholic Beverage Control. (hereafter "ABC").

10. Ofc. Vierra later spoke with ABC Supervising Agent Casey Tinloy (hereafter "Agent Tinloy") regarding Respondent's assertion regarding serving distilled spirits in the restaurant. Agent Tinloy confirmed Ofc. Vierra's belief that Respondent was wrong in his claim that just because the bar and restaurant businesses were physically connected, Respondent could sell and serve distilled spirits in his restaurant. Ofc. Vierra and Agent Tinloy agreed to re-inspect the premises together.

11. On June 16, 2016, Agent Tinloy and Officer Vierra inspected Respondent's restaurant and bar. Their inspection of the restaurant revealed that a hallway had been constructed along one portion of one side of the premises. It took the place of the premises restroom, a pantry, a refrigerator, and a storage area. The restaurant no longer had any restroom whatsoever. One end of the hallway opened into the dining area of the restaurant. As Ofc. Vierra proceeded down the hallway from the dining area, he found a doorway that led to the kitchen area. The entrance to the kitchen had previously been from the dining area. However, that opening had been walled over, and the entrance to the kitchen was now via the newly constructed hallway. (Exhibit 9b and Exhibit 9d). At the end of the hallway was a doorway. Immediately on the opposite side of the doorway was Respondent's bar premises. (Exhibit 9a and 9c-photos of hallway) and Exhibit 16. (ABC-257 premises diagram marked to show existing hallway) A person could traverse going from Respondent's restaurant to Respondent's bar merely by walking though the newly constructed connecting doorway. This doorway was not reflected in the ABC-257 for Respondent's restaurant.

12. Respondent told Ofc. Vierra that ABC indicated he could retail in distilled spirits in his restaurant. Respondent indicated he had altered the premises. He said there was a bathroom in the restaurant that he moved or eliminated. Restaurant patrons were directed to use the restroom located in the bar.

13. In the restaurant, Ofc.Vierra and Agent Tinloy saw a variety of bottled distilled spirits in the drink racks and shelves in a bar counter. (Exhibit 7a, 7b, 8a, and 8b) Agent Tinloy and Ofc. Vierra seized 35 bottles of various distilled spirits from the restaurant's service bar. (Exhibit 12-evidence seizure receipt). The bottles included distilled spirits such as

vodka, tequila, rum, brandy, and liqueurs. Some bottles were sealed and some were open with pour spouts affixed in them.

14. Agent Tinloy seized a drink menu and a "happy hour" menu from the restaurant. Both listed the restaurant's name, "la furia chalaca", street address, and phone number. (Exhibit 11- drink menu and happy hour menu) The menus listed a full assortment of cocktails made with distilled spirits. Many drinks listed on the menus specified the distilled spirits ingredient in the drink. Full bottles of distilled spirits were also listed for sale on one of the menus.

15. It was not established by either party exactly when the restaurant's hallway and connecting doorway were constructed. These features were not included in Respondent's original ABC-257 Diagram of Licensed Premises form. Respondent's counsel, Edward Higgenbotham, testified he was personally aware of the existence of the restaurant's hallway as of approximately 2008. Respondent did not testify at the hearing.

16. No evidence was presented that the Department had, at any time, given its written permission to Respondent for the construction and installation of the restaurant's hallway, removal of the only restroom in the restaurant, or the newly constructed doorway directly connecting Respondent's restaurant business to his bar business.

17. With respect to Respondent's bar, there was no evidence regarding any interior remodeling or changes made to that premises making it any different than the layout as diagramed in the ABC-257 Diagram of Licensed premises submitted for that site. (Exhibit 3) However, in the bar's ABC-257 diagram, there were three locations identified as an "Exit". One of those exits was the doorway, or near the doorway, that connected into one end of the restaurant's hallway.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions 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. Business and Professions Code section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any rules of the Department and 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. Business and Professions Code section 25607 states: "(a) Except as provided in subdivision (b), it is unlawful for any person or licensee to have upon any premises for which a license has been issued any alcoholic beverages other than the alcoholic beverage which the licensee is authorized to sell at the premises under his or her license.
It shall be presumed that all alcoholic beverages found or located upon premises for which licenses have been issued belong to the person or persons to whom the licenses were issued. Every person violating the provisions of this section is guilty a misdemeanor. The department may seize any alcoholic beverages found in violation of this section.

(b) A bona fide public eating place for which an on-sale beer and wine license has been issued may have upon the premises brandy, rum, or liquors for use solely for cooking purposes.

4. California Code of Regulations, Title 4, Division 1, Article 11, section 64.2 (referred to hereafter as Rule 64.2), states:

(a) Premises and Activity Diagram.

(1) Prior to the issuance or transfer of a license, the applicant shall file with the department, on forms furnished by the department, a complete detailed diagram of the proposed premises wherein the license privileges will be exercised.
(2) The diagram will show all boundaries, dimensions, entrances and exits, interior partitions, walls, rooms, and common or shared entryways. Each room and/or partitioned area within the premises area shown will include a brief statement or description of the principal activity to be conducted therein, e.g., office, storeroom, toilets, bar, cardroom, billiards, etc. If any described activity shown thereon is not, or will not be, conducted under the direct control, supervision and ownership of the alcoholic beverage licensee, the name and full identification of any person or persons who own, direct, control and/or supervise the activity will be furnished to the department together with a full disclosure of any agreement, written or oral, between the licensee and said person.
(3) If the area proposed to be licensed uses, either as a principal or secondary means of public ingress and/or egress, any common door or common passage with any other occupant of the same or adjacent buildings or rooms, a statement of the general entities conducted and the identification of the persons or entities conducting said activities will be made on the diagram.

(b) Substantial Physical Changes of Premises or Character of Premises.
(1) After issuance or transfer of a license, the licensees shall make no changes or alterations of the interior physical arrangements which materially or substantially alter the premises or the usage of the premises from the plan contained in the diagram on file with his application, unless and until prior written assent of the department has been obtained.

For purposes of this rule, material or substantial physical changes of the premises, or in the usage of the premises, shall include, but are not limited to, the following:
(A) Substantial increase or decrease in the total area of the licensed premises previously diagrammed.

(B) Creation of a common entryway, doorway, passage or other such means of public ingress and/or egress, when such common entryway, doorway, passage or other such means of public ingress and/or egress, when such common entryway, doorway or passage permits access to the licensed premises area from or between adjacent or abutting buildings, rooms, or premises.
(C) Where the proposed change will create in the licensed premises an area, or room, or rooms, whether or not partitioned, or in some other manner delimited and defined wherein activities of any nature not directly related to the sale of alcoholic beverages will be conducted by a person, persons, or entity not under the direct control, supervision and direction of the licensee.
(2) Where the proposed change will create in the licensed premises area, or room, or rooms, or any portion of the premises, whereby the licensee, or the owner of the real property wherein the license privileges are exercised, creates or purports to create in any persons or entity by license, easement, grant sublease, subassignment or similar means an interest in which any person or entity will conduct any activity not directly related to the sale and service of alcoholic beverages not previously conducted on the premises.
(c) Application to Winegrower's and Brandy Manufacturer's Premises. The provisions of this rule shall not apply to the premises of a winegrower or brandy manufacturer, except for those portions of such premises where sales at retail are made or wine tasting activities are conducted.

DETERMINATION OF ISSUES

1. With respect to the accusation under registration number 17085242 against Respondent's bar, cause for suspension or revocation of Respondent's license does not exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because there was no evidence that Respondent made any changes or alterations to the interior physical arrangements of the premises from the plan in the diagram on file with the Department of Alcoholic Beverage Control and so did not act contrary to California Code of Regulations, Title 4, Division 1, Article 11, section 64.2(b).

2. As to Respondent's bar, there was no evidence presented that Respondent made any physical changes to the interior of that licensed premises. (Exhibit 17-ABC 257 Diagram for 428 3rd Street) The ABC-257 diagram reflected three locations marked as "Exit". One of those was the doorway that apparently opened to one end of the hallway corridor wholly located in Respondent's restaurant. However, as to the bar, that doorway was not the result of any physical change to the bar as the doorway/exit was identified as a feature in the

original ABC-257 for the bar. Therefore, as there was no evidence of any changes or alterations of the interior physical arrangements in the bar, Count 1 in the accusation against Respondent's bar license is dismissed.

3. With respect to Count 1 in the accusation against Respondent's restaurant, cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on June 17, 2016, Respondent possessed upon that premises distilled spirits, to-wit, tequila, brandy, rum, vodka, and liquors, for which a license had not been issued in violation of section 25607.

4. Respondent's Type 41-On-Sale Beer and Wine Eating Place license for his restaurant permitted him to sell, serve, and permit consumption of only beer and wine on that licensed premises. On June 17, 2016, Respondent's restaurant bar counter fixture was stocked with a substantial quantity and variety of distilled spirits including vodka, tequila, liqueurs, rum, whiskey, and brandy. Thirty-five bottles of distilled spirits were seized by Agent Tinloy and Officer Vierra from the restaurant's drink service counter. Some bottles were located in bottle racks on the bartender's side of the counter while some were displayed on shelves behind the counter. Some were partially full and had pour spouts in them. Lastly, two menus with Respondent's restaurant name and address printed on them were found in the restaurant. They offered for sale at the restaurant a full variety of cocktails made with distilled spirits, including the availability of full bottle service. On March 24, 2016, a restaurant bartender told Ofc. Vierra that they used the distilled spirits in the restaurant's bar counter to make drinks for restaurant customers. On April 21, 2016, Respondent told Officer Vierra that Respondent could possess and serve distilled spirits in the restaurant because it was connected to Respondent's bar. As such, there was sufficient evidence to sustain Count 1 of the accusation for unauthorized possession of distilled spirits on Respondent's restaurant premises.

5. With respect to Count 2 of the accusation against Respondent's restaurant, cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because Respondent made changes or alterations of the interior physical arrangements which materially or substantially altered the premises or the usage of the premises from the plan contained in the diagram on file with his application with the Department of Alcoholic Beverage Control without obtaining the prior written assent of the Department and therefore he acted contrary to California Code of Regulations, Title 4, Division 1, Article 11, section 64.2(b).

6. As to Respondent's licensed restaurant, he made several modifications to the interior of that premises that materially or substantially altered it from the original plan on file with the Department as reflected in the ABC-257 Diagram of Licensed Premises. (Exhibit 16, dated

5/22/99) The changes included the addition of a fixed bar in the public eating area of the premises, the walling off of an entryway/doorway between the kitchen area and the public eating area, and the creation of a hallway corridor that led from the public area down the length of the kitchen and ended at a doorway that connected the restaurant directly to Respondent's immediately adjacent licensed bar premises. (Exhibit 9A- photo of a corner of premises showing entry to new hallway and Exhibit 9C- photo of hallway itself including doorway to Respondent's Type-48 bar premises and doorway to restaurant kitchen area)

7. The creation of the hallway corridor included the complete elimination of the restaurant's restroom, a reach-in pantry or closet, and space for a refrigerator, and a storage area. Approximately midway down the new hallway corridor a doorway was created that connected it to the kitchen area. The restaurant's original ABC-257 (Exhibit 16) reflected no connecting doorway to Respondent's bar. Under Rule 64.2(b)(1)(B), the addition of a public ingress or egress by way of the addition of a new "... common entryway, doorway, passage or other such means of public ingress and/or egress, when such common entryway, doorway or passage permits access to the licensed premises area from or between adjacent or abutting buildings, rooms, or premises." is specifically noted as a physical change requiring the Department's pre-approval. Respondent presented no evidence that the Department had, at any time, approved in writing the construction of the hallway, installation of a fixed bar counter, elimination of the restroom and storage areas, and installation of a doorway to Respondent's bar. As such, Count 2 in the accusation against Respondent's restaurant Type-41 restaurant license is sustained.

8. On April 21, 2016, Respondent told Ofc. Viera that since the restaurant was connected to the bar via the hallway and doorway, Respondent could sell, serve, and permit consumption of distilled spirits throughout both licensed premises. Respondent's belief was incorrect. The creation of a doorway connecting the bar to the restaurant does not automatically expand the bar's license privileges into the restaurant space. The bar's licensed boundaries were those shown on its ABC-257 and do not expand absent express written permission from the Department. To whatever extent Respondent permitted distilled spirits to be sold, served, and consumed by patrons in the restaurant, that constituted exercising license privileges at the restaurant that were not granted under its Type-41 On-Sale Beer and Wine Eating Place license and therefore contrary to sections 23355[3] and section 23300[4].

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[3] Section 23355 states, "Except as otherwise provided in this division and subject to the provisions of Section 22 of Article XX of the Constitution, the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no others at the premises for which issued during the year for which issued."

[4] Section 23300 states, "No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division."

9. On June 17, 2016, Respondent told Ofc. Vierra and Agent Tinloy that since Respondent had eliminated the restroom in the restaurant, those patrons were to use the restroom that was in the bar via the hallway and its connecting doorway to the bar. Respondent's plan in this regard was faulty. Section 25665 prohibits public-premises licensees from permitting minors to enter and remain on the licensed premises.[5] To the extent Respondent permitted minors from his restaurant to enter and remain on his bar's premises, such would have likely violated that section with respect to the bar's license.

10. Respondent argued the Department had waived any complaint about Respondent's usage of both licensed premises or any modifications thereto because Respondent's bar had suffered a prior accusation in 2008 and was therefore put on notice of the changes to the restaurant at that time. (Exhibit 4-Prior Discipline Pleadings) That argument has no merit. Exhibit 4 included the accusation, stipulation and waiver, and decision regarding that accusation against Respondent's bar. The accusation charged Respondent with buying alcoholic beverages for resale from another retailer, refilling of distilled spirits packages, and contamination of distilled spirit bottles. None of the violations therein related to modification or alterations made to either Respondent's restaurant or his bar premises. There was no convincing evidence presented the Department was specifically aware of any modifications made to the interior of Respondent's restaurant or was aware of Respondent's apparent practice of permitting consumption of distilled spirits in his restaurant other than what was discovered by Ofc. Vierra and Agent Tinloy in their 2016 investigation.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as "Rule 144". Under that rule, the presumptive penalty for violating section 25607 (possession of distilled spirits on a premises not permitted by the license for that premises) is a 10 day license suspension. With respect to Respondent's alterations to his restaurant premises contrary to Rule 64.2, there is no recommended penalty noted in Rule 144.

2. Rule 144 permits imposition of a different penalty based on the presence of a non-exhaustive list of aggravating or mitigating factors. Prior disciplinary history is specifically noted as a factor in aggravation. The length of licensure without prior disciplinary action or problems can be a factor in mitigation.

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[5] Section 25665 states, "Any licensee under an on-sale license issued for public premises, as defined in Section 23039, who permits a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein is guilty of a misdemeanor. Any person under the age of 21 years who enters and remains in the licensed public premises without lawful business therein is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200), no part of which shall be suspended."

3. In this instance, the Department contended the evidence proved that Respondent improperly possessed distilled spirits on the restaurant premises. It also argued that the creation of the hallway corridor in the restaurant was a significant modification of the premises. Also, by eliminating the restaurant's restrooms, minors who were restaurant patrons were to use the restrooms in the bar, but that was, and would be, contrary to section 25665 that does not permit minors in public-premises bars. The Department recommended a 20 day license suspension be imposed as to each licensed premises and that each suspension remain in effect until the restaurant and bar were returned to their originally diagramed plan.

4. Respondent did not materially dispute that distilled spirits were possessed on the restaurant premises.

5. As addressed above, Respondent's argument that no physical changes were ever made at the bar so there was no ground established for discipline against that license had merit. Respondent's argument that any modifications made to the restaurant were known to the Department several years ago does not have merit as was discussed above.

6. In this instance, as to the accusation against Respondent's Type 41 license at his restaurant, the fact that Respondent has been licensed there since 1999 without disciplinary action as a factor in mitigation is somewhat off-set by the fact that Respondent had his restaurant's bar service counter fully stocked with a wide variety of distilled spirits, both sealed, and with pour spouts. It was not simply that there were 35 bottles of distilled spirits possessed there, but they were there for the specific purpose of selling and serving distilled spirit drinks to restaurant customers as confirmed by the statements of Respondent and his bartender and the wide variety of distilled spirit drinks listed on two restaurant menus. Further, Respondent made significant physical changes to the restaurant's interior without any written Department approval. Although these changes may have been made several years ago, that does not ratify the change. As the evidence showed, as Respondent eliminated the restaurant's restroom, his plan of having those customers make use of the bar's restroom continues ran, and continues to run the risk of minors from the restaurant having unrestricted access to the licensed bar where minors are not permitted to enter and remain.

7. Except as set forth in this decision, all other allegations in the accusations and any other contentions raised by the parties in the pleadings or at the hearing lack merit.

ORDER

As to the accusation filed under Registration number 17085242 against Respondent's Type-48 license at 428 3rd Street, Oakland, California:

Count 1 is dismissed.

As to the accusation filed under Registration number 17085237 against Respondent's Type 41 license at 310 Broadway, Oakland, California:

Count 1 is sustained and Respondent's license is suspended for 15 days.

Count 2 is sustained and Respondent's license is suspended for a minimum of 15 days and that suspension shall remain in effect indefinitely thereafter until the premises is restored to its original layout as set forth in its ABC-257 dated 5-22-99 (Exhibit 6 herein) or the Department, pursuant to Rule 64.2, approves in writing Respondent's request for an alternate layout of the licensed premises, whichever occurs first.

The 15 days of suspension imposed as to Count 1 and the initial 15 days of suspension imposed as to Count 2 shall run concurrent to one another.

Dated: October 13, 2017

David W. Sakamoto
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: _____

By: _____

Date: _____