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

AB-9568
File: 48-465868; Reg: 15081982

BMGV, LLC,
dba Atmosphere
447-459 Broadway Street, San Francisco, CA 94133-4513,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 6, 2016
Sacramento, CA
Redeliberation: November 3, 2016

ISSUED NOVEMBER 17, 2016

Appearances: *Appellant:* John W. Edwards II, of Hinman & Carmichael, LLP, as counsel for appellant BMGV, LLC.
Respondent: Joseph J. Scoleri, III and Jacob L. Rambo, as counsel for the Department of Alcoholic Beverage Control.

OPINION

BMGV, LLC, doing business as Atmosphere, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 45 days (with 15 days conditionally stayed, subject to one year of discipline-free operation) for operating a disorderly house in violation of Business and Professions Code section 25601; and for

[1] The decision of the Department, dated January 19, 2016, is set forth in the appendix.

creating a law enforcement problem, in violation of Article XX, section 22 of the California Constitution, and Business and Professions Code section 24200, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on August 28, 2008 and it has no prior record of discipline. On February 13, 2015, the Department instituted a two-count accusation against appellant. Count 1, consisting of 52 sub-counts, alleged that appellant operated the premises as a "disorderly house," in violation of Business and Professions Code section 25601. Count 2 re-alleged the sub-counts of count 1, but under a different theory—that the alleged incidents created a law enforcement problem and therefore continuance of appellant's license would be contrary to public welfare or morals in accordance with Article XX, section 22 of the California Constitution, and Business and Professions Code section 24200, subdivision (a).

At the administrative hearing held on July 21-23, and 28-29, 2015, documentary evidence was received and testimony concerning the violation charged was presented by numerous members of the San Francisco Police Department (SFPD); Bennett Montoya, managing member of BMGV, LLC and co-owner of Club Atmosphere (now doing business as Hue); Guy Carson, business consultant and Acting General Manager of Club Hue; and Terrance Alan, business consultant and expert on entertainment and nightlife in San Francisco.

Testimony established that the licensed premises, doing business as Atmosphere from August 28, 2008 to December 13, 2014, was the largest nightclub in the Broadway area—an area of San Francisco known for night life and adult entertainment. The premises has since been re-branded and is doing business as

Club Hue. In 2014 Atmosphere served approximately 40-50,000 patrons, plus an additional 2-6,000 at private events. (Exh. M.) The club is situated on the 400 block of Broadway Street, a block with nine other venues which sell alcohol, including one on each side of Atmosphere. Several public parking lots are also nearby, and there is significant foot traffic on the sidewalk in front of the club.

In November 2014, an inspection of the premises revealed fire-code violations, a lack of Workers Compensation insurance, labor code violations, and violations of conditions on its license. The club was closed because of these violations on December 13, 2014. The violations were listed as aggravating factors in the accusation, however the Department failed to argue these issues in its briefs—therefore the administrative law judge (ALJ) declined to consider them, and they are not a part of the case before the Board. The club later reopened as Club Hue, after remodeling and correction of the violations, in July 2015.

The incidents comprising the 52 subcounts of the accusation derived from police reports taken between October 2013 and December 2014. These include allegations of assault, public intoxication, resisting arrest, disturbance/fighting, battery on a police officer, and sale of alcohol to an obviously intoxicated person.[2]

After the hearing, the ALJ requested, and the parties submitted, their closing arguments in writing. Thereafter, the Department issued its decision which determined that a sufficient number of the allegations in the accusation had been established to sustain the statutory violations. Of the 52 subcounts in the accusation, 11 were

[2] The facts of these incidents are outlined more fully in section II, infra.

sustained (subcounts 4, 14-15, 20, 24, 26-28, and 39-41); two counts were partially sustained and partially dismissed (subcounts 29 and 50); and the remaining 39 subcounts were dismissed entirely. The ALJ rejected appellant's selective prosecution defense and found the Department's requested remedy of revocation was not warranted. He imposed a penalty of 45 days' suspension—with 15 days conditionally stayed, subject to one year of discipline-free operation, in light of steps taken by appellant in mitigation.

Appellant then filed a timely appeal raising the following issues: (1) it was error for the Department to reject appellant's selective prosecution defense, and (2) the decision is not supported by substantial evidence, and applies an erroneous and overly stringent legal standard—holding appellant responsible for behavior that was either not proved, or beyond the control of the licensee.

Following oral argument before the Appeals Board on October 6, 2016, appellant submitted a motion for leave to file a supplemental brief on an issue raised during that hearing — namely, "that this Board and litigants may not refer to, or utilize, prior decisions of the Board" and that it is unethical to do so. (Motion at p. 1.) The motion was granted, the Department was directed to respond in writing within 10 days, and the Board informed the parties that it would not hear oral argument on this issue. The Board considered the supplemental briefs submitted by both parties during closed session on November 3, 2016.

DISCUSSION

I

Appellant contends the Department erred when it rejected appellant's selective

prosecution defense. Appellant maintains it was targeted because of the racial makeup of its clientele, and singled out for harassment when it did not accede to the SFPD's request that it "stop playing music and holding events [*i.e.*, hip-hop] that attracted African-American patrons." (App.Br at p. 9; Resp.Cl.Br. at p. 38.)

The elements necessary to prove discriminatory or selective prosecution are set forth in *People v. Battin* (1978) 77 Cal.App.3d 635, 666 [143 Cal.Rptr. 731]:

> Discriminatory prosecution constitutes adequate grounds for reversing a conviction . . . when the defendant proves: "(1) that he has been deliberately singled out for prosecution on the basis of some invidious criterion;" and (2) that "the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.". . . The discrimination must be "intentional and purposeful.". . . Further, defendant must carry the burden of proof that he has been deliberately singled out in order to overcome the presumption that "[prosecutorial] [duties have] been properly and constitutionally exercised. [Citations omitted]."

In a more recent case, the court explained:

> Although referred to for convenience as a "defense," defendant's claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution. [Citation.] The defect lies in the denial of equal protection to persons who are singled out for a prosecution that is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." [Citation.] When a defendant establishes the elements of discriminatory prosecution, the action must be dismissed even if a serious crime is charged unless the People establish a compelling reason for the selective enforcement. [Citations.]
>
> Unequal treatment which results simply from laxity of enforcement or which reflects a nonarbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement. [Citation.]

(*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 831-832 [50 Cal.Rptr.2d 101].)

In his decision, the ALJ states the following in support of his determination that

appellant failed to establish a selective prosecution defense:

> In order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion. Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the direct victim of the discriminatory practice . . .. (Citation omitted.) (Emphasis added.)" (1996) 12 Cal.4th 826, 83-833, 50 Cal.Rptr.2d 101.
>
> [See also U.S. v. Armstrong, where the United Supreme court stated: "The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law (Citations omitted.) (Emphasis added.) 517 U.S. 456, 469, 116 S.Ct. 1480.]
>
> In this case, Respondent has not provided evidence of any similarly situated licensees with the record of law enforcement problems that Respondent has who were not prosecuted by the Department.
>
> Accordingly, Respondent's allegation of selective prosecution fails.

(Decision at p. 10.)

Appellant maintains the ALJ's conclusion is false, and that appellant did, in fact, present evidence that similarly situated licensees along Broadway were not prosecuted. Sergeant Tom Harvey testified that he dealt with intoxicated persons along Broadway from patrons of other clubs (RT at pp. 44-45) as well as fights involving patrons of other clubs. (*Ibid.*) Officer Theodore Polovina reiterated both these statements. (RT at p. 59.) Officer Lauro Baca testified that he had occasion to break up fights along Broadway between people who were not patrons of Atmosphere and had arrested individuals from other clubs in this area. (RT at pp. 74-75.) Officer Terrance Saw testified that he had arrested people for assaults or fights that were not patrons of Atmosphere. (RT at p. 82.) Officer Josh McFall testified that he has seen security

guards at clubs other than Atmosphere get into altercations with patrons as the guards were attempting to evict them. (RT at pp. 103-103.) And Sergeant Alax Takoaka testified that he has arrested individuals along Broadway who were not patrons of Atmosphere, both for public intoxication and for assaults or fighting. (RT at pp. 150-151.)

Appellant contends the "evidence of a failure to prosecute individuals outside of the allegedly disfavored class for conduct similar to that of the defendant provides indirect evidence that the defendant was 'singled out for prosecution on the basis of some invidious criterion.'" (App.Br at p. 18, quoting *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 298, quoted in Decision at p. 10.) In addition, appellant argued that its patrons were singled out for enforcement because squad cars were regularly parked in front of Atmosphere—but not other establishments in the Broadway area—making it more likely that Atmosphere's patrons would be reported on compared to other premises. (RT at pp. 553-555.)

Appellant maintains it presented not only evidence that it was treated differently than other clubs along Broadway, but direct evidence that the difference in treatment was "the result of an invidious criterion—the desire of Capt. Lazar and the SFPD to reduce African-American patronage of Atmosphere by eliminated Hip-Hop music." (App.Br at p. 18.) Captain Lazar testified:

> My recollection is that we had a discussion about hip hop, and in my mind that quite often is associated with the third-party DJs that we're talking about. The folks that come in and promote these events and not - - and oversell and overbook, which has been the experience at Atmosphere.
>
> And I also know from experience that some types of music will incite crowds to a little bit more rambunctious behavior than in other types of

music. . . .

(RT at p. 262.) Lazar went on to say, "I think it was Mr. Montoya that brought up the fact that he shouldn't have this - - you know, he should not have the hip hop or what have you." (RT at p. 264.)

Bennett Montoya testified that both Captain Lazar and Officer Matthias expressed disapproval—more than once—of the events and entertainment offered at Atmosphere. When asked what Captain Lazar said to him he replied "He recommended and encouraged not to have hip hop events but would always say . . . 'But I can't tell you what to do or what type of events to have.'" (RT at p. 525; 655-656.) Montoya testified that Officer Matthias made the same type of comments. (*Ibid*.) Similarly, Mr. Horne, Director of the Broadway Community Benefit District in 2014, who attended a meeting in August of that year at which Montoya was asked not to bring in hip-hop promoters and DJs, testified that this was attracting "a crowd that the neighborhood and community felt that was—brought in a crowd we didn't want." (RT at p. 454; App.Cl.Br. at pp. 2-3.) Montoya testified that hip hop events "brought out a lot more of the African American descent." (RT at p. 478.)

In support of its selective prosecution argument, appellant introduced evidence that African Americans comprise:

6% of the San Francisco population,

47% of the people arrested by the SFPD in 2014, and

58.3% of the individuals arrested or detained, detailed in the reports produced in discovery by the SFPD supporting the 52 subcounts of the accusation. (App.Op.Br. at

p. 9; Exhibits L, K, & J.)[3]

The Department argues that these statistics fail to prove selective enforcement because Atmosphere's patrons were not limited to residents of San Francisco and, in fact, arrived on party buses from many different counties. (Dept.Br. at p. 9.) In addition, it argues that appellant failed to put forth evidence of the demographics of patrons of other clubs, (*Ibid.*) the type of music played at these clubs, (*Id. at* p. 10) or the level of "violent activity" at other venues. (*Ibid.*)

We believe appellant has made a strong case that it was targeted for more enforcement than other establishments in the Broadway area by the SFPD, and a strong enough case of discriminatory prosecution to shift the burden to the Department on this issue. However, because of our findings on the remaining issues, discussed below, we need not and do not reach this issue in the present matter. The parties should be aware, however, that the Board is extremely sensitive to claims of this nature.

II

Appellant contends the decision is not supported by substantial evidence and that it applies an erroneous and overly stringent legal standard—holding appellant responsible for behavior that was either not proved, or beyond the control of the licensee.

[3] Coincidentally, the U.S. Department of Justice recently issued a report that "criticized [San Francisco's] Police Department for bias against African-American residents in its use of force and during traffic stops but stopped short of saying it was the result of racism." (Thomas Fuller, *U.S. Cites Bias by San Francisco Police Against Blacks*, *NEW YORK TIMES*, Oct. 12, 2016 at http://www.nytimes.com/2016/10/13/us/us-cites-bias-by-san-francisco-police-against-blacks.html?_r=0; accessed November 11, 2016.)

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 an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, 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. (Bus. & Prof. Code, § 23804; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as

support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) "Substantial evidence," however, is not synonymous with "any" evidence. (*People v. Bassett* (1968) 69 Cal.2d 122, 138-139 [70 Cal.Rptr. 193, 203]; *DiMartino v. City of Orinda* (2000) 80 Cal.App.4thy 329, 336 [95 Cal.Rptr.2d 16, 22].) The substantial evidence rule "does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The [Board] was not created . . . merely to echo the determinations of the [Department]. A decision supported by a mere scintilla of evidence need not be affirmed on review." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 [29 Cal.Rptr.2d 191, 193] (internal quotes omitted).)

The 13 subcounts which were sustained are discussed below. The ALJ dismissed the other 39 subcounts.

Finding of Fact I - Subcount 4 (assault):

Officer John Hoge testified that on November 1, 2013, at 1:28 a.m., he observed a woman leaving Atmosphere through the emergency exit followed by a man. The woman told Officer Hoge that the man had struck her in the head, and Officer Hoge observed a lump on her forehead. The man was arrested but the woman declined to press charges. (Exh. 2.) As appellant points out, the statement of the alleged victim was specifically excluded by the ALJ as hearsay and cannot be relied upon for the truth of the matter that an assault took place. The officer did not observe an assault. (App.Op.Br at p. 27; App.Cl.Br. at p. 6.)

We believe this subcount must be dismissed because it is not supported by

substantial evidence. While we are well aware of and sensitive to the rule that, in examining the sufficiency of the evidence, this Board must resolve all conflicts in favor of the Department, (Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815, 817]), we cannot permit a total lack of evidence to pass as "substantial evidence."

Finding of Fact II - Subcount 14 (public intoxication/resisting arrest):

Officer Terence Saw testified that on March 9, 2014, at 1:57 a.m., a large crowd was observed exiting from Atmosphere. Two patrons (Edwards and Brown), who appeared to the officer to be intoxicated, were yelling at each other and challenging others to fight. When the police attempted to arrest Edwards he resisted, then Brown attempted to help Edwards resist by grabbing one of the officers. Both men were taken into custody. (Exh. 3.)

We believe this subcount is supported by substantial evidence.

Finding of Fact III - Subcount 15 (public intoxication/resisting arrest):

Officer Lauro Baca testified that on March 15, 2014, at 11:09 p.m., he answered a call to assist other officers who were attempting to arrest two men fighting in the street outside Atmosphere. (RT at p. 61.) It took 5 officers to subdue one individual. (RT at p. 62.) Another individual, who had been handcuffed by an Atmosphere security guard was arrested also. Both men appeared to the officer to be intoxicated. (*Ibid*.) (Exh. 4.)

While there is direct testimony of Officer Baca that one individual was handcuffed by Atmosphere security guards, there is no evidence that either individual was ever in the club or that appellant’s employees sold alcoholic beverages to them. Throughout

the transcript there are numerous references to Atmosphere security guards patrolling the sidewalk in front of the premises and assisting police in dealing with problem individuals. Contrary to the Department's *assumption* that the individuals were patrons of Atmosphere, the only *actual* connection that this altercation has with the club is the fact that the fight took place in the street directly in front of the licensed premises and that SFPD received assistance with the arrest from one of appellant's security guards. The Board is mindful, as mentioned, that "[w]e must indulge in all *legitimate inferences* in support of the Department's determination." (*Masani*, *supra*, 118 Cal.App.4th at 1437 (italics added).) "An inference is a deduction of fact that may *logically and reasonably* be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code § 600(b) (italics added).) It is simply not a logical inference to say that someone who is intoxicated *outside* of Atmosphere got intoxicated *inside* of Atmosphere. That person may well have entered Atmosphere already intoxicated; correlation (*e.g.* that an intoxicated person is standing outside an establishment on a street where many establishments serve alcohol to patrons) does not equate with causation (*i.e.*, that the intoxicated person got that way by drinking inside the establishment he or she is standing near). To say otherwise is mere speculation—an opinion lacking in a factual or logical basis.

We believe this subcount must be dismissed because it is not supported by substantial evidence; there is an inadequate factual basis from which the Department can draw a logical inference to make a finding.

Finding of Fact IV - Subcount 19 (sale to obviously intoxicated person):

Sergeant Scott Gaines testified that on April 12, 2014, shortly after midnight, he

observed individuals coming out of the club and noticed a female being thrown over the shoulder of another person because she could not stand. (RT at p. 85; Exh. 6.)

This subcount was properly dismissed because the ALJ found no evidence that any of appellant's employees sold an alcoholic beverage to this person.

Finding of Fact V - Subcount 20 (battery):

Officer Josh McFall testified that on April 14, 2014, at 1:42 a.m., he observed an individual striking an Atmosphere security guard with a cell phone, outside the licensed premises. Officer McFall was told by the security guard that the individual had been ejected from Atmosphere. The individual was arrested for battery. (RT at p. 95; Exh. 7.)

We believe this subcount is supported by substantial evidence.

Finding of Fact VI - Subcount 24 (fighting):

Officer Mark Milligan testified that on July 12, 2014, at 1:29 a.m., he responded to a call regarding a fight already in progress in the middle of the street near Atmosphere, involving approximately 15 people. One of the individuals involved in the fight told Milligan that the fight started inside the club, but this hearsay statement cannot be admitted to prove that fact. There was no admissible evidence to prove that any of the individuals who were fighting were ever in Club Atmosphere, and Officer Milligan admitted that the participants could have come from other clubs. (RT at p. 113; Exh. 8.)

We believe this subcount must be dismissed because it is not supported by substantial evidence.

Finding of Fact VII - Subcount 26 (public intoxication):

Officer Baca testified that on August 9, 2014, at 1:30 a.m., he was called to Club Atmosphere where security had detained and handcuffed an individual for fighting in the club. Officer Baca determined that the individual was intoxicated and he was transported to the hospital for medical care. (RT at p. 77; Exh. 5.)

We believe this subcount is supported by substantial evidence.

Finding of Fact VIII - Subcount 27 (assault):

SFPD clerk Veronica Vidrio testified that on August 11, 2014, an individual came to the counter at the police station to report that the previous night he had been hit in the head with a bottle. He wanted to file a police report so that he could file a lawsuit. (RT at pp. 114-117; Exh. 9.) The ALJ admitted this testimony and the supporting exhibit as administrative hearsay. However, as appellant points out, “It cannot be used as administrative hearsay, because the Department introduced no competent evidence that could be supported or explained.” (App.Br. at p. 20.) Government Code Section 11513, subdivision (d) provides in relevant part that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding . . . ” (Gov. Code § 11513(d).)

We agree with appellant that this subcount must be dismissed because it is not supported by substantial evidence.

Finding of Fact VIII,cont. - Subcount 28[4] (battery of a police officer/resisting arrest):

[4] Subcount 28 is inexplicably lumped together with subcount 27 in Finding of Fact VIII, even though it concerns entirely different facts.

Officer John Quinlan testified that on August 10, 2014, at 1:34 a.m., he responded to a call to assist other officers in controlling a large crowd and stopping multiple fights. The large crowd was in the street in front of Atmosphere and extended into an adjacent public parking lot. Officer Quinlan was elbowed in the face, breaking his glasses and lacerating his face under his right eye. (RT at pp. 126-130; Exh. 11.)

Appellant contends, and we agree, that there is no evidence that the individuals involved in these fights had a connection to Atmosphere. Officer Alax Takoaka testified that the crowd came from Club Atmosphere (RT at p. 138), but he admitted that by the time he arrived on the scene, the crowd was already assembled in the street and parking lot—he did not observe any of them exiting the club—and that he was speculating that they came from Atmosphere. (RT at pp. 145-146.) The mere fact that the crowd was assembled in front of the club is insufficient evidence to determine that these individuals were patrons of Atmosphere. Furthermore, this activity occurred near closing time, on a street with multiple venues which serve alcohol, many of whose customers are headed to the parking lot in question at this time of night. Officer Quinlan's testimony did not corroborate the ALJ's finding that the individuals in the crowd had originated from Atmosphere. (App.Open.Br. at p. 21.)

We agree with appellant that this subcount must be dismissed because it is not supported by substantial evidence.

Finding of Fact IX - Subcount 29 (fighting/public intoxication/resisting arrest):

Officer Alax Takoaka testified that on August 17, 2014, he received a radio transmission:

that the clubs were closed and there was [*sic*] a large number of patrons

> out on the street. At approximately 12 minutes after 2 a.m., one of my supervisors radioed that there was a large fight in progress *at a pizzeria at 464 Broadway*. And with that radio transmission, myself and other available units responded.

(RT at pp. 138-139, emphasis added.) The ALJ properly found that there was no testimony to support the charges of public intoxication or resisting arrest at the club that day, and dismissed those portions of subcount 29. However there is also no testimony to support the ALJ's finding that a fight occurred in appellant's club.

We believe that the portion of this subcount sustained by the Department must be dismissed because it is not supported by substantial evidence.

Finding of Fact X - Subcount 30 (battery):

Officer Branson Harris testified that on August 23, 2014, he observed an altercation between a male and female, 50 to 75 feet from the club. The male individual stated that he had been drinking at Atmosphere. (Exh. 10.) The ALJ found that the battery occurred too far away from the club for appellant to be culpable.

This subcount was properly dismissed.

Finding of Fact XI - Subcount 39 (public intoxication):

The ALJ made a finding that on October 31, 2014, intoxicated and belligerent persons exited Atmosphere. This finding is based on information contained in a large packet of computer assisted dispatch (CAD) reports, admitted as Exhibit 19. At the hearing, the ALJ ruled that these CAD reports would be admitted as administrative hearsay only, and that the Department had the burden to establish relevance. (RT at pp. 328-330.) The ALJ then dismissed all subcounts based on the "unauthenticated, hearsay CAD reports." (Determination of Issues, ¶ V.) No witnesses corroborated the

incident mentioned in the CAD report, supporting subcount 39, so it is inadmissible hearsay.

We believe this subcount must be dismissed—by the ALJ's own reasoning—and because it is not supported by substantial evidence.

Finding of Fact XII - Subcount 40 (battery of a police officer/resisting arrest):

Officer Regiland Pena testified that on November 1, 2014, at 1:13 a.m., he was in front of Atmosphere with Officer Nelson Yu. They observed a security guard escorting an individual out of the club. Officer Yu spoke to this individual while Officer Pena returned to the car. Pena did not hear their verbal exchange, but turned and saw the individual throw something at Yu. Officer Yu attempted to detain the person, but he resisted, then punched Yu in the face. (RT at pp. 164-165; Exh. 12 & 16.)

We believe this subcount is supported by substantial evidence.

Finding of Fact XIII - Subcount 41 (public intoxication/resisting arrest):

Initially it should be noted that the ALJ repeats the facts from subcount 4, and references exhibit 2 in the first two paragraphs of this finding of fact—regarding an incident which took place one year previously, on November 1, 2013. Accordingly those two paragraphs do not support Finding of Fact XIII, and must be dismissed.

Officer Frank Olcomendy testified that on November 1, 2014, he assisted other SFPD officers in arresting an individual who had been removed from Atmosphere by security. Officer Olcomendy testified that the individual was very intoxicated and resisted arrest. (RT at p. 195; Exh. 14.)

We believe only the portion of this subcount detailed in paragraph three of Finding of Fact XIII is supported by substantial evidence. The portions of paragraphs

one and two, which refer to events outlined in Finding of Fact I (subcount 4) must be dismissed.

Finding of Fact XIV - Subcount 50 (resisting arrest):

Officer Ryan McEachern testified that on December 13, 2014, at 1:27 a.m., he observed several individuals fighting as they exited Atmosphere, and observed that SFPD Officer Wong was injured when he assisted the security guards in making an arrest. (RT at p. 179; Exh. 13.)

We believe the portion of this count that was sustained is supported by substantial evidence, and that the portion of the count that was dismissed for being unsupported by any evidence was properly dismissed.

In sum, the Board finds that six of the eleven subcounts sustained by the Department must be dismissed for lack of substantial evidence, plus a portion of a seventh subcount. The remaining four and a half counts are simply not sufficient to impose discipline for maintaining a "disorderly house."

Business and Professions Code section 25601 states:

> 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.

In *Minshew* (2001) AB-7741, at p. 6, the Board said:

> it does take a period of time and an accumulation of violations to show the elements of the "disorderly house" statute, which speaks to a somewhat continuous series of conduct which disturbs the community, or can be said to be contrary to public safety, welfare, or morals.

The Board went on to say:

> The test as to the disorderly house complaint is "not one of simply counting numbers. Common sense tells us that some conduct is more socially troublesome than others, and the human frailty will emerge in almost every context. People who drink sometimes fight. It is not enough merely to employ a staff of security personnel capable of breaking up fights. The failure to remove from the premises persons who have become intoxicated invites fights to occur. People who become intoxicated suffer from impairment, and may be more likely to become pugnacious than if sober." (See VE Corporation (1998) AB-6797.)

(*Id.* at p. 8.)

Appellant complains that it is held to an impossible standard in dealing with problem patrons. On the one hand, while it has a duty to employ security personnel and to eject individuals from the premises who are intoxicated, fighting, or causing other problems, it can also be penalized if those security guards carry out their duties in an overly aggressive manner. (See e.g., *Kritzer* (1999) AB-7127; *Sherbondy* (1997) AB-6658.) Furthermore, while security personnel are required—within their limited authority—to detain problem patrons, and individuals in the general vicinity of the licensed premises who may be causing problems, and remand them to police custody, it is manifestly unfair for the Department to subsequently claim such actions constitute a violation of section 25601 or 24200—as it has done in subcounts 20, 26, and 40 (three of the four counts we find are supported by substantial evidence). Appellant is in a damned if you do, damned if you don't situation, and imposing liability on licensees in such circumstances provides an incentive to let security guards exceed their lawful powers, to allow intoxicated individuals to remain in the premises, or to allow potentially dangerous individuals to roam freely in the streets—rather than turning them over to the police. (See App.Op.Br. at pp. 40-41.)

The Board in *Minshew* did not define what period of time, or how many violations

it should take to establish a violation of section 25601, but it is clear that it must be more than the four and a half subcounts which were proved here—particularly when one considers that 40-50,000 patrons passed through this establishment over a course of a year. Accordingly, the ALJ's finding in Determination of Issues II, that appellant's club constitutes a law enforcement problem, such that continuation of its license would be contrary to public welfare or morals, is not supported by four and a half subcounts.

The Department asserts that "[t]he facts of this case closely resemble the facts of *Harris . . .*" (Dept.Br. at p. 8, citing *Harris v. Alcoholic Bev. Control Appeals Bd* (1965) 238 Cal.App.2d 106, 118 [28 Cal.Rptr. 24]) — a case in which the court found there was good cause to support the charges of a "disorderly house" and law enforcement problem. In that case, however, the record contained substantial evidence that there had been 101 arrests at that location over a six month period, with authentication of the arrest reports by the officers involved. In the instant case, the CAD reports (Exhibit 19) the Department sought to use as proof of multiple arrests and a law enforcement problem was rejected by the ALJ who said:

> Without some evidence to show that the police dispatches recorded in those reports were connected to Respondent club, and that they were warranted, there is insufficient evidence to show that, regarding those subcounts, Respondent violated either Business and Professions Code Section 25601, or 24200(a), or Article XX, Section 22 of the California Constitution.

(Determination of Issues, ¶ V.) This is precisely why the ALJ dismissed 39 of the 52 subcounts.

The four and a half subcounts which we find to be supported by substantial evidence, taken as a whole, do not rise to the level which meets the definition of a

"disorderly house" or which constitutes a law enforcement problem. The subcounts which are supported by substantial evidence are simply too few, and have insufficient ties to appellant's club, to establish the charges in the accusation. The problems as set forth in the accusation were, on the whole, poorly presented and not properly proven. Overall, much of the case appears to be based on innuendos and speculation about the Broadway neighborhood as a whole, rather than solid proof linked to this appellant. Once all the dismissed counts and inadmissible evidence are discarded, there simply is not enough evidence to support the charges of the accusation. In addition, we agree with appellant that affirming the Department's decision would actually, as to subcounts 20, 26, and 40, penalize appellant for doing what it is required by law to do.

The Department failed to meet its burden of proof to establish that appellant maintained a "disorderly house" or that continuation of appellant's license would constitute a law enforcement problem. Consequently, we reverse the decision of the Department and recommend that the accusation be dismissed.

III

The issue raised in the supplemental briefs—*viz.*, are Board decisions on the same or related issues, "precedent" or "persuasive authority" to be relied upon for guidance to counsel and parties in a dispute—though not essential to our determination of the ultimate decision in this matter, is deserving of our attention. We thus address as *dicta* here what we mean by the "precedential" value to be afforded our published decisions and our expectation of the parties who brief and argue cases before us with respect to citing and discussing these decisions. We emphasize that our discussion of

this issue, while *dicta* here, is nonetheless the type of *dicta* intended to be "highly persuasive, particularly [because] . . . made . . . after careful consideration, . . . in the course of an elaborate review of the authorities, [and] when it has been long followed." (*People v. Lozano* (1987) 192 Cal. App.3d 618, 632 [237 Cal.Rptr. 612].) This description of dicta coincidentally describes the Board's practice of treating its own decisions as having precedential value, one acknowledged and followed by counsel and parties until a year ago when the Department's newly appointed general counsel apparently had a personal epiphany upon reading the Administrative Procedure Act (APA) and decided to embark on a scorched earth policy of treating all our decisions as nothing more than the "law of the case," unpublished opinions he claims would be "unethical" if not "illegal" for the department to cite or discuss.

This issue arose from a question asked by the Board of the Department's counsel during oral argument — what is the Board to make of the Department's brief that failed to address several of the Board's past decisions relied upon by appellant in its opening brief? The Department's General Counsel then rose to apparently assist counsel who was arguing the case, and informed us that, in the Department's opinion, it is "illegal and unethical" for parties to cite prior decisions of the Board. This prompted appellant's motion to submit a supplemental brief on the issue. It is the Department's position that the Board is prohibited by Government Code section 11425.60 from designating its decisions as precedential, which means, in its view, our decisions have no *stare decisis* effect whatsoever. As appellant points out, such a position implies that "the Board must approach each case as a *tabula rasa* without regard to analogous cases that have preceded it." (Motion at p. 3.) We believe the Department's position

completely ignores past practice and mistakenly reads the APA literally, but not literately. (See, *e.g.*, Roger Traynor, *Reasoning in a Circle of Law* (1970) 56 *VA.L.REV.* 739, 749; *Ip v. U.S.* (9th Cir. 2000) 205 F.3d 1168, 1176 ("[A]s Justice Roger J. Traynor put it, we need literate, not literal judges, lest a court make a construction within the statute's letter, but beyond its intent.")

For many years, both appellants and Department attorneys have cited past Appeals Board decisions as persuasive authority. In addition, the Department's **own decisions** have cited our past decisions to this effect. For example, in *Sangha & Singh* (2001) AB-7521, the ALJ quotes from a 1998 Appeals Board case and cites as justification for his decision the fact that the Board "has routinely affirmed the Department's imposition of discipline, usually revocation, in instances where licensees have been found to have attempted to purchase 'stolen' cigarettes." (Determination of Issues, ¶ X.) In *Garfield Beach* (2015) AB-9514, the ALJ cites a 2012 Appeals Board decision for the proposition that prior disciplines and prior discipline-free history, under a different license number, may be considered in a later case. (Legal Basis for Decision, ¶ V.) And in *Masoud Zaighami* (2016) AB-9522, the ALJ rejects one of appellant's arguments saying, "[t]his argument is . . . rejected, as it has also consistently been rejected by the Alcoholic Beverage Control Appeals Board." The ALJ in *Zaighami* then cites two previous decisions of the Board, decided in 2014 and 2011, in support of his rejection. (Determination of Issues, ¶ IV.)

Even though parties and the Department themselves have cited and relied Board decisions for many years, the Department occasionally attempts to arrogate to itself the sole authority to render a precedential or guiding decision. In 2004, for example, the

Department argued in *7-Eleven /Jain* (2004) AB-8082 that:

> Pursuant to Government Code §11425.60(a) "[a] decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency." There is no evidence that the Department of Alcoholic Beverage Control adopted *Dianne* as a precedent decision. Thus, *Dianne* is not a precedent decision.

The Board repudiated this argument, explaining:

> We are not sure what this means. Since *7-Eleven/Dianne* is a decision of the Appeals Board, it does not appear that the Department has the authority to adopt it or reject it as a precedent decision. The designation of a decision as precedent is made by the agency that issues the decision, not by the agency that is a party to the action being decided.
>
> If the Department meant that the Appeals Board failed to adopt *7-Eleven/Dianne* as a precedent decision, the statement is still enigmatic, since the Appeals Board is not subject to chapter 4.5 of the APA, in which section 11425.60 is found.

(*Id.*, fn. 7 at p. 7.)

It appears to again be the Department's now *reinvigorated* position that only **it** can designate decisions as "precedential"—entirely ignoring the fact that the Department lacks the authority to adopt or reject decisions of the Appeals Board as precedential. (*Ibid.*) Government § 11425.60, upon which the Department relies for its position, was part of a 1995 comprehensive reform of California's APA intended to prevent administrative departments from relying upon their own *unpublished* decisions

in deciding issues within their jurisdiction. (See Jacobs, *Illuminating a Bureaucratic Shadow World: Precedent Decisions Under California's Revised Administrative Procedure Act* (2001) 21 *J. NAT'L ASS'N ADMIN. L. JUDGES* 247.) To the extent the Department desires any of ***its*** decisions—including decisions of ALJs that it affirms, reverses or rewrites—to be treated as "precedent," ***it*** must so designate that decision and index it in a publicly available list of agency precedents; but this requirement does not apply to the Board as the Board is exempt from this statutory scheme. (Gov. Code § 11425.60(b) & (c.) Curiously, in the 21 years since these provisions were enacted, the Department has never designated any of its decisions as "precedent," which, assuming arguendo the veracity of the Department's asserted proposition, means there are no precedential decisions from the Department or the Board to guide licensees or counsel, only the few cases that are accepted and decided by appellate courts or the Supreme Court pursuant to discretionary writs. As the appellant quite rightly points out, the only potential beneficiary in a world where prior decisions of the Board must be ignored and the Department has issued no precedential decisions itself, is the Department. (Motion at p. 4.) "If no one can cite or rely upon decisions of this Board, the Department is free to disregard them and create its own 'shadow world' of unrestrained discretion—precisely what the Legislature sought to eliminate in 1995 [when it amended the APA]." (*Ibid*.)

The Board explained its position as to why reliance on our prior decisions is warranted in *Garfield Beach* (2013) AB-9258, at p. 4:

> To be sure, while "[t]here is . . . no rule of administrative stare decisis" (*BankAmerica Corp. v. United States* (1983) 462 U.S. 122, 149 [103 S.Ct. 2266]), **agency adjudications and appellate decisions therefrom**

> **produce administrative norms that, like judicial interpretations of statutes and regulations, operate as rules of general application and thus enjoy analogous stare decisis precedential value**. (See *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade* (1973) 412 U.S. 800, 807-08 [93 S.Ct. 2367] [stating **agency adjudicatory decisions "may serve as precedents,"** that there is "a presumption that those policies [announced in adjudications] will be carried out best if the settled rule is adhered to," and that the agency's "duty to explain its departure from prior norms" flows from that presumption]; *Kelly ex rel. Mich. Dept. of Natural Res. v. FERC* (1996) 96 F.3d 1482, 1489 [321 U.S.App.D.C. 34].) (Emphasis added.)

The Board's decisions, as we have previously made clear, are "persuasive authority" and, as such, they can and sometimes do have precedential value—even if they have not been formally designated by us as "precedential." (See *Garfield Beach, supra.*) Of course, not all our decisions are "precedents." As one court has explained:

> A . . . precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case . . ., which is then considered as furnishing the rule for the determination of a subsequent case involving . . . similar material facts and arising in the same [tribunal] or a lower [tribunal] in the [administrative] hierarchy.

(*Allegheny Gen. Hosp. v. NLRB* (3d Cir. 1979) 608 F.2d 965, 969-70.) "Precedent" is a normative legal precept containing both specific facts and a specific result. But courts and administrative appellate bodies cannot ordinarily "frame a principle . . .on the basis of a single case. . . When [this Board] has the same state of facts before it, unless there is some very controlling reason, it is expected to adhere to the former decision. But when it [goes] further and endeavors to formulate a principle, *stare decisis* does not mean that the first tentative gropings for the principle . . . by th[e] process of . . . inclusion and exclusion, are of binding authority." (Roscoe Pound, *Survey of Conference Problems* (1940) 14 *U. CIN. L. REV*. 324, 330-31.)

To be sure, the difference between "persuasive authority" and "binding authority" or "precedential value" is not always subject to a "bright line" distinction; but so far as

this Board is concerned, any party who fails to cite and discuss decisions we have rendered that are relevant to issues before us, does so at its peril. As a notable book on brief writing advises:

> [Y]our brief or reply brief will have distinguished your opponent's principal cases—and will have responded to your opponent's distinguishing of your own. Not only may the court [or Appeals Board] wish to explore these disagreements, but it may have its own views of how and why the major cases cited or discussed are not germane. You must be able to enter these discussions with full and secure knowledge to the cases—their facts, their holdings, and their significant relevant dicta.

(Antonin Scalia & Brian A. Garner, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008) at p. 152.) Obviously this cannot be accomplished when a reply brief omits citation and discussion of our decisions on the specious ground that they are merely the equivalent of unpublished appellate opinions and cannot ethically be cited as authority. At bottom, this is nothing more than a lazy and disrespectful posture for counsel to take, one that does not assist the client, in this case the Department, on whose behalf it is asserted.

We obviously cannot and do not make each decision of this Board in a vacuum—something the Department seems to suggest is our only option when it decrees neither we nor appellants may rely upon prior decisions because they have not been designated as "precedential." Our prior decisions, as persuasive authority, must and should inform and guide our decision-making process—and we endeavor to make our decisions consistent with prior adjudications unless we give a reasoned basis for departing from those precedents.

ORDER

The decision of the Department is reversed.[5]

FRED HIESTAND, ACTING CHAIRMAN
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] 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*.