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

AB-9568a
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: July 12, 2018
South San Francisco, CA

ISSUED JULY 27, 2018

Appearances: *Appellant:* John W. Edwards, II, of Hinman & Carmichael, LLP, as counsel for BMGV, LLC,

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

OPINION

This is the second appeal in this matter. The Board has been directed by the Court of Appeal[1] to consider two issues on remand: (1) whether dismissal of the accusation is warranted on the ground of selective or discriminatory prosecution, and — if the answer to that question is no — (2) whether the discipline imposed by the

[1]The decision of the Court of Appeal, dated August 28, 2017, is set forth in the appendix.

Department constitutes an abuse of discretion.

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 subcounts, alleged that appellant operated the premises as a "disorderly house," in violation of Business and Professions Code section 25601. Count 2 re-alleged the subcounts 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).

Administrative hearings were held on July 21-23, and 28-29, 2015, at which documentary evidence was received and testimony concerning the violations charged was presented by members of the San Francisco Police Department (SFPD); Bennett Montoya, managing member of BMGV, Inc. 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 was subsequently re-branded and currently is doing business as Club Hue. In 2014, Atmosphere served approximately 40-50,000 patrons,

plus an additional 2,000 to 6,000 at private events. 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.

The incidents comprising the 52 subcounts of the accusation were 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 to an obviously intoxicated person.

After the five days of 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 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 that 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) for operating a disorderly house, in violation of Business and Professions Code section 25601; and for 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).

Appellant then filed its first appeal (AB-9568) 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.

The Appeals Board heard oral argument on October 6, 2016, and issued its decision on November 16, 2016, finding:

> 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.

(*BMVG* (2016) AB-9568, at pp. 20-21.) In light of this holding, the Board determined that it was not necessary to reach the issue of selective prosecution.

The Department filed for a Writ of Review in the First District Court of Appeal and the matter was accepted for review. In its decision,[2] the Court annulled the Board's decision and found there was sufficient evidence to sustain the accusation as to ten of the incidents outlined in the subcounts. The Court summarized its conclusion as follows:

> In sum, and based on our review of the record, we conclude the ALJ's recommendation to sustain the accusation against BMGV is supported by the six undisputed incidents, as well as the four additional incidents for which we find there is substantial evidence. These ten incidents establish BMGV's club patrons were involved in incidents of public intoxication, resisting arrest, fighting, as well as assault and battery.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* / *BMGV* (2017) Cal.App.Unpub. LEXIS 5957 at p. 14.) The court also admonished the Board saying:

> In our view, the Board's contrary decision "is tantamount to an attempt by the . . . Board to reweigh the evidence in the record and, by thus reaching a conclusion which it considers more reasonable, to usurp the function of the Department. This, the . . . Board cannot do. [Citation.]"

(*Id* at p. 15.)

Having sustained the Department's decison on the basis of substantial evidence, as to ten of the incidents outlined in the subcounts, the Court of Appeal nevertheless remanded the matter to the Appeals Board for consideration of two remaining issues: (1) whether the accusation should be dismissed on the basis that appellant had successfully established the defense of selective prosecution, and — if the answer was no — (2) whether the accusation should be dismissed because the Department

[2]The opinion, issued on August 28, 2017, was not designated for publication and therefore cannot be cited as precedent.

exceeded its discretion when it imposed a penalty of 45-days' suspension with 15 days conditionally stayed. The Court said:

> Because the Board recommended dismissal of the accusation on the ground of insufficient evidence, it did not rule on BMGV's additional contentions that dismissal was warranted on the ground of selective or discriminatory prosecution or that the imposed discipline was "grossly disproportionate" when compared to discipline imposed in other cases. We find the Board should resolve these outstanding issues in the first instance. Our decision should not be read and we express no opinion on how the Board should rule on these issues.

(*Id*.)

DISCUSSION

Appellant contends the accusation should be dismissed because it has established the defense of selective prosecution. 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. (AOB at pp. 16-19.)

Yick Wo v. Hopkins (1886) 118 U.S. 356 [6 S.Ct. 1064] stands as the landmark decision applying the principles of the equal protection clause to the discriminatory enforcement of a law. The case involved a San Francisco ordinance prohibiting a person from maintaining a laundry in a building not made of brick or stone without first obtaining a permit from the Board of Supervisors. 280 individuals applied for permits under the ordinance, and, even though the applicants were apparently equally qualified, the board granted permits only to the 80 non-Chinese applicants and denied permits to the 200 applicants who were Chinese. Yick Wo, one of the unsuccessful applicants, was thereafter convicted and imprisoned for maintaining a laundry without a permit.

On appeal, the Supreme Court found that the board had impermissibly discriminated against the Chinese applicants, and that such discrimination directly violated the mandate of the equal protection clause, stating:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

(*Id*. at pp. 373-374.)

The evidence required to support a claim of discriminatory prosecution is well established. In *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 [124 Cal.Rptr. 204] the Court held:

> As we have explained, 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 enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.

(*Id.* at p. 298.) As appellant explained during oral argument, *Murgia* establishes that when there is no legitimate purpose for singling out a licensed premise for prosecution, this constitutes selective prosecution.

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], emphasis added.) Appellant maintained at oral argument that it has established a prima facie case by inference — sufficient to create a presumption of discrimination in this case, and sufficient to shift the burden to the Department to justify the use of selective enforcement

The issue before the Board on remand is not a question of fact, where we are bound by the ALJ's findings, but is, instead, a question of law — thus, the Board is not bound by the ALJ's assumptions and findings, but considers the question *de novo*.

> "It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to *de novo* review on appeal. [Citation.] Accordingly, we are not bound by the trial court's interpretation. [Citation.]" (*Rudd v. California*

> *Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624].) An appellate court is free to draw its own conclusions of law from the undisputed facts presented on appeal.

(*Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578]. In sum and substance, we consider here whether or not the defense of selective prosecution was established by appellant as a matter of law. If it was, as *Baluyut, supra* directs, the Board must reverse the Department's decision and the accusation must be dismissed.

In the Department's original decision, the ALJ made the following findings 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 erroneous, and that appellant did, in

fact, present evidence that similarly situated licensees along Broadway were not prosecuted, and that the patrons of Atmosphere were singled out for more than their share of police enforcement.

Appellant presented evidence that its patrons were singled out for enforcement when squad cars were parked in front of Atmosphere every night that it was open — but not in front of 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. 354; 521-522.) Evidence at the administrative hearing also established that appellant's address was used for incidents that occured anywhere on the street nearby, and that the SFPD blamed the club for those incidents, even when there was no evidence that such individuals had a connection to Atmosphere. (*Ibid.*)

Appellant 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 eliminating hip-hop music. At the administrative hearing, 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 type of music was attracting "a crowd that the neighborhood and community felt that was - brought in a crowd we didn't want." (RT at p. 454.) Testimony was heard that hip hop events "brought out a lot more of the African American descent." (RT at p. 478.) The evidence clearly established that a racial component was part of the animus directed at appellant.

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

- 6% of the San Francisco population,
- 47% of all the people arrested by the SFPD in 2014, and
- 58.3% of the individuals arrested or detained in the incidents underlying the 52 subcounts of the accusation.

(Exhibits L, K, & J.)

The Department argued 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. We disagree with this conclusion. Even if not all of Atmosphere's patrons were residents of San Francisco, these figures clearly demonstrate a huge disparity in the number of African-American individuals arrested by the SFPD during the year in question, and an astonishingly large percentage of the African-American individuals arrested in the incidents underlying the 52 subcounts of the accusation.

In addition, the Department argued that appellant failed to put forth evidence of the demographics of patrons of other clubs, the type of music played at these clubs, or the level of "violent activity" at other venues. Appellant argued, however, that only the SFPD and the Department would be able to provide such evidence, because this type of information is entirely within their domain — not information available to individuals who are not members of law enforcement.

In our decision after the first appeal, we said:

> 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.

(*BMGV* (2016) AB-9568, at p. 9.) Nevertheless, we did not decide the first appeal on that basis, since we reversed on other grounds.

Our view on this issue has not changed. We still believe appellant has established a strong enough selective prosecution defense to shift the burden to the Department. As we said in the first appeal in this matter, it appears that Atmosphere has been blamed for more than its share of the problem individuals involved with the

police in the 400 block of Broadway. Based on the record, it appears that Atmosphere was singled out for unique surveillance and enforcement, even though other clubs on Broadway (that did not feature hip-hop music) had problem patrons similar to, or worse than, those at Atmosphere. The Department offered no evidence to counter this indirect evidence of discrimination, and appellant maintains such knowledge is uniquely within the realm of the SFPD and the Department. Appellant maintains the fact that no such evidence was introduced by the Department leads to the inescapable conclusion that none exists. We have to agree.

In addition, appellant presented direct evidence of prohibited discriminatory animus (in the testimony from Mr. Montoya, confirmed by Captain Lazar and Mr. Horne) that Lazar repeatedly requested that Atmosphere stop playing hip-hop music which attracted the African-American crowd the SFPD didn't want. Appellant maintains it was subjected to retribution in the form of: false reports made to the SFEC; a "raid" by Captain Lazar in search of regulatory infractions; and a letter from Lazar to the Community Benefit District members containing what appellant characterizes as false and defamatory charges against Atmosphere. (Exh. 17.)

The Department asks the Board to "explicitly acknowledge the complete absence of any facts indicating that there was any discriminatory purpose on the part of the Department." (RRB at p. 28.) However, the discrimination alleged by appellant is that of the SFPD, not the Department. The underlying enforcement efforts supporting the Department's accusation were brought by the SFPD, thus any discrimination is imputed to the Department.

The Department also asserts that the appellant's "claimed evidence of bias is

merely another attempt by appellant to have the Board reweigh and reframe the evidence on appeal, as there were no findings of bias made by the ALJ." (*Id. at p. 29.)* This is both wrong and irrelevant. It is immaterial whether the ALJ made any findings of bias — since no such finding by the ALJ is required as a prerequisite to the Board's determination that a discriminatory prosecution defense has been established. Here, the Board is tasked with determining — as a matter of law — whether the selective prosecution defense has been established, and we are not bound by the ALJ's findings of fact in making that determination. And, as case law instructs, "[w]hen 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." (*Baluyut, supra* at p. 831, emphasis added.)

We believe the record taken as a whole supports a finding that appellant was deliberately singled out for prosecution on the basis of an invidious criterion and that prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities. This, by definition, establishes the defense of selective prosecution. Appellant having made that prima facie case, and shifted the burden to the Department, the Department then failed to establish any compelling reason to justify such selective enforcement.

The Court of Appeal directed the Board to determine, if necessary, whether the imposed discipline was "grossly disproportionate" when compared to discipline imposed in other cases. We do not reach this issue since we find that appellant has established a complete defense.

Appellant has established a selective prosecution defense as a matter of law.

Accordingly, we reverse the Department's decision and recommend that the accusation be dismissed.

ORDER

The decision of the Department is reversed.[3]

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

[3]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

Filed 8/28/17

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Petitioner,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

Respondent;

BMGV, LLC,

Real Party in Interest.

AB-9568a

A150055

(Alcoholic Beverage Control Appeals Board No. AB-9568)

Petitioner Department of Alcoholic Beverage Control (the Department) issued a 45-day suspension of an on-sale general public premises license held by real party in interest BMGV, LLC, doing business as "Atmosphere" (BMGV). The discipline was imposed based on a sustained accusation that BMGV was maintaining its premises, known as Club Atmosphere, as a disorderly house (Bus. & Prof. Code, §§ 24200, subd. (b), 25601[1]), and creating a law enforcement problem such that the continuation of the license would be contrary to public welfare or morals (Cal. Const., art. XX, § 22; § 24200, subd. (a).) Respondent Alcoholic Beverage Control Appeals Board (the Board) annulled the Department's decision and recommended dismissal of the accusation on the

[1] All further unspecified statutory references are to the Business and Professions Code.

ground of insufficient evidence. In light of its decision, the Board did not address BMGV's additional argument that dismissal was warranted on the ground of selective or discriminatory prosecution or BMGV's challenge to the imposed discipline. We granted the Department's petition for writ review of the Board's decision. (§ 23090.)

We agree with the Department that there is substantial evidence in the record to support the sustained accusation against BMGV. However, we believe the Board should address, in the first instance, the remaining outstanding issues - BMGV's contention that dismissal of the accusation is warranted on the ground of selective or discriminatory prosecution and, if necessary, BMGV's challenge to the imposed discipline. Accordingly, we annul the Board's decision and remand the matter to the Board with directions to conduct further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND[2]

BMGV operated the licensed premises, as Club Atmosphere, from August 28, 2008 to December 13, 2014.[3] By 2014, the club was the largest nightclub in the Broadway area - an area of San Francisco known for night life and adult entertainment. In 2014, the club operated four nights each week (Thursday through Sunday) and served that year approximately 40,000-50,000 patrons, plus an additional 2,000-6,000 patrons attended private events. There was significant foot traffic on the sidewalk in front of the club, and several public parking lots were located nearby.

On February 13, 2015, the Department filed a two-count accusation, to which BMGV filed a notice of defense. The accusation included 52 subcounts describing various incidents that occurred in 2013 and 2014 for which the Department sought to discipline BMGV for (a) operating the premises as a disorderly house (count one); and

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[2] Our statement of facts is taken from undisputed portions of the administrative record. The Department requests that we take judicial notice of its penalty guidelines. However, we deny the request for judicial notice because the penalty guidelines are not necessary for our resolution of this writ review.

[3] Club Atmosphere was closed on December 13, 2014, and after remodeling, reopened as Club Hue in July 2015.

(b) creating a law enforcement problem such that continuation of the license would be contrary to public welfare or morals (count two). (Cal. Const., art. XX, § 22; §§ 24200, subds. (a), (b), 25601.[4]) An evidentiary hearing was held on several days in July 2015 before an administrative law judge (ALJ). The Department adopted the ALJ's findings and recommendation that the accusation be sustained and that BMGV's license be suspended for 45 days (with 15 days conditionally stayed subject to one year of discipline-free operation). The ALJ's findings and recommendation were based, in pertinent part, on evidence of 13 incidents for "disturbance-fighting" and "resisting arrest," which demonstrated BMGV was operating a disorderly house and creating a law enforcement problem such that continuation of its license would be contrary to public welfare or morals. The Department also accepted the ALJ's finding that BMGV had failed to establish that dismissal of the accusation was warranted on the ground of selective or discriminatory prosecution.

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[4] California Constitution, Article XX, Section 22, subdivision (d) reads, in pertinent part: "The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the . . . continuance of such license would be contrary to public welfare or morals . . . ."

Section 24200 reads, in pertinent part: "The following are the grounds that constitute a basis for the suspension or revocation of licenses: [¶] (a) When the continuance of a license would be contrary to public welfare or morals. However, proceedings under this subdivision are not a limitation upon the department's authority to proceed under Section 22 of Article XX of the California Constitution. [¶] (b). . . the violation or the causing or permitting of a violation by a licensee of this division, any rules of the board . . ., any rules of the department . . .,or any other penal provisions of the state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors."

Section 25601 reads: "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."

BMGV successfully appealed to the Board, which reversed the Department's decision and remanded the matter with a recommendation to dismiss the accusation. The Board decided, among other things, that there was no substantial evidence supporting the ALJ's findings with respect to seven incidents and the remaining sustained incidents were "simply too few" and had "insufficient ties" to the club to establish that BMGV had maintained a disorderly house or created a law enforcement problem. In light of its decision, the Board did not address BMGV's additional contention that dismissal was warranted on the ground of selective or discriminatory prosecution or BMGV's challenge to the imposed discipline.

On December 16, 2016, the Department filed a timely petition for writ review challenging the Board's decision. (§ 23090.) We granted the petition and heard oral argument. (§ 23090.1.)

DISCUSSION

I. Applicable Law

"The administration of the [Alcoholic Beverage Control] Act, within its scope and purposes, is initially vested in the Department. (Cal. Const., art. XX, § 22; see also § 23000 et seq.) The Department's decisions are subject to administrative review by the Board. (§ 23084.) After the Board has issued a final order, the Department's decision is also subject to judicial review in the Supreme Court or the Court of Appeal. (§ 23090.2.) [¶] The scope of review of both the Board and the courts is a narrow one. 'The review by the board of a decision of the department shall be limited to the questions: [¶] (a) Whether the department has proceeded without, or in excess of, its jurisdiction. [¶] (b) Whether the department has proceeded in the manner required by law. [¶] (c) Whether the decision is supported by the findings. [¶] (d) Whether the findings are supported by substantial evidence in the light of the whole record. [¶] (e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.' (§ 23084.) [¶] [In addition,] Section 23090.2 directs the courts to review, not the Board's decision, but the

Department's decision, addressing the same enumerated questions. The statute goes on to provide: 'Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.' (*Ibid.*) Thus, in deciding the issues before us our role is limited to determining, based upon a review of 'the whole record of the department,' whether the *Department's* decision is subject to reversal on the grounds specified in section 23090.2. [¶] If the Department's administrative action declares or applies legal rules, or sets forth conclusions of law which are drawn from adjudicated or undisputed facts, it is subject to review only for insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion. [Citation.] ' "[T]he discretion exercised by the Department. . . ' "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." ' [Citations.] Nevertheless, *it is the Department, and not the Board or the courts, which must determine whether 'good cause' exists for denying a license upon the ground that its issuance would be contrary to public welfare or morals.* [Citations.]" ' [Citations.] Although most cases address the Department's discretionary powers in the context of the revocation, granting or denial of a license, the same deferential standard of review should and would apply to the Department's discretionary powers to determine whether there is good cause to suspend a license, since all of the powers derive from the same constitutional source. (Cal. Const., art. XX, § 22.)" [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1071-1072.)

II. Sufficiency of the Evidence to Support the Department's Decision

The Department argues that, contrary to the Board's decision, there was substantial evidence to support the ALJ's findings, and those findings support the Department's decision to sustain the accusation against BMGV and suspend its license. We agree with all of the Department's arguments save one.

"Our review of the Department's factual findings and conclusions is circumscribed by section 23090.3, which provides that '[t]he findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department.' 'We accept the Department's findings of fact as conclusive. [Citation.] We indulge 'all legitimate inferences in support of the Department's determination.' [Citation.] A reviewing court may not disregard or overturn the Department's findings of fact merely because it concludes that contrary findings would be equally or more reasonable. [Citation.] In short, we may not exercise our independent judgment on the evidence. [Citation.]" [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 128 Cal.App.4th 1195, 1205-1206.)

Additionally, Government Code section 11513 addresses the admissibility of evidence generally in administrative hearings. It states: "(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. [¶] (d) 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 unless it would be admissible over objection in civil actions."

In finding BMGV maintained a disorderly house and was a law enforcement problem, the ALJ relied on several subcounts describing 13 incidents which occurred over a 14-month period (November 1, 2013 through December 13, 2014). The Board sustained the ALJ's findings regarding six incidents and found there was a lack of substantial evidence to support seven additional incidents. There is no dispute as to the ALJ's findings, adopted by the Department and upheld by the Board, sustaining six incidents. On this writ review the Department limits its arguments to challenging the Board's determination that there was insufficient evidence to support an additional five

incidents.[5] For the reasons which follow, we conclude there was substantial evidence to support four of the five additional incidents.

Subcount Number 4: The ALJ found: "On November 1, 2013, at approximately 1:30 a.m., a woman left Respondent club through the emergency exit, followed by a man a few paces behind her. The woman, who had a large lump on her forehead, reported to a police officer that the man had struck her in the head. A security guard informed a police officer that he, the guard, observed a 'physical altercation' between the woman and the man. The police arrested the man and took him to jail. The woman declined to press charges," from which the ALJ inferred "the woman had grounds to file charges against the man, but chose not to do so." The Board dismissed this subcount on the grounds that the police officer (Officer Hoge) had not observed the assault, and the ALJ had excluded the victim's statement as inadmissible hearsay. However, the Board's decision fails to take into account that a finding that an assault took place does not require "that an eyewitness be produced to testify directly to the [assault]. The connection may be made by circumstantial evidence in the same way that any other fact can be proved." *(Johnson* v. *Griffith* (1941) 19 Cal.2d 176, 179-180.) Additionally, the record shows the ALJ properly admitted the victim's statement, as well as the statement of the club security guard, as "administrative hearsay" under Evidence Code section 11513, subdivision (d),[6] to "supplement[ ] and explain[ ]" Office Hoge's personal observations of the physical condition of the victim as she exited the club. (See *Lake* v. *Reed* (1997) 16 Cal.4th 448, 461 (*Lake*).[7]) Thus, we conclude there was substantial evidence supporting the ALJ's

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[5] The Department does not challenge the Board's decision that there was no substantial evidence to support two additional incidents sustained by the ALJ.

[6] Because we conclude the club security guard's statement and the victim's statement were admissible under Government Code section 11513, subdivision (d), we do not address the Department's arguments that the evidence was also admissible under exceptions to the hearsay rule in Evidence Code section 1222 [authorized statement of a party's agent] and section 1240 [spontaneous declaration], respectively.

[7] "[A]lthough we are not bound by the ... Board's decisions," we may "take judicial notice" of "their reasoning for persuasive value." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2017) 7 Cal.App.5th 628,

recommendation to sustain subcount number 4. The Board's determination to the contrary exceeded its authority to review for substantial evidence regarding that subcount.

Subcount Number 15: The ALJ found: "On March 15, 2014, police officers attempted to arrest two men who were involved in a fight outside of Respondent club. The officer who testified concluded, from the men's behavior and appearance, that they were intoxicated. The two men resisted arrest. It took five officers to arrest one of the men. One of the security guards at Respondent club admitted to one of the officers that the two men had been patrons at the club." The Board dismissed this subcount on the grounds that there was no evidence the two men who "resisted arrest" had ever been in the club or been sold alcoholic beverages by BMGV's employees. To the contrary, the Board determined the only actual connection the altercation had to the club was the fact that the fight took place in the street directly in front of the licensed premises, warranting police assistance from the club security guards in making the arrests. According to the Board, it was simply not logical to infer that a person who was intoxicated outside of the club got intoxicated inside the club as the person may well have entered the club already intoxicated, and to hold otherwise, was mere speculation. However, the Board's decision ignores evidence from which the ALJ could reasonably find the altercation directly involved club patrons who had been drinking inside the club. Specifically, Officer Baca's testimony describing his personal observations at the scene, and the portions of his police report (admissible as relevant evidence under Government Code section 11513,

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639.) Thus, for example, in *VE Corporation dba Cheers* v. *Department of Alcoholic Beverage Control* (1998) AB-6797, the Board sustained a disorderly house accusation based on (1) a police officer's observations of fresh wounds on combatants, together with police reports recounting admissible "administrative hearsay" comments of witnesses and others, illuminating what had occurred in the bar, and (2) a police officer's observations of a club bouncer restraining a person on the ground, together with admissible "administrative hearsay" consisting of the club bouncer's statement that he was assaulted by club patron, to explain why the club bouncer was restraining the club patron and wished to effect a citizen's arrest. (*Id.* at pp. 7, 8, 10.)

subdivision (c); *Lake, supra,* 16 Cal.4th at p. 461), and under the public employee records exception to the hearsay rule (Evid. Code, § 1280[8]; *Hildebrand v. Department of Motor Vehicles* (2007) 152 Cal.App.4th 1562, 1571 (*Hildebrand*)), describing Lieutenant Martin's personal observations at the scene (admissible under the public employee records exception to the hearsay rule (*ibid.*) and properly admitted by the ALJ as administrative hearsay to " 'supplement[] or explain[ ]' " the personal observations of Officer Baca (*Lake, supra,* at p. 461), and the statements of the club security guards and the two men "who resisted arrest" (also properly admitted by the ALJ as administrative hearsay to " 'supplement[] or explain[ ]' " the personal observations of Officer Baca (*ibid.*)). The evidence thus established that when Lieutenant Martin arrived at the scene in front of the club, the officer saw a large group of Hispanic males (including the later arrested man) "begin to push at bouncers and start a fight." When Officer Baca arrived at the scene he saw the ongoing fight initially witnessed by Lieutenant Martin. Officer Baca assisted in the arrest of the Hispanic man, together with some of the club security guards. In seeking an explanation for the fight, Officer Baca spoke with the club security guards who described their initial altercation with one man who was detained but not ultimately arrested (detained man), and the later altercation with the group of Hispanic males including the arrested man who had been seen by Lieutenant Martin as he arrived at the scene. Speaking with police officers, the detained and arrested men admitted they had been inside the club before the fighting witnessed by the police occurred outside the club. One man said he had been drinking in the club, "the bouncers were messing with us," and he did not know what happened to cause the altercation. The other man said he had arrived at the club on a party bus with friends, he had not consumed any alcoholic

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[8] Evidence Code section 1280 reads: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶](b) The writing was made at or near the time of the act, condition, or event. [¶](c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

beverages on the bus, he had consumed a 'Jager Bomb" and a couple of other drinks in the club when he arrived, and the club's "bouncers in the bar had 'jacked' him and his friends." Thus, we conclude there was substantial evidence supporting the ALJ's recommendation to sustain subcount number 15.

Relying on isolated portions of the record, however, BMGV argues it should not have been held liable for the circumstances giving rise to subcount number 15 because "the evidence confirmed that Atmosphere staff acted properly," "[i]t would be both unfair and counterproductive to apply [the statutes] to a licensee that has properly exercised its limited powers to control patron misconduct," and "[a]s for the glib assertion that the Club should have cut off service earlier, the evidence was unrefuted that it is not always easy to tell when a patron is overconsuming, because many arrive 'preloaded' with alcohol or other drugs and interaction with even a small amount pushes them over the edge." However, the ALJ was not required to accept the evidence cited by BMGV, even if supported in part by evidence submitted by the Department. "It is well settled that the trier of fact may accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted. [Citations.] As [the court] said in *Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762, 777 [327 P.2d 111], 'the [trier of fact] properly may reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material. [Citations.]" (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67-68.) BMGV is in effect attempting "to reargue those factual issues decided adversely to" it, which is contrary to our standard of review. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398-399 (*Hasson).)* Thus, our conclusion that substantial evidence supports the ALJ's recommendation to sustain subcount number 15 stands.

Subcount Number 28: The ALJ found: "On August 10, 2014, a crowd 'spilled' out of Respondent club onto the sidewalk and then to the parking lot. Multiple fights broke out. Many police officers, including officers from other districts of San Francisco, tried to stop the fights. Some of the fighters resisted arrest. One of the fighters elbowed

one of the officers in the face, resulting in a laceration under his right eye and breaking his glasses. Another fighter swung at one of the officers and hit him," The Board dismissed this charge on the ground there was no evidence the individuals involved in the fights were connected to the club. In our view, the Board's decision ignores the testimony of Officer Baca who was present at the club on the date of the incident, as well as the on-scene observations of Officer Takaoka, recounted in his police report, which was admissible under Government Code section 11513, subdivision (c) (*Lake, supra,* 16 Cal.4th at p. 461), and under the public employee records exception to the hearsay rule (Evid. Code, § 1280; *Hildebrand, supra,* 152 Cal.App.4th at p. 1571). When asked about the focus of his attention when he arrived at the scene, Officer Baca testified his attention was focused on Club Atmosphere "[b]ecause that's where the fights were originating from, in front of the club. It was so many people, and all those people coming out were starting the fights in the street and in the parking lot." Officer Baca testified that he saw "people piling out of the club" and "they were screaming and yelling and pushing each other and trying to throw fists at whoever they were trying to hit." He further testified there were "a mixture of males and females all fighting each other" and "they were enraged," and "screaming, yelling, cursing." In his police report, Officer Takaoka recounted that he had responded to the scene and saw "about one hundred persons in front of the Club. . . . [¶] [He] saw several fights in progress that involved groups of two to six persons. There were males and females involved in the fights. Club security as well as arriving police officers were attempting to stop the fights. [¶] Suddenly, about another hundred patrons exited the Club. Everyone appeared to be arguing, yelling and/or screaming. A large portion of the crowd headed east on the sidewalk. Suddenly, several fights broke out on the sidewalk and police units took action to stop the fights." Based on the personal observations of Officer Baca and Officer Takaoka, the ALJ reasonably inferred the fight that had originated within the club was " 'a continuous fight in progress.' " The Board's finding to the contrary exceeded its authority to review for substantial evidence relating to subcount number 28.

Again, relying on isolated portions of the record, BMGV argues it should not have been held liable for the circumstances giving rise to subcount number 28 because "the evidence does not support the inference that the [Department] seeks - that Atmosphere was responsible for the fight;" "[h]ow the fighing began and who started it was not proven," and "no evidence support[ed] that all of the fighters came from Atmosphere." BMGV also argues that "[e]ven if some of those leaving Atmosphere became involved in the fighting, the [Department] failed to introduce any evidence that they did so willingly, as opposed to being attacked by others in the street;" and "[h]olding only Atmosphere, but not any other club on Broadway, solely responsible for the fight on this flimsy evidence would be a travesty." We reject BMGV's contentions. Because the ALJ's recommendation to sustain subcount number 28 is supported by substantial evidence, *"it is of no consequence that the [trier of fact] believing other evidence or drawing other reasonable inferences, might have reached a contrary conclusion.* [Citations.]" *(Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

Subcount Number 39: The ALJ found: "On October 31, 2014, patrons exited Respondent club intoxicated and belligerent." The Board dismissed this subcount on the ground the facts referred to derived from a computer-assisted dispatch (CAD) report, and no witnesses otherwise corroborated the incident. Here again, the Board failed to consider the testimony of Captain Lazar who was present at the club on the date of the reported incident. On the evening of October 31, 2014, Captain Lazar, as the commanding officer on partrol in the Broadway area, was tasked with the duty of assessing the big picture regarding club patrons. His responsibilities included making an assessment of how people were behaving when they came out of the club, were "they overly intoxicated," and had the club provided for "added security." On the evening in question, Captain Lazar personally observed intoxicated and belligerent individuals exiting the club. He testified that, "[s]ince May of 2014," he was concerned the club employees were "serving . . . intoxicated persons," and the night of October 31, 2014, was "no different. People were coming out, they were intoxicated." Captain Lazar also believed that if a club had the potential for problems, there was a need for adequate

security to manage the club. According to Captain Lazar, Club Atmosphere had problems but "did not employ" or have additional security, which "was quite evident on Halloween when people were coming out and they were fighting with police and they were intoxicated and things were happening all around us." As a consequence of his observations on the evening of October 31, 2014, Captain Lazar requested assistance from other stations in the city. After gunshots "rang out and the crowd that had left from Atmosphere was in the street," Captain Lazar "had to request every available police officer in San Francisco to respond to the 400-block of Broadway in order to make the scene safe, to apprehend the shooter, to establish a large crime scene, and to manage a very intoxicated and hostile crowd."[9] On this record, we have no trouble concluding there was substantial evidence to support the ALJ's recommendation to sustain subcount number 39. The Board's finding to the contrary exceeded its authority to review for substantial evidence relating to that subcount.

Subcount Number 24: The ALJ found that "[o]n July 12, 2014, police officers responded to a fight, involving approximately fifteen persons, occurring in front of Respondent club. One of the persons in the fight told one of the officers that the fight had started inside the club." The Board determined this subcount should have been dismissed because there was no admissible evidence proving that the individuals involved in the fight were ever in the club. In so concluding, the Board referenced the

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[9] At this point in Captain Lazar's testimony, BMGV's counsel moved to strike on the ground that "[t]his is all related to some event that's not part of the accusation, this attempted murder and shots." The ALJ noted there was no allegation of attempted murder, and then asked the Department's counsel to indicate whether the testimony just given by Captain Lazar related to subcount numbers 39 (incident on October 31, 2014,''public intoxication"), 40 (incident on November 1, 2014, "battery of a police officer;" "resisting arrest"), or 41 ("public intoxication," "resisting arrest"). Counsel replied, "[W]e're dealing with a law enforcement count in general, on that end, as to how they deploy or what is required to deploy additional resources and . . . and the events that cause that to occur." The ALJ ruled that "[t]he language of Count 2 . . . is broad enough to cover the testimony that this witness just gave. The objection is overruled." Accordingly, we reject BMGV's argument that Captain Lazar's testimony had no relevance whatsoever to subcount number 39.

testimony of Officer Milligan, who had responded to a call regarding the fight. Officer Milligan admitted the participants involved in the fight could have come from other clubs. The Board also found that the statement by one of the fighters that the fight started inside the club was inadmissible hearsay. We agree with the Board. The Department's decision on this subcount, as distinguished from the subcounts above, is not supported by substantial evidence. Indeed, the only evidence that supports a finding that the fight originated in the club was the hearsay statement of one of the fighters, which evidence, standing alone, is not sufficient to sustain this subcount, (Cf. *Lake, supra,* 16 Cal.4th at p. 461 [hearsay statement of witness may be considered only to supplement or explain other nonhearsay evidence that supports the finding].)

In sum, and based on our review of the record, we conclude the ALJ's recommendation to sustain the accusation against BMGV is supported by the six undisputed incidents, as well as the four additional incidents for which we find there is substantial evidence. These ten incidents establish BMVG's club patrons were involved in incidents of public intoxication, resisting arrest, fighting, as well as assault and battery. (See, e.g., *Coleman v. Harris* (1963) 218 Cal.App.2d 401, 404 [because section 25601 "imposes the affirmative duty of maintaining lawfully conducted premises, it is unnecessary that the evidence show active participation on the part of the license holder in the acts which have rendered the premises injurious to the public morals"].) The ALJ acknowledged that "[t]he incidents in this case involve typical 'disorderly house' and 'police problem' incidents: public drunkenness, fighting, minor injuries to persons. There was no evidence of anyone using a knife, a gun, or any other weapon. And, there was no evidence of anyone being seriously injured or killed." Nonetheless, as the ALJ further found, "[a]lthough the incidents are typical, they are quite significant. Because of the incidents at the . . . club, the police captain for the district in which [the] club is located on many occasions had to 1) assign officers to work overtime to handle those incidents, and 2) request assistance from police officers from other districts to handle those incidents. On at least one occasion, the captain had to request every available officer in the city to handle fights at [the] club." For the same reasons, we conclude the

record more than adequately supports the ALJ's recommendation that the number of sustained subcounts warranted suspension of BMGV's license. In our view, the Board's contrary decision "is tantamount to an attempt by the . . . Board to reweigh the evidence in the record and, by thus reaching a conclusion which it considers more reasonable, to usurp the function of the Department. This, the . . . Board cannot do. [Citation.]" (*Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 119.)

Lastly, we find unavailing BMGV's argument that we should uphold the Board's decision because there was no substantial evidence to support the ALJ's finding that the club "uniquely burdened" the police department. BMGV asks us to consider evidence that was apparently found not persuasive by the ALJ from which we are to conclude that the club did not "uniquely" burden the police department. However, as we have previously noted, we do not review the ALJ's findings for substantial evidence that would support findings in favor of BMGV, as it suggests. Rather, our authority is limited to determining whether there is substantial evidence to support the ALJ's findings. If there is substantial evidence to support those findings, "no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld." *(Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) By its argument, BMGV is in effect again attempting "to reargue . . . those factual issues decided adversely to" [it] . . ., contrary to established precepts of appellate review." *(Hasson, supra,* 32 Cal.3d at pp. 398-399.)

II. Dismissal Based on Selective or Discriminatory Prosecution and Appropriateness of Imposed Discipline

Because the Board recommended dismissal of the accusation on the ground of insufficient evidence, it did not rule on BMGV's additional contentions that dismissal was warranted on the ground of selective or discriminatory prosecution or that the imposed discipline was "grossly disproportionate" when compared to discipline imposed in other cases. We find the Board should resolve these outstanding issues in the first instance. Our decision should not be read and we express no opinion on how the Board should rule on these issues.

DISPOSITION

The Board's decision under review is annulled and the matter is remanded to the Board for further proceedings consistent with this opinion. The parties shall bear their own costs on this writ review.

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Jenkins, J.

We concur:

McGuiness, P. J.

Pollak, J.

Dept. Of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Board, A150055