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

AB-9678
File: 41-509522; Reg: 17085610

THE WICKED GROUP, INC.,
dba Wicked Chicken
2565 The Alameda,
Santa Clara, CA 95050,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 6, 2018
Sacramento, CA

ISSUED JANUARY 28, 2019

Appearances: *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for The Wicked Group, Inc.,

Respondent: Sean Klein, as counsel for the Department of Alcoholic Beverage Control.

OPINION

The Wicked Group, Inc., doing business as Wicked Chicken, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for three concurrent 20-day periods, because it violated a condition on its license on three separate occasions, in violation of Business and Professions Code section 23804.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on July 28, 2011,

[1]The decision of the Department, dated December 19, 2017, is set forth in the appendix.

subject to six conditions placed on the license presumably because of its proximity to Santa Clara University. There is one prior instance of discipline against the license, also for violation of conditions.

On June 5, 2017, the Department instituted a three-count accusation (exh. 1) against appellant charging that on three separate occasions — February 16, 2017, February 17, 2017, and February 23, 2017 — appellant violated condition #4 on its license. That condition states:

> Sales, service, and consumption of alcoholic beverages on the patio shall be permitted only between the hours of 11 am and 9 pm each day of the week.

(Exh. 3, at p. 2.) The premises is also subject to the City of Santa Clara's rule banning alcoholic beverages on the patio after 10:00 p.m.

An administrative hearing was held on September 27, 2017. Documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Ricky Barone; by Clarence Robert Long, a licensed investigator; and by Matthew McClean, the owner of the licensed premises.

Testimony established that on February 16, 2017, at approximately 9 p.m., Department agents Ricky Barone and Angela Nutt went to the licensed premises to investigate a complaint about the premises. They entered through a gated patio area and proceeded into the interior of the restaurant where they walked to the service counter. The business model for the restaurant is one where the patrons place their food and drink order at the counter, drinks are served upon order and payment, and food is picked up at the counter when ready. There is no table service.

The agents each ordered, paid for, and were served a glass of beer at the counter. They took their beers outside, sat at a table on the patio, and consumed their beers over a period of approximately 30 minutes. Other patrons were observed by the agents, sitting on the patio and drinking what appeared to be beer. No employees informed the agents they could

not consume beer on the patio.

Agent Barone observed one sign indicating no drinking on the patio after 9 p.m. Testimony of the owner of the premises, Matthew McClean, established that following the previous incident of discipline — also for the violation of condition #4 — he posted four signs in the patio area, indicating that drinking was not permitted after 9 p.m. He also instructed his cashiers about this restriction since they are the ones that actually serve drinks to customers at the service counter inside the premises.

On February 17, 2017, at approximately 9 p.m., the agents returned to the premises, ordered beer as they had the day before, and again took the beer out to the patio. Once again, over a period of about 30 minutes, they consumed the beer while sitting at a table on the patio. Also as before, no employee told them they could not consume beer on the patio after 9 p.m. They went inside to return their glasses and were asked if they wanted another beer, but they did not order another.

On February 23, 2017, at approximately 9 p.m., the agents repeated these actions a third time. They each ordered a beer and took it out to the patio. Once again, over a period of about 30 minutes, they consumed the beer while sitting at a table on the patio, and no employee told them that the consumption of beer on the patio was prohibited.

After being informed of the current violations, McClean stressed to his staff that alcoholic beverages were not to be consumed on the patio after 9 p.m. He put up additional signage to this effect on the main doorway, in the patio, on each of the cash registers, and in the interior of the premises. He also posted an employee on the patio from 8 p.m. to midnight Thursday through Saturday, to ensure that alcoholic beverages are not consumed on the patio after 9 p.m.

The administrative law judge (ALJ) issued his proposed decision on October 16, 2017, sustaining the accusation and recommending a 20-day suspension for each of the three counts

of violating condition #4 — with the suspensions to run concurrently. The Department adopted the proposed decision in its entirety on December 13, 2017, and a Certificate of Decision was issued on December 19, 2017.

Appellant then filed a timely appeal contending that the Department failed to prove that appellant violated condition #4 on its license.

DISCUSSION

Appellant contends that the Department failed to prove that appellant violated condition #4 on its license because the wording of the condition — specifically, the use of the word "and" instead of "or" — led appellant to believe that the condition was designed to prevent the placement of a fixed or portable bar on the patio. Appellant maintains that since a bar was never placed on the patio, and sales and service of alcohol were never allowed on the patio, the condition was not violated. (AOB at p. 2.)

Condition #4 on the license states:

> Sales, service, and consumption of alcoholic beverages on the patio shall be permitted only between the hours of 11 am and 9 pm each day of the week.

Appellant maintains that all three actions listed in the condition must happen for a violation to occur — i.e., sales, service, **and** consumption of alcoholic beverages — and that if the condition were intended to apply to just one of these actions, the Department would have written the condition as: sales, service, **or** consumption of alcoholic beverages.

Specifically, appellant maintains:

> The Decision is not supported by the law because it fails to address the core issue raised at the hearing, i.e., that the condition used the word "and", and not "or"; and as a result of the use of "and" all three events (sales, service, and consumption) must happen on the patio before there is a violation of condition four.

(AOB at p. 3.)

Appellant's contention is addressed in the decision as follows:

> 4. Respondent's argument that for a violation of condition #4 to have occurred it required the sale of the alcoholic beverage to have occurred on the patio, and the alcoholic beverage must have been served/delivered to the patron while he/she was on the patio, and that the patron must have consumed the beverage while on the patio after 9:00 p.m. does not have merit. The license, as tailored by the condition, granted Respondent limited license privileges with respect to use of the patio for alcoholic beverages.
>
> It permitted sales, service, and consumption of alcoholic beverages on the patio ". . . only . . ." between 11:00 a.m. and 9:00 p.m., daily. Therefore, that also meant that none of the those privileges were granted outside of that time frame with respect to the patio. In this case, the agents were permitted or allowed to consume their alcoholic beverages on the patio after 9:00 p.m. and before 11:00 a.m., thereby outside the time frame specifed in the condition and therefore beyond the scope of the limited license privilege granted to Respondent with respect to the patio.

(Determination of Issues, ¶ 4.) Appellant maintains that the decision is deficient because it fails to discuss whether the condition should have used the word "or" instead of "and" and because it fails to discuss the vagueness caused by the choice of words.

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

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

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

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of

equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra*, at 114.)

Here, appellant urges the Board to engage in its own analysis of the condition's wording, and to disregard the ALJ's conclusion that the condition was violated by the consumption of alcohol on the patio outside the permissible hours. Appellant points to the language of *Kobzoff* in support of its position that the Board must construe the use of "and" to require all three actions — sales, service, and consumption of alcohol — before a violation occurs:

> The Legislature's use of the word "and" shows it intended courts to construe in the conjunctive the two requirements for bringing or maintaining the action in "good faith" and "with reasonable cause." [Citation.] In construing the plain meaning of a statute, the "ordinary usage of 'and' is to condition one of two conjoined requirements by the other, thereby causally linking them. If, for example, it is said: 'If you leave the gate unlatched and the dog gets out you will be punished,' it likely means that no punishment attaches if the gate is left open but the dog escapes by digging a hole under the fence." [Citation.] "Use of the conjunction 'and' in [one statute] indicates a contrasting meaning to [another statute's] disjunctive 'or.' In the former the public entity must act after both events occur, and in the latter either event allows an action." [Citation.]

(*Kobzoff v. Los Angeles County Harbor* (1998) 19 Cal.4th 851, 861 [80 Cal.Rptr.2d 803].)

Appellant argues that "the condition as written by ABC is conjunctive and requres all three (sales, service, and consumption) to occur on the patio before there is a violation." (AOB at p. 5.) Based on the record in this case, we must disagree.

The Board is prohibited from engaging in its own independent inquiry, as it is urged to do by appellant — in an effort to reach a contrary conclusion that it thinks is equally or more reasonable — when, as here, the Department's decision is supported by substantial evidence. As higher courts have told us time and again, we must defer to the Department's findings when they are reasonable. We cannot reweigh the evidence and reach a different conclusion simply because an alternate interpretation is possible.

Appellant was put on notice of the meaning of condition #4 — and what it prohibited — when it was disciplined for violating the exact same condition in 2015. (Exh. 2.) Following the resolution of that matter by stipulation and waiver, and the payment of a fine, appellant put up the signs on the patio indicating "no drinking on the patio after 9:00" and notified the employees that drinking of beer on the patio was not allowed on the patio after 9 p.m. (RRB at p. 3; RT at pp. 91; 93.) This evidence directly contradicts appellant's assertion that "[t]he corporate officer of the Wicked Chicken has always believed that this condition was worded to prevent the placement of a bar on the patio." (AOB at p. 2.)

Appellant clearly knew that the consumption of alcoholic beverages on the patio after 9 p.m. was prohibited, notwithstanding the wording of the condition. The accusation was properly sustained.

ORDER

The decision of the Department is affirmed.[2]

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[2]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

BAXTER RICE, CHAIRMAN
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST:

THE WICKED GROUP, INC
WICKED CHICKEN
2565 THE ALAMEDA
SANTA CLARA, CA 95050

ON-SALE BEER AND WINE EATING PLACE - LICENSE

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

SAN JOSE DISTRICT OFFICE

File: 41-509522

Reg: 17085610

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on December 13, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after January 29, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: December 19, 2017

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

The Wicked Group, Inc. Dba: Wicked Chicken 2565 The Alameda Santa Clara, CA 95050 Respondent	File: 41-509522 Reg.: 17085610 License Type: 41 Word Count Estimate: 26,692
Regarding Its Type 41 On-Sale Beer and Wine Eating Place License. Under the State Constitution and the Alcoholic Beverage Control Act	Rptr: Myra A. Pish California Reporting **PROPOSED DECISION**

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in San Jose, California, on September 27, 2017.

Sean Klein, Attorney III, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (hereafter,"the Department")

James Witkop, Esq., represented licensee The Wicked Group, Inc. (hereafter "Respondent")

The Department seeks to discipline Respondent's License on the grounds that, on or about February 16, 2017, February 17, 2017, and February 23, 2017 Respondent's agents or employees permitted consumption of alcoholic beverages on its patio after 9:00 p.m. in violation of condition #4 on its license thus establishing grounds for license suspension or revocation under Business and Professions Code section 23804.[1] (Exhibit 1-pre-hearing pleadings)

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on September 27, 2017.

[1] All further statutory references are to the California Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on June 5, 2017. On June 23, 2017, the Department received Respondent's Notice of Defense requesting a hearing on the accusation. The hearing was heard to completion on September 27, 2017.

2. The Department issued Respondent a Type-41 on-sale beer and wine eating place license on July 28, 2011. A Type- 41 license permits the holder to retail in beer and wine for on-site consumption at a premises that operates as a bona-fide eating place as described in section 23038.

3. The premises operated as a restaurant. Patrons order their food and drink at a counter in the interior of the premises. Drinks are served upon order and payment, and then food is picked up at the counter when ready. There is no table service to patrons.

4. The license was issued subject to six specified conditions and restrictions in Respondent's Petition for Conditional License. (Exhibit 3) Condition #4 states; "Sales, service, and consumption of alcoholic beverages on the patio shall be permitted only between the hours of 11 a.m. and 9 p.m., each day of the week."[2]

5. The Respondent's patio sat just outside the frontage of Respondent's restaurant. The patio was approximately 30 feet wide extending along the restaurant frontage and approximately 15 feet deep. There was a low wrought iron fence around two sides. A third side was the frontage to the restaurant and the last side was the wall of an adjacent building. There were approximately 4-6 tables in the patio with accompanying chairs. Separating the patio and the premises interior were approximately 4 clear glass window panels, approximately 4 feet wide by 20-15 feet tall. There was also one section that was a solid column. Although the main service counter inside the premises was approximately 15 feet from the main entrance, employees who staffed the counter would face in the direction of the main public glass doorway and glass panel windows looking onto the patio.

6. Since being licensed, Respondent suffered one prior disciplinary action under Reg: 15083208. That accusation was resolved via a stipulation and waiver that resulted in a Department decision that imposed a 15 day license suspension, with 10 of the 15 days stayed from imposition for 12 months. Under section 23095, Respondent paid $1,294.50 in lieu of serving an actual term of license suspension. (Exhibit 2-prior discipline pleadings)

[2] The Respondent is also bound by a condition imposed by the City of Santa Clara indicating that alcoholic beverages are banned on the patio past10:00 p.m.

7. On February 16, 2017 at approximately 9:00 p.m., Alcoholic Beverage Control Agents Ricky Barone and Angela Nutt (hereafter "Agent Barone" and "Agent Nutt") went to Respondent's premises to follow-up on a complaint the Department received about Respondent's operation. Prior to going to Respondent's premises, the Agents inspected the Department's file and were aware that Respondent's license was issued subject to six conditions in the Petition for Conditional License. (Exhibit 3)

8. Upon the agents' arrival at Respondent's premises, they entered Respondent's gated patio area and proceeded through it into the interior of Respondent's restaurant. Once inside the restaurant they walked to the service counter. They each ordered, paid for, and were served a small glass of beer by Respondent's employees. The agents took their beers outside and sat at a table within Respondent's patio. Over approximately the next 30 minutes, the agents consumed their beer in the patio. Agent Barone also observed that other patrons were drinking beverages resembling beer in the patio. During their time in the patio, none of Respondent's employees informed them they could not consume their beer in the patio. Agent Barone saw one 8" x 11" sign posted on one of the patio pillars that indicated no drinking on the patio after 9:00 p.m.

9. On February 17, 2017 at approximately 9:00 p.m., the agents returned to Respondent's premises. Again, they walked through the patio and entered the interior of the restaurant. They each ordered a small beer which, after paying for, they took out to the patio where they sat at one of the tables therein. Over approximately the next 30 minutes, the agents consumed their respective beers in the patio. While in the patio, none of the Respondents employees came out there to inform them beer was not permitted in the patio past 9:00 p.m. From their seats, the agents could see through the restaurant's glass panel windows and see the restaurant's well-lit interior area. The agents then went inside the premises to return their glasses. One of the employees at the counter asked if they wanted another beer, but no refill was ordered.

10. On February 23, 2017 at approximately 9:00 p.m., the agents again returned to the premises and walked through the patio area and entered the interior portion of Respondent's restaurant. They each ordered, paid for, and were served a small beer at the service counter inside the restaurant. They took the beers and seated themselves at a table in the patio. They each consumed their beer over approximately the next 30 minutes. While they could see Respondent's employees inside the restaurant from their seats, none ever came out to the patio area to inform them that beer was not permitted in the patio after 9:00 p.m.

11. Matthew G. McClean (hereafter "McClean") worked at the premises site since 1995 as an employee. The site is near Santa Clara University and nearby residents. In 2011 he took over as the owner-operator of the restaurant. He formally incorporated the business in 2011.

After becoming the owner, he applied to the Department for a type-41 on-sale beer and wine license. In 2011, the Department issued Respondent his Type-41 license subject to the conditions in the Petition for Conditional License. (Exhibit 3)

12. In 2015, McClean was notified of the violations that were alleged in the prior accusation under Registration number 15083208 that related to Respondent's license at this premises. (Exhibit 2) Count 2 and Count 4 of that accusation alleged a violation of condition #4. As a result of that prior disciplinary matter, McClean posted 4 signs in the patio indicating that drinking was not permitted in the patio past 9:00 p.m. He also alerted and reminded his cashiers of this restriction as they were the ones that actually served drinks to customers.

13. After McClean was alerted of the violations alleged in the pending accusation, he re-stressed to his staff that there was no consuming of alcoholic beverages in the patio past 9:00 p.m. He also put up added signage on the main public doorway, in the patio, on the three sales registers, and in the interior of the premises indicating that there was no "drinking" on the patio past 9:00 p.m. He also posted an employee in the patio from 8:00 p.m. until midnight Thursday through Saturday to help insure that there was no alcoholic beverage consumption there after 9:00 p.m.

14. McClean testified that he had neither observed persons consuming alcoholic beverages in the patio past 9:00 p.m. nor had he ever seen such activity in his review of store surveillance video. He also testified the view of the patio from inside the premises is partially obstructed by a solid column of the building, tables, chairs, and a low wall.

15. McClean testified he believed the restriction imposed by condition #4 meant that he could not have or use a fixed or portable bar in the patio. He also believed that for the condition to be violated, the alcoholic beverage must be sold in the patio, then served in the patio, and then consumed in the patio past 9:00 p.m.

16. Respondent has a pending request with the Department to have condition #4 and condition #2 lifted or modified.[3]

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

[3] Condition #2 bans the use of any exterior alcoholic beverage advertising, or any such advertising directed to the exterior of the premises from the interior.

2. Business and Professions Code Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Business and Professions Code Section 23804 states: "A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license."

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on February 16, 2017, February 17, 2017, and February 23, 2017, Respondent's agents or employees permitted or allowed alcoholic beverages to be consumed on Respondent's patio after 9:00 p.m. such being in violation of a condition on the license and thereby grounds for license suspension or revocation in accordance with Business and Professions Code section 23804.

2. The evidence established that on each of the agents' three visits, they were able to openly consume their beers on Respondent's patio past 9:00 p.m. for approximately 30 minutes. During those three occasions, no employee ever came out on the patio to enforce the condition banning consumption of alcoholic beverages on the patio past 9:00 p.m. daily. Although there were from one to three signs posted in the patio indicating there was no drinking past 9:00 p.m., that does not provide a defense to the accusation. Further, the premises frontage did have large plate glass windows through which employees should have been able to view and monitor activity on the patio.

3. Respondent's belief that condition #4 was really targeted at banning permanent or portable bar service counters to be installed or used on the patio does not provide a defense to the accusation. There was no evidence the Department ever told Respondent that is what the condition meant. Further, if such were the objective of a license condition, then it would have likely been put in those terms, i.e. "No permanent bar and no portable bar(s) is permitted on the patio."

4. Respondent's argument that for a violation of condition #4 to have occurred it required the sale of the alcoholic beverage to have occurred on the patio, and the alcoholic beverage must have been served/delivered to the patron while he/she was on the patio, and that the patron must have consumed the beverage while on the patio after 9:00 p.m. does not have merit The license, as tailored by the condition, granted Respondent limited license privileges with respect to use of the patio for alcoholic beverages.

It permitted sales, service, and consumption of alcoholic beverages on the patio "...only..." between 11:00 a.m. and 9:00 p.m., daily. Therefore, that also meant that none of those privileges were granted outside of that time frame with respect to the patio. In this case, the agents were permitted or allowed to consume their alcoholic beverages on the patio after 9:00 p.m. and before 11:00 a.m., thereby outside the time frame specified in the condition and therefore beyond the scope of the limited license privilege granted to Respondent with respect to the patio.

5. Respondent's contention that Agent's Barone's testimony was insufficient to support sustaining the accusation is also without merit. While it is true Agent Barone did not present purchase receipts to document his beer purchases and did not author the Department's investigative report, he was physically present on all three visits and participated in the investigation. Thus, he was an actual witness to the events he testified to. Also, the nature of the investigation was not particularly complex. Both Agents knew of Respondent's conditions prior to their initial visit. The core of Agent Barone's testimony that on three occasions he and his partner arrived at the premises at approximately 9:00 p.m., purchased beers at the sales counter, upon service of their beers by Respondent's employees or agents, Agent Barone and his partner turned right around and walked directly to the patio and thereon consumed their beers undisturbed over a 30 minute period was sufficiently credible.

6. Respondent's argument that the agents somehow manufactured the violation because they ignored the restricted drinking sign(s) in the patio is not persuasive. To adopt Respondent's theory would result in relieving it from complying with the condition for the cost of some paper and ink. Respondent cannot delegate its responsibility to comply with license conditions that easily. While appropriate visible signage can certainly aid in Respondent's over-all effort to achieve compliance with the license conditions, ultimate responsibility for non-compliance must rest with Respondent

7. Based upon the above, there was sufficient evidence to sustain all three counts in the accusation.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as "Rule 144". Under that rule, the presumptive penalty for violating a License condition is a 15 day license suspension, with 5 of those 15 days stayed for one year. The rule also permits imposition of a different penalty based on the presence of a non-exhaustive list of aggravating or mitigating factors contained therein. Prior disciplinary history is specifically noted as a factor in aggravation. The length of licensure without prior disciplinary action or problems can be a factor in mitigation.

2. In this instance, the Department recommended a slightly aggravated penalty of a 20 day license suspension noting that Respondent had a recent prior accusation for violating the same condition involved in this matter. Further, the Department argued in this case Respondent did not comply with Condition #4 regarding the patio on three separate occasions. After purchasing their beers, the agents went directly to the patio where they consumed their drinks for approximately 30 minutes each time. While the agents consumed their beer on the patio, none of Respondent's employees were observed on the patio, particularly to enforce Condition #4.

3. Respondent argued that resolution of the earlier accusation did not involve a specific admission by Respondent that the facts alleged therein were true and correct. Therefore, it should be disregarded as a factor in aggravation in this case. While there may not have been a specific factual admission in the prior case, it was clear that Respondent, through Mr. McClean, specifically understood Respondent was being disciplined by the Department for violating license conditions. In response to the prior accusation, Respondent took some remedial steps to try and enforce the conditions on the license. Though Respondent may have had a different interpretation of what condition #4 meant, it should be of no surprise to Respondent that the prior matter would be considered an aggravating factor if there were any future violations of license conditions such as occurred here, especially a violation of condition #4. Also, under Rule 144, the use of prior discipline as an aggravating factor is not disallowed merely because it was not specifically shown to involve the exact same type of offense that is the subject of the subsequent disciplinary action.

4. The Respondent argued in mitigation that after initial accusation, it put up no drinking past 9:00 p.m. posters/flyers in the patio area and reminded its counter employees of that limitation on use of the patio. Also, when it was notified of the incident herein, it posted added similar flyers in the patio, on the main public doorway, and on the three cash registers. Respondent again reminded its counter sales staff of the restriction regarding the patio and assigned an employee to specifically monitor the patio on Thursday night through Saturday night to especially enforce condition #4.

5. In aggravation, Respondent did suffer a recent prior disciplinary action that involved violations of license conditions. Further, the agents in this case were able to consume alcoholic beverages on three separate occasions, not once being admonished, warned, personally informed, or advised by Respondent's counter staff about the restricted use of the patio after 9:00 p.m. After purchasing their beers, the agents walked directly out to the patio with their beers in what would have been in a full unobstructed view by Respondent's counter staff who had just served them their beers. Further, on none of the three occasions were any employees ever seen on the patio to monitor activity thereon or enforce condition #4.

6. Based on the above, the penalty assessed in the Order below reflects a reasonable weighing of factors in aggravation and mitigation and complies with Rule 144.

ORDER

Counts 1, 2, and 3 in the accusation are sustained.

As to each count, Respondent's license is suspended for 20 days.

All penalties are to be served concurrent to one another.

Dated: October 16, 2017

David W. Sakamoto
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: _____

By: _____

Date: 12/13/17