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

AB-9682
File: 48-534962; Reg: 16084416

FLORENCE MARTIN O'SULLIVAN,
dba O'Sullivan's Sports Bar
5660 Thornton Avenue,
Newark, CA 94560-3825,
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 29, 2019

Appearances: *Appellant*: John Kevin Crowley as counsel for Florence Martin O'Sullivan, doing business as O'Sullivan's Sports Bar.
Respondent: John Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

Florence Martin O'Sullivan, doing business as O'Sullivan's Sports Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking his license, with revocation stayed for a period of four years provided no cause for disciplinary action arise during that time, and concurrently suspending his license for 15 days. The Department decision found first that appellant allowed his premises to be operated in a manner that constituted a law enforcement problem, thus creating

1. The decision of the Department, dated January 25, 2018, is set forth in the appendix.

conditions contrary to public welfare and morals meriting discipline under Article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code, and second, that appellant kept a disorderly house in violation of section 25601 of the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on October 17, 2013. Appellant's license was the subject of prior discipline action in April 2016[2] for violations of sections 25658(b) and 25665 of the Business and Professions Code and section 647(f) of the Penal Code.[3]

On June 29, 2016, the Department filed a two-count accusation against appellant. Count 1 alleged that appellant, "directly or by and through [his] agents, employees or servants, permitted or suffered the above designated premises to be used in a manner which did create a problem, for the law enforcement officials of the Newark Police Department" and thereby created conditions contrary to public welfare and morals in violation of article XX, section 22 of the California Constitution and section 24200 of the Business and Professions Code. (Exh. 1, First Amendment to Accusation,

2. Reg. No. 16083755. (Exh,. 1, Accusation, at p. 4.) This matter was resolved by stipulation and waiver, and a fine in lieu of suspension. (See *ibid.*; Findings of Fact, ¶ 4.)
3. The violations of sections 25658(b) and 25665 relate, respectively, to the sale of alcohol to a minor and to permitting the presence of minors in an on-sale licensed premises. (See Bus. & Prof. Code, §§ 25658(b) and 25665.) The violation of Penal Code section 647(f) relates to disorderly conduct—specifically, public intoxication. (See Pen. Code, § 647(f).) According to the Department decision, discipline was imposed "for permitting a minor to enter and remain on the licensed premises, permitting a minor to consume an alcoholic beverage on the licensed premises, and permitting that same minor to remain on the premises while in an intoxicated state." (Findings of Fact, ¶ 4.)

at p. 1.) Count 2 alleged appellant "kept or permitted, in conjunction with a licensed premises, a disorderly house" in violation of section 25601 of the Business and Professions Code. (*Id.*, at p. 3.) The two counts emerge from the same 17 incidents of law enforcement contact at or near the licensed premises, which are listed in the accusation under each count. (See *id.* at pp. 1-3.) The Department decision addresses each of these incidents as a subcount.

At the administrative hearing held on March 15-16 and September 6-8, 2018, documentary evidence was received and testimony was presented by Sergeant Jolie Macias and Officers Todd Nobbe, Patrick Smith, Matt Warren, Steven Losier, Sam Ackerman, Daniel Khairy, Brian Simon, and Yama Homayoun of the Newark Police Department; by Florence O'Sullivan, the owner and licensee; by Brian Dover, an independent security officer contracted by appellant; and by Daniel Soares, appellant's manager.

Testimony established that appellant Florence O'Sullivan purchased the prior business at this site, then known as "Whiskeytown," in 2013. Appellant renovated the property into a sports bar that commenced business in 2014 as "O'Sullivan's Sports Bar."

The premises has a capacity of 200 persons. It has service counters, booths, stools, tables, chairs, and 35 television screens. The bar, located in the Newark Square shopping center, is the largest and busiest bar in Newark. Appellant's premises is adjacent to a retail liquor store known as "Oliveira's Liquors." A space 30 feet long by 8 to 10 feet wide located just outside the premises' entrance was gated off as a designated smoking area for appellant's patrons. Appellant has a video surveillance

system with 12 cameras inside the premises and four that view exterior areas. Other businesses in the shopping center include, but are not limited to, Oliveira's liquor store, a taqueria, a jewelry store, a Taco Bell, a Carl's Jr., a bakery, a gas station, a 7-Eleven store, and an Afghan restaurant. The shopping center businesses share a parking lot.

The first incident took place on October 4, 2014, at approximately 2:00 p.m. Newark Police Officer Todd Nobbe received a police radio dispatch to respond to appellant's premises.[4] The radio call indicated an employee there had been pushed or had a physical altercation with his boss. Officer Nobbe responded to the premises and contacted appellants' manager, Daniel Soares, and the other involved party, Mark Gold. In attempting to break up the dispute Gold had with a third party over a dice game inside the premises, Soares escorted Gold outside the premises where he pushed Gold in the process. Gold fell backwards, cutting his hand on a metal vent. Eventually, Gold left the scene and no arrest was made nor citation issued regarding the incident. Just prior to the incident, Gold had finished doing some painting at the premises for appellant and thereafter consumed 2 to 3 alcoholic beverages at the premises. (Subcount 1.)

The second incident took place on December 6, 2014. Officer Patrick Smith, while on a security check at appellant's premises, observed Douglas Bradshaw, a patron, stumble and stagger out of appellant's premises. Officer Smith expressly warned Bradshaw not to drive his car due to his state of intoxication. Officer Smith next observed Bradshaw enter a car and start its engine. Officer Smith immediately

4. The ALJ noted a late hearsay objection regarding the information Officer Nobbe received via radio dispatch as to why he was directed to respond to appellant's premises. The ALJ admitted the information as administrative hearsay. (See Gov. Code, § 11513(d).)

contacted Bradshaw and removed him from his car. Bradshaw did not pass a field sobriety test. Officer Smith arrested Bradshaw for driving under the influence. (Subcount 2.)

No evidence was presented regarding the third alleged incident. Accordingly, the ALJ found subcount 3 could not support disciplinary action against appellant.

The fourth incident took place on December 21, 2014. At about 1:15 a.m., Officer Matt Warren and Officer Patrick Smith were dispatched to a large fight in the parking lot near appellant's premises. Upon Officer Warren's arrival, he saw a male in a "bladed stance" directly in from of one of appellant's security guards. Both were about 10 to 20 feet from the entrance to appellant's premises. As Officer Warren saw the male patron advance on appellant's security guard, Officer Warren immediately exited his police car and tackled the patron. After Officer Warren tackled the patron, the bar's crowd of patrons began to threateningly surge toward Officer Warren. Officer Smith arrived on scene and held the crowd at bay by drawing, but not discharging, his taser. A total of eight Newark police officers responded to the premises on this incident. The person Officer Warren tackled exhibited symptoms of alcohol intoxication such as slurred speech and bloodshot, watery eyes, and had the odor of alcohol on his breath and person. He was arrested. Two friends of the arrestee then approached officers and argued with police about the arrest of their friend. Although admonished several times by police to not interfere any further, ultimately, they were also arrested for being extremely intoxicated. It was later determined that one of the arrestee's two friends was hit on the head by a bottle inside the premises due to a disagreement over a female. The assault victim did not want to further cooperate with the police investigation into that

earlier incident. The arrestee and his two friends were drinking in appellant's premises prior to the entire incident. (Subcount 4.)

The fifth incident took place on March 17, 2015. At approximately 10:43 p.m., Officer Patrick Smith responded to a domestic violence call at appellant's premises wherein a subject claimed that his wife, who had just exited the bar with him, struck him. The involved parties were apparently going through a divorce or other type of "breakup." After police arrived at the scene and investigated the incident, neither party wanted any further action taken against the other party. (Subcount 5.)

The sixth incident took place on April 2, 2015. At approximately 7:18 p.m., Officer Simon and Officer Saunders responded to a call about a fight in the parking lot in front of appellant's premises.[5] The police report indicated that appellant's manager reported a fight started inside the premises. Four Newark Police officers responded to the call. However, all participants left the scene before the police arrived. No victim was located. There were at least two groups of people involved, with two individuals doing the actual fighting. People separated the two fighting parties, and all left the area. The fight started inside appellant's bar and moved outside. The police spent approximately one hour and 20 minutes at the scene investigating the incident. (Subcount 6.)

The seventh incident took place on May 3, 2015. At approximately 2:30 a.m., Newark Police Officer Yama Homayoun went to appellant's parking lot in response to a

5. The ALJ noted a hearsay objection regarding Officer Simon's response to a question regarding how the fight began. Officer Simon referred to a police report documenting statements made by appellant's manager. The ALJ admitted the information as administrative hearsay. (See Gov. Code, § 11513(d).) Later, Officer Simon also testified that his primary investigating officer told him the fight had started inside. No hearsay objection was made to this statement.

reported battery. There, he made contact with Miguel Gonzalez, the reporting party. Gonzalez told Officer Homayoun that late in the evening hours of May 2, 2015, he saw appellant's security personnel escorting a person from the premises. Gonzalez tried to intercede with security on the patron's behalf when a security guard hit Gonzalez in the jaw. Gonzalez went home, but later returned to the premises where he called the police. Officer Homayoun did not observe any signs of injury on Gonzalez. However, Officer Homayoun called paramedics to the scene where they also examined Gonzalez and did not determine that his jaw was broken. The paramedics did not transport him for any further medical care. Officer Homayoun met with appellant's manager, Daniel Soares, who agreed to pay for any medical care Gonzalez needed or for damage to a cell phone that Gonzalez dropped during the scuffle. Officer Homayoun determined that as this matter was resolved by a civil compromise, no further police action was required. There was no evidence appellant paid for any medical care for Gonzalez as a result of this incident, but appellant did pay a $150 deductible for damage to Gonzalez' cell phone. Appellant's surveillance video was examined but did not capture the Gonzalez incident. (Subcount 7.)

Appellant's counsel, however, made a hearsay objection to Officer Homayoun's testimony regarding Gonzalez' statement about why he called police. The ALJ noted there was no corroborating evidence other than the appellant's offer to pay for medical expenses or personal property damage, which was not necessarily an admission of the validity of Gonzalez' claim. Accordingly, the ALJ rejected that portion of the testimony as unsupported hearsay, and found that subcount 7 did not support disciplinary action.

The eighth incident took place on May 22, 2015. Officer Steven Losier saw a man wearing a "Second Society" motorcycle club vest drive up on his motorcycle, park it near appellant's premises, and get off the motorcycle. The "Second Society" is a supporter of the "Hell's Angels" motorcycle gang. Officer Losier's supervising sergeant had instructed him to document any motorcycle gang member sighted at appellant's premises. The motorcycle rider went to the premises entrance, spoke with someone, entered the bar, exited about five minutes later, and drove away on his motorcycle. The rider was never detained or identified by police. It was never established why the individual went to appellant's premises or what he did inside. Appellant's manager, Daniel Soares, told Officer Losier that it was appellant's policy to not let gang members into the premises. If a prospective patron wore a motorcycle club vest, they were required to take the vest off before entering the premises. Since this March 22, 2015 observation occurred, Officer Losier has not seen any other gang members at the licensed premises. (Subcount 8.)

The ALJ found that it was not established that the motorcycle gang member caused any crime or violated any public statute, rule, or regulation by wearing his vest or visiting appellant's premises. Accordingly, he found that subcount 8 did not support disciplinary action.

The ninth incident took place on June 5, 2015. At 1:01 a.m., at least two Newark Police officers responded to a reported battery at appellant's premises. The statements

in the investigative report indicated the suspect followed the victim out of the premises into the parking lot where the suspect battered the victim.[6] (Subcount 9.)

The tenth incident took place on or about August 7, 2015, when one or more of appellant's personnel committed a battery against one of the patrons at the licensed premises. The victim filed a report with Newark Police on or about August 7, 2015.[7] (Subcount 10.)

The eleventh incident took place on August 16, 2015. At approximately 1:43 a.m., Officer Smith was at appellant's premises on a security check. He heard appellant's security officers try to get patron Gilberto Luna-Sosa to leave the premises along with other patrons being cleared out for the night. Luna-Sosa was demanding to re-enter the premises. He was approximately 5 to 10 feet from the premises' entrance. Luna-Sosa was not compliant. Officer Smith contacted Luna-Sosa, who exhibited a belligerent nature. Ultimately, Officer Smith arrested Luna-Sosa for being intoxicated in public. (Subcount 11.)

The twelfth incident took place on October 17, 2015. At approximately 1:56 a.m., Officer Simon received a call regarding a fight at the licensed premises and an injured person in the parking lot. All available Newark officers for that shift responded to the scene. The investigation determined a Mr. Sanchez had hugged Salvador Tapia's girlfriend, "Teresa," while they were all drinking inside appellant's premises. Once outside, Sanchez attempted to kiss Teresa's hand, and Tapia either punched or pushed

6. As the ALJ noted, no hearsay objection was made to the testimony offered in support of this incident.
7. Again, no hearsay objection was made to the testimony offered in support of this incident.

Sanchez to the ground, resulting in a considerable laceration to the back of his head. (Subcount 12.)

The thirteenth incident took place on November 15, 2015. At approximately 12:40 a.m., Officer Simon, then acting watch-commander, was patrolling the immediate area of appellant's premises due to ongoing problems there. He observed a fight among appellant's security staff and approximately 25 patrons just outside the main entrance to appellant's premises. He immediately radioed for an emergency response by other Newark police officers to appellant's premises. Some patrons were throwing punches while others tried to pull people away from the fight. When added police arrived, appellant's security guards backed off and the two patrons they had fought with began to walk away. Officer Simon then drew his taser at the two patrons, who sat down and surrendered. It took about 15 to 20 minutes to break up the fighting and detain the appropriate parties to the incident. Eventually, Officer Simon interviewed both security staff and the involved patrons. The investigation revealed that after appellant's security staff ejected two patrons, a fight erupted outside appellant's premises involving one of the ejected patrons, his friend, and appellant's security staff. Three intoxicated persons were arrested. Two of those three were involved in the original fight, while the third man, a friend of theirs, was also arrested. (Subcount 13.)

The fourteenth incident took place on December 13, 2015. At approximately 1:15 a.m., Officer Daniel Khairy and other officers were on patrol near appellant's premises as it was closing business for the night. Officer Khairy and Officer Losier parked their cars so as to observe the crowd exiting appellant's premises. Officer Smith saw and informed Officer Khairy via radio of a patron who exited appellant's premises but was

yelling, cursing, and harassing other patrons. This person was later identified as Mr. Hearold. Officer Khairy observed Hearold stumble as he walked and as he cursed and yelled at other people. Hearold appeared intoxicated as he headed back in the direction of appellant's premises and met up with a second man. The two men met and together stumbled around the parking lot. In what appeared the result of a friendly banter between the two men, Hearold fell to the ground. Officer Khairy then detained both men. He tried to facilitate a ride for them out of the area. Eventually, Officer Khairy placed Hearold, who was 20 years old, under arrest for being drunk in public. Although initially cooperative, both men became uncooperative. Hearold suddenly dropped to the ground and began to struggle with the officers in an attempt to escape from custody. Hearold started kicking and rolling his body. Officers Khairy and Losier struggled with Hearold. With the help of four or five added officers, Hearold was eventually put into a full body restraint, also known as a "WRAP." Hearold spit on Officer Losier's face during the struggle. The entire shift of six to seven Newark police officers responded to appellant's premises to handle this incident. Officer Khairy suffered a broken finger as a result of that struggle, which caused him to be off work for two months. (Subcount 14.)

The fifteenth incident took place on February 6, 2016. Sergeant Macias and all available Newark police officers responded to appellant's premises. A female patron had exited appellant's premises and was stabbed by an intoxicated suspect. The victim walked into the adjacent liquor store. She later indicated she had been inside of appellant's premises prior to the incident. She also identified the person who stabbed her as another woman who was in the parking lot close to the Carl's Jr. restaurant. Both the victim and the suspect appeared intoxicated. (Subcount 15.)

The ALJ found that although the victim was apparently one of appellant's patrons, there was insufficient other evidence provided for the incident to support discipline against appellant.

The sixteenth incident took place on March 4, 2016. At approximately 3:30 a.m., Officer Sam Ackerman responded to the area of appellant's premises to assist Sergeant Deserpa on a call unrelated to appellant's premises. Once they cleared that call, Officer Ackerman noticed a car parked in a marked stall near appellant's premises entrance. The car engine was running, its headlights were on, and it was occupied by a man. The man had vomit on his chest and his head bobbed back and forth. The odor of alcohol came from the interior of the car. Officer Ackerman had the man exit the car. The man had bloodshot, watery eyes, an unsteady gait, slurred speech, and swayed when he stood. The man appeared intoxicated and told Officer Ackerman he had two tall shots and two beers at O'Sullivan's. Officer Ackerman took the car's occupant into custody at about 3:45 a.m. (Subcount 16.)

Appellant's counsel, however, made a timely hearsay objection regarding the driver's statements to Officer Ackerman. The ALJ observed that while the evidence established the individual was intoxicated in his car near appellant's premises, there was no evidence beyond the arrestee's hearsay statement to indicate where he had been drinking. The statement was therefore not admissible as administrative hearsay, and subcount 16 could not establish cause for disciplinary action against appellant.

No evidence was presented regarding the seventeenth alleged incident. Accordingly, the ALJ found subcount 17 could not support disciplinary action against appellant.

Additionally, testimony established the circumstances surrounding these incidents. Newark Police Sergeant Jolie Macias was familiar with appellant's site before and after it opened for business as O'Sullivan's in 2014. During 2014 to 2016, Newark police responded to O'Sullivan's numerous times for calls for service or security checks. In response thereto, in approximately summer of 2016, Newark Police command staff made Sergeant Macias a liaison with appellant's premises as she was most frequently the on-duty supervising sergeant for weekend graveyard shifts, when most of the calls occurred at appellant's premises. From August 28 to March 15, 2016, Newark police responded to disorderly type incidents at the premises such as fights and intoxicated persons. Initially, Sergeant Macias observed that appellant's security efforts ended at the premises' front doors. Over time, the problems began to spill out into the parking lot and immediately adjacent areas. Some patrons would even leave appellant's premises, patronize the liquor store adjacent to appellant's premises, and consume store-bought drinks in their parked cars. In response to all of this, Sergeant Macias frequently assigned her officers to patrol appellant's premises and adjacent areas to establish a high-visibility police presence to dissuade, deter, and prevent improper conduct. This effort included extra officers assigned to the area when the premises was about to close for business at approximately 1:00 a.m. to 2:00 a.m. O'Sullivan's was the largest and busiest bar in Newark, with crowds of up to 100 persons exiting at the end of a busy night. On approximately four or five occasions, she and the entire weekend night patrol shift of six Newark police officers and a community service officer (CSO) responded to the premises to handle incidents there. If other high priority calls for service came in, she would have to ask for mutual aid from adjacent city police departments. Newark

Police did not respond that many times to the predecessor business at appellant's premises, as it was much less popular and less busy than appellant's business.

In the summer of 2016, Sergeant Macias, as the police liaison, met with appellant's manager, Daniel Soares, appellant's security supervisor Brian Dover, and Newark Police Lieutenant Loth to discuss appellant's operations. No second meeting was conducted due to the pending Department accusation. Sergeant Macias remains in contact with Soares to monitor premises operations. Appellant retained a private security service to patrol the parking lot on weekends, the busiest time at the premises, and that seemed to help address some police concerns. The installation of a fenced smoking area near the premises' entrance seemed to reduce patrons wandering in and out of the premises. Appellant had an electronic identification card reader, but it was not always functional. There were no substantive issues with the operation of the adjacent liquor store itself in terms of being the primary cause or origin of disorderly conduct in the immediate area. In the six months of operation prior to the hearing, the volume of calls to appellant's premises was substantially less. There now appears to be an average number of calls for a bar of that size and popularity. Sergeant Macias did not currently consider appellant's premises a police problem site.

Exhibit 6 was a Case Search Results report from the Newark Police Department covering the time period from September 14, 2014 to March 13, 2016. It listed the dates and nature of 48 specific criminal incidents and, if known, the alcoholic beverage related business located in Newark tied to the incident. Of the 48 listed incidents, 27 were linked to appellant's premises, while the next highest was only four incidents linked to a bar known as "Jacques."

Officer Smith testified that when the premises opened as O'Sullivan's in 2014, it had some "growing pains." It was having too many calls for service and was a law enforcement problem then. However, during the year prior to the hearing, it seemed to him there were less calls for service there.

Officer Warren frequently conveyed to appellant's manager that there were problems at the premises and made recommendations to him regarding added attention to security in the parking lot, including dissuading O'Sullivan's patrons from drinking, loitering, or lingering there, and the need for adding lighting for portions of the parking lot nearest to appellant's premises. Officer Warren observed that sometimes guards would be more active in patrolling the parking lot, but then their efforts abated after a week passed. Officer Warren assessed that the manager would only address problems on a temporary basis, and would not make long-term consistent and concerted effort to address the problem issues.

Officer Simon added that appellant's manager, Daniel Soares, was generally cooperative with police. He permitted police to review premises video surveillance tapes on at least four occasions to assist in police investigations. The police advised Soares to make a designated smoking area to prevent patrons from loitering about. He recommended Soares continue using an identification scanning machine and add surveillance cameras to view activity outside the premises near appellant's premises and the adjacent liquor store. He also recommended Soares replace a specific security staff member and recommended better training for the remaining security staff so they did not unduly antagonize or insult patrons being escorted off the licensed premises. He also recommended that there should be no consumption of alcoholic beverages by

appellant's on-duty staff. To Officer Simon, it seemed appellant was very active in security efforts, but then began to merely push any problems through the premises front door and into the parking lot area.

Brian Dover was appellant's security supervisor for approximately the past three to four years. Dover had 13 years of experience as a security officer, most of the time at busy nightclub venues in Las Vegas, Nevada. Appellant typically had four security staff that worked at the premises Thursday night and six to eight security staff on Friday and Saturday nights. If appellant had a special event or anticipated higher than normal patronage, security staff was increased and they would begin working earlier in the evening. On the occasion of high-attendance events at the premises, such as championship sports games, after the event concluded appellant closed the business a little earlier in the day rather than stay open his full regular hours. Appellant posted a 3' by 2'6" sign near the premises entrance informing patrons of certain conditions of entry including, but not limited to: the need for valid identification; no weapons; no gang colors; and no horseplay. Appellant does not admit patrons who are attempting to bring alcoholic beverages into the premises from outside. Appellant also banned the wearing of motorcycle gang or club vests in the premises. Appellant also constructed a gated area adjacent to the main entrance for his patrons to use for smoking and to help prevent them from wandering or loitering in the area. Appellant began keeping a security log of notable events that occur there.

Appellant's manager, Daniel Soares, worked at "Whiskeytown" as its manager for two years before appellant purchased it in 2013. Soares worked with appellant in his transition taking over the premises. Ultimately, appellant hired Soares to be his

manager. Soares sought to foster and maintain a positive relationship with the Newark Police Department. He fully cooperates in any police checks of the premises and has no issue with police presence in, at, or near appellant's premises as the police deem appropriate. Upon police recommendations, appellants added more lighting in the exterior area and added more cameras to view activity outside the premises. Soares generally notifies the police of upcoming large events at the premises and discloses appellant's planned security staffing and the time the business will close for the day after the event is over. Soares does not permit persons wearing motorcycle gang or club vests to enter or remain on the premises. Any such vest must be taken off and put away upon the patron's admission to the premises.

After the hearing, the Department issued a decision determining that the violations charged were proved and no defense was established. The ALJ found that the incidents described in subcounts 3, 7, 8, 15, 16, and 17 did not provide support for disciplinary action, either because there was no evidence presented, or because the subcount relied on uncorroborated hearsay to which appellant's counsel lodged a timely objection. The ALJ found, however, that the remaining incidents—subcounts 1, 2, 4, 5, 6, 9, 10, 11, 12, 13, and 14—supported the conclusion that appellant's premises constituted a law enforcement problem for the City of Newark, as alleged in count 1, and further supported the conclusion that appellant kept or permitted the premises to be operated as a disorderly house, as alleged in count 2.

Appellant then filed this appeal contending (1) the evidence does not establish that appellant's premises constituted a law enforcement problem meriting discipline under section 24200; (2) the evidence does not establish that appellant kept a

disorderly house in violation of section 25601; (3) appellant's due process rights were violated because appellant received no notice that law enforcement was keeping records of all calls to the licensed premises; and (4) revocation of appellant's license is an abuse of discretion.

DISCUSSION

I

Appellant contends that the evidence, including the incidents described in the subcounts, does not support the conclusion that appellant's premises constituted a law enforcement problem meriting discipline under section 24200. Appellant addresses the facts surrounding each subcount individually.

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

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

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

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if

contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code, § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

> [T]he existence of such "substantial evidence" will be determined as follows: When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.

(*Bowers v. Bernard* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925], emphasis omitted.)

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

> 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. . . .

> (b) [T]he violation or the causing or permitting of a violation by a licensee of this division, . . . any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

(Bus. & Prof. Code, § 24200(a) and (b).)

California courts have long found that "[w]here premises licensed for the sale of alcoholic beverage are operated in such a manner as to make them a law enforcement problem for the police, public welfare and morals are directly involved and affected." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 118 [28 Cal.Rptr. 74] [holding that premises presented law enforcement problem meriting license revocation]; see also *Torres v. Dept. of Alcoholic Bev. Control* (1961) 192 Cal.App.2d 541 [13 Cal.Rptr. 531] [denying license due to law enforcement problems]; *Parente v. State Bd. of Equalization* (1934) 1 Cal.App.2d 238 [36 P.2d 437] [same].) As the *Harris* court wrote:

> If the law enforcement problem emerges, as it does here, from repeated instances of intoxicated patrons found on the premises in violation of a local ordinance, it is fatuous to maintain that these conditions of doing business do not offend public welfare or morals until or unless the intoxicated patron has aggravated them by performing some additional improper, illegal or immoral act on the premises. A tolerant society and sensible law enforcement may accept on occasion the bibulous patron in the bar. But pacific behavior does not confer upon the common drunk a vested right in a public place. Moreover, where, as here, the presence of such a patron on the premises and his removal and arrest by public authority occur with alarming regularity, it is naive to suppose that these conditions of the establishment prevailed without the permission and consent of the licensee.

(*Harris*, supra, at pp. 118-119.)

Appellant argues that "reasonable steps" may be taken to correct objectionable conditions and, ostensibly, operate as an affirmative defense. (App.Br., at p. 33.)

Appellant, however, cites section 24200, subdivision (f)—a provision addressing "objectionable conditions" "on any public sidewalk abutting" the licensed premises. (See *ibid.*, citing Bus. & Prof. Code, § 24200(f)(3)(A)-(C).) That provision is not at issue in this case; count 1 of the accusation was brought under subdivisions (a) and (b), which neither requires written notice of a law enforcement problem nor grants the licensee the opportunity to take reasonable steps to cure the law enforcement problem. (See Bus. & Prof. Code, § 24200(a) and (b).) In particular, subdivision (a) allows revocation of a license based solely on the ground that "continuance of [the] license would be contrary to public welfare and morals." (Bus. & Prof. Code, § 24200(a).) This provision echoes the California Constitution, which puts the discretion to revoke a license on these grounds squarely in the hands of the Department. (See Cal. Const., art. XX, § 22.)

The only question, then, is whether there is substantial evidence—even if contradicted—to support the ALJ's findings of fact. (See *Masani*, *supra*, at p. 1437; *Bowers*, *supra*, at pp. 873-874.)

Appellant divides the subcounts described in the Department decision into two groups: those he alleges involved "actual calls for police assistance" and those in which the police were conducting "routine checks of the parking lot and the premises." (App.Br., at p. 34.) Appellant does not explain why this distinction is legally or factually significant.

With regard to subcount 1, the ALJ made the following findings of fact:

> [O]n October 4, 2014, at approximately 2:00 p.m., Newark Police Officer Todd Nobbe (hereafter "Officer Nobbe") received a police radio dispatch to respond to [appellant]'s premises. The radio call indicated an employee there had been pushed or had a physical altercation with his boss. Officer Nobbe responded to the premises and contacted [appellant]'s manager, Daniel Soares, and the other involved party, Mark Gold. In attempting to

> break up a dispute Gold had with a third party over a dice game inside the premises, Soares escorted Gold outside the premises where he pushed Gold in the process. Gold fell backwards cutting his hand on a metal vent. Eventually, Gold left the scene and no arrest was made nor citation issued regarding the incident. Just prior to the incident, Gold had finished doing some painting at the premises for [appellant] and thereafter consumed 2-3 alcoholic beverages at the premises.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 1.)

Appellant responds to these findings by claiming Gold was "a disgruntled painting contractor" who was "acting out" and "fabricated an incident of assault so he could get his broken cell phone replaced." (App.Br., at p. 34.) Appellant further argues the incident "lacks corroboration" and "supports no conduct that could be considered a disturbance of the peace, a nuisance or a justified police call." (*Ibid.*)

Testimony from Officer Nobbe, however, supports the ALJ's findings regarding this incident. On cross-examination, Officer Nobbe described the situation:

> BY MR. CROWLEY:
>
> Q. In your investigation, did you witness any evidence that a crime had been committed?
>
> A. Yes.
>
> Q. What evidence did you witness?
>
> A. The cut on Mr. Gold's hand, his demeanor, and Mr. Soares's demeanor.
>
> Q. And what about their demeanor led you to believe a crime had been committed?
>
> A. I didn't believe either one of them were being truthful.
>
> Q. Because?
>
> A. They weren't coming forward with everything that happened. Both of them were reluctant to tell me everything. You can tell when someone is clearly shaken up or disturbed about what has occurred but they are only telling you a very small thing happened, it doesn't add up.

> That, combined with Mr. Gold having cut his hand, they seemed to be somewhat honest about that, but I don't think either party was completely honest about what happened.
>
> Q. And where did the hand cutting occur, if you learned that?
>
> A. Gold said that Mr. Soares pushed him back, and he caught himself on a metal vent out front. They called it a vent. I don't know if it's just louvers—these metal louvers outside. It kind of looked like a vent on the wall. He said he caught himself on that when he was falling backwards and cut his hand on it.
>
> [¶ . . . ¶]
>
> Q. And according to Soares?
>
> A. According to Soares, he didn't push him.

(RT, vol. I, at pp. 34-35.) While Soares did testify that it was "absolutely untrue" that he pushed Gold, he also testified, unprompted, that "If ever a hand was on him, it might have been on his shoulder, in a motion like, Come on, buddy, let's go." (RT, vol. V, at p. 39.) The ALJ, however, was not required to credit Soares' testimony on this point over Officer Nobbe's. Additionally, Soares corroborated Officer Nobbe's testimony insofar as Gold got into a dispute with another patron, which "escalated" and resulted in Soares expelling Gold from the premises, after which Gold "yelled quite a few obscenities and threatened to come back" and ultimately summoned police. (RT, vol. V, at pp. 38-39.) Substantial evidence therefore supports the findings of fact. Moreover, as a result of this conflict—notably, between the premises' manager and a contractor, and not ordinary patrons—Officer Nobbe was required to expend police time and resources investigating. This incident therefore supports the conclusion that the premises constituted a law enforcement problem.

With regard to subcount 2, the ALJ made the following findings of fact:

> [O]n December 6, 2014, Officer Patrick Smith, while on a security check at [appellant]'s premises, observed Douglas Bradshaw (hereafter "Bradshaw"), a patron, stumble and stagger out of [appellant]'s premises. Officer Smith expressly warned Bradshaw not to drive his car due to his state of intoxication. Officer Smith next observed Bradshaw enter a car and start its engine. Officer Smith immediately contacted Bradshaw and removed him from his car. Bradshaw did not pass a field sobriety test. Officer Smith arrested Bradshaw for driving under the influence of alcohol and/or drugs.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 2.)

Appellant counters that Officer Smith never informed him that Bradshaw had exited the premises and never examined video recordings from the bar to verify that Bradshaw consumed alcohol there. (App.Br., at p. 42.) Appellant argues Officer Smith "just assumed [Bradshaw] was at the bar." (*Ibid.*) Appellant alludes to the adjacent liquor store, but does not go so far as to suggest that Bradshaw obtained liquor there instead. (*Ibid.*) Appellant concludes that "[t]his incident lacks substantial evidence of a disturbance of the peace or a nuisance" and "does not support a 'good cause' claim of law enforcement problems," and claims that, "[s]tanding alone, this incident is insufficient for a basis for a revocation or suspension." (*Id.*, at pp. 42-43.)

Appellant's apparent claim that this incident bears no connection to his premises is belied by Officer Smith's testimony. On direct examination, he twice stated that Bradshaw had come from O'Sullivan's. (RT, vol. I, at pp. 130-131.) He confirmed that testimony on cross-examination:

> BY MR. CROWLEY:
>
> Q. And were you in the bar at this time?
>
> A. No. I was outside.
>
> [¶ . . . ¶]
>
> Q. And this young man walked past you?

A. Right out of the bar right to us.

Q. And wanted to shake your hand and not a good idea.

A. No. I don't know where his hand has been. He doesn't know where my hands have been.

Q. Fair enough. Did you inquire of this young man how much he had consumed—how much alcohol he had consumed and where?

A. I don't think I asked him that, no. I saw him walk out of the bar. So I assumed he was at the bar.

(RT, vol. I, at pp. 171-172.) This testimony is uncontradicted. Substantial evidence therefore supports the finding that Bradshaw came out of appellant's premises. Appellant does not dispute any of the other factual findings surrounding this incident.

Appellant cites no law requiring a licensee be notified, either formally or informally, before an incident may be considered in determining whether a premises constitutes a law enforcement problem, nor any law requiring that such a finding be supported by video evidence. There is no such law. Moreover, we need not consider whether this event "standing alone" merits disciplinary action, because the accusation was not based solely on this incident. The evidence establishes that police time and resources were expended in arresting a drunk driver who had just exited appellant's premises. This—combined with other incidents—is sufficient to support the conclusion that appellant's premises constituted a law enforcement problem.

With regard to subcount 4, the ALJ made the following findings of fact:

[O]n December 21, 2014, at about 1:15 a.m., Officer Matt Warren and Officer Patrick Smith (hereafter "Officer Warren" and "Officer Smith") were dispatched to a large fight in the parking lot near [appellant]'s premises. Upon Officer Warren's arrival, he saw a male in a "bladed stance" directly in front of one of [appellant]'s security guards. Both were about 10-20 feet from the entrance to [appellant]'s premises. As Officer Warren saw the male patron advance on [appellant]'s security guard, Officer Warren immediately exited his police car and tackled the patron. After Officer

> Warren tackled the patron, the bar's crowd of patrons began to threateningly surge towards Officer Warren. Officer Smith arrived on scene and held the crowd at bay by drawing, but not discharging, his taser. A total of 8 Newark police officers responded to the premises on this incident. The person Officer Warren tackled exhibited symptoms of alcohol intoxication such as slurred speech, bloodshot and watery eyes, and had the odor of alcohol on his breath and person. He was arrested. Two friends of the arrestee then approached officers and argued with police about the arrest of their friend. Although admonished several times by police to not interfere any further, ultimately, they were also arrested for being extremely intoxicated. It was later determined that one of the arrestee's two friends was hit on the head by a bottle inside the premises due to a disagreement over a female. The assault victim did not want to further cooperate with the police investigation into that earlier incident. The arrestee and his two friends were drinking in [appellant]'s premises prior to the entire incident.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 4.)

As with previous counts, appellant challenges the nexus between the incident and appellant's premises. Appellant contends "[t]he officer 'assumed' the Hispanic male was from the O'Sullivan's Sports Bar. He does not know why he never verified this assumption with the video recordings that he knew were available." (App.Br., at p. 14.)

Appellant goes on to shift the blame for the incident to Officer Warren. Appellant cites testimony from appellant's manager Soares, who "was on duty that evening," that "the incident was calmed down and had ended when Officer Warren unnecessarily interjected himself and escalated the situation." (App.Br., at p. 35.) Appellant contends that "Officer Warren was not an experienced patrol officer at the time and escalated a situation by not conducting a simple police assessment and making his presence known." (*Ibid*.) Appellant further contends that "[s]everal days later, Mr. Soares spoke with Officer Smith who informed Mr. Soares that he told the other officers to 'leave the guy alone,' that he had a ride home," and that "the other officers instigated the incident." (*Ibid.*)

Notably, appellant does not explain how Soares knew the man had a ride home if the man did not come from O'Sullivan's licensed premises. In any event, Officer Warren testified that in the course of investigating, officers discovered one of the individuals had purportedly been hit in the head with a bottle inside appellant's premises, and that "that's how it just spilled outside."[8] (RT, vol. I, at p. 220.)

More importantly, the alleged misconduct by officers—and we emphasize the word "alleged"—is irrelevant to the question of whether the evidence supports the ALJ's factual findings. Although he attempts to shift the blame by implying that the altercation was somehow Officer Warren's fault, appellant never disputes the finding that Officer Warren was called to the licensed premises in response to "a large fight in the parking lot," or that such a fight took place. (Findings of Fact, ¶ 4; see also RT, vol. I, at p. 206 [Officer Warren testifies he was "dispatched to a large fight involving 15 to 20 subjects"]; RT at p. 219 [Officer Warren testifies officers ultimately needed security guards' assistance to "control that crowd"].) Appellant instead merely contends that the fight had ended by the time officers arrived. The ALJ's findings of fact are therefore supported by substantial evidence. More importantly, the findings establish that multiple Newark police officers expended time and resources in responding to a large fight at appellant's

8. While this could be characterized as hearsay, it properly supports factual findings for two reasons. First, it is corroborated by other evidence, including the fact of the altercation, its vicinity to the licensed premises, and Officer Warren's firsthand observations, that the individual appeared to be engaged in a confrontation with appellant's security guard. (See RT, vol. I, at p. 216 [Officer Warren testifies individual was "ten feet" from appellant's premises door] and pp. 216-217 [individual was confronting security guard wearing green O'Sullivan's polo shirt].) The hearsay testimony that the fight began inside appellant's premises was therefore properly considered as administrative hearsay. (Gov. Code, § 11513(d).) Second, and more significantly, appellant's counsel never lodged a hearsay objection. (See RT, vol. I, at pp. 221-222.)

premises—which supports the conclusion that the appellant's premises constitute a law enforcement problem.

With regard to count 5, the ALJ made the following findings of fact:

> [O]n March 17, 2015, at approximately 10:43 p.m., Officer Patrick Smith responded to a domestic violence call at [appellant]'s premise wherein a subject claimed that his wife, who he had just exited the bar with, struck him. The involved parties were apparently going through a divorce or other type of "break-up". After the police arrived at the scene and investigated the incident, neither party wanted any further action taken against the other party.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 5.)

Appellant argues Officer Smith did not witness any assault, that the incident took place outside the bar, and that "Officer Smith could not find anything that O'Sullivan's bar or its personnel did or failed to do that precipitated this event." (App.Br., at pp. 36-37.) Appellant therefore contends the Department failed to produce substantial evidence in support of this allegation, and further, that the incident does not support the conclusion that appellant's premises constituted a law enforcement problem. (*Id.*, at p. 37.)

Officer Smith, however, testified that according to the participants, the incident did take place inside O'Sullivan's:

> [BY MR. CROWLEY:]
>
> Q. You did the investigation?
>
> A. Yes.
>
> Q. And your investigation led you to believe that this activity occurred inside the bar?
>
> A. According to their statements.
>
> [¶ . . . ¶]

> JUDGE SAKAMOTO: You talked to these involved parties?
>
> THE WITNESS: Yes. I don't know if I should say this, but the bottom line is it happened in the O'Sullivan's bar. Therefore, it gets put in the Bar File. You understand?
>
> JUDGE SAKAMOTO: I follow.
>
> THE WITNESS: So as far as this happening in the bar, no, these people were at the bar. And one showed up. The other one showed up, didn't like what they saw. There were some words. Like you said, they were going through some type of divorce or some type of thing, and, you know. . . .

(RT, vol. I, at pp. 185-186.) Appellant contradicts himself and acknowledges Officer Smith's testimony on this point when he writes that Officer's Smith's "investigation disclosed that the parties were going through the final stages of a divorce and the female spouse *arrived at the bar* and saw the male spouse with another woman and did not like what she saw." (App.Br., at p. 37, emphasis added.)

As with other counts, appellant insists that Officer Smith should have viewed appellant's surveillance footage to verify the incident and spoken with appellant's manager. (*Id.*, at pp. 36-37.) Appellant cites no law requiring police do so. There is no requirement that police view a licensee's surveillance footage or speak with the licensee's supervisory staff before a specific incident can be considered as part of a determination of a law enforcement problem. Such a requirement would require the expenditure of *additional* limited police resources to locate a manager and review tapes. Moreover, surveillance tapes and management staff would be under the licensee's control, giving licensees an incentive to be uncooperative where video would prove the incident occurred.

Substantial evidence supports the ALJ's finding that a domestic dispute, originating at appellant's premises, required Newark police to respond and expend time

and resources investigating. This in turn supports the ALJ's conclusion that the appellant's premises constitute a law enforcement problem.

With regard to subcount 6, the ALJ made the following findings of fact:

> [O]n April 2, 2015, at approximately 7:18 p.m., Officer Simon and Officer Saunders responded to a call of a fight in the parking lot in front of O'Sullivan's. The police report indicated that [appellant]'s manager reported a fight started inside the premises. Four Newark officers responded to the call. However, all participants in the fight left the scene before the police arrived. No victim was located. There were at least two groups of people involved, with two individuals doing the actual fighting. People separated the two fighting parties, and all left the area. The fight started inside [appellant]'s bar and moved outside. The police spent approximately 1 hour and 20 minutes at the scene investigating this incident.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 6.)

Appellant describes this call as a "non-incident." (App.Br., at p. 38.) He argues that upon Officer Saunders' "arrival, he observed no fight, no crowd, and no need for police intervention," and that he never "obtained information as to where in the parking lot the alleged fight occurred," that he "did not know the time that elapsed from the alleged dispersing of the crowd and his arrival, he interviewed no one, made no arrests and did no investigation." (*Ibid.*) As with other subcounts, appellant notes Officer Saunders did not review surveillance tapes or speak with appellant's manager. (*Ibid.*)

In making this argument, appellant cites the testimony of Officer Simon, who was one of four officers who responded to the call in question. (RT, vol. II, at pp. 57-60.) Officer Simon was not the primary officer,[9] but according to the report prepared by the

9. Officer Saunders was the primary responding officer and prepared the report. (RT, vol. I, at p. 68.) Officer Simon, who was the secondary responding officer, relied on this report to refresh his recollection of events. (RT, vol.I I, at p. 68-69.)

primary officer, the manager provided a statement.[10] (RT, vol. II, at p. 58.) Officer Simon testified that his primary investigating officer told him that the fight had started inside the bar and then moved into the parking lot.[11] (RT, vol. II, at p. 73.) Moreover, the report indicated that Officer Saunders reviewed appellant's surveillance footage from this incident. (RT, vol. II, at p. 75.) Appellant's manager, Daniel Soares, did not contradict Officer Simon's testimony. (See generally RT, vol. V.) In sum, while Officer Simon did testify that he personally did not conduct an investigation, substantial evidence supports the ALJ's findings of fact, including his finding that an investigation did take place. The evidence indicates that the incident required the Newark Police Department to expend substantial time and resources investigating this incident, supporting the conclusion that appellant's premises constitutes a law enforcement problem.

On this subcount, appellant also reiterates that it is taking "reasonable steps" to correct "what concerns [police] may have." (App.Br., at p. 38.) Appellant claims these steps constitute a defense under Business and Professions Code, section 24200, subdivision (3). As noted above, the defenses appellant cites apply only to charges brought under section 24200, subdivision (f). (See Bus. & Prof. Code, § 24200(f)(3)(A)-

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10. The content of the manager's statement—that the "fight started inside" the licensed premises—was admitted as administrative hearsay. (See RT, vol. II, at pp. 58-60.) The fact that the manager made a statement to officers, however, is not hearsay, and indicates that officers did contact appellant's manager and did conduct an investigation, contrary to appellant's claims.

11. While this statement does qualify as hearsay, appellant raised no objection, and therefore forfeited any right to object to its use for the truth of the matter asserted. (See RT, vol. II, at p. 73; see also Gov. Code, § 11513(d) ["Hearsay evidence may be used for the purpose of supplementing or explaining other evidence *but over a timely objection* shall not be sufficient in itself to support a finding."]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1970) 8 Cal.App.3d 1009, 1018-1020 [87 Cal.Rptr. 908] [issue forfeited before Board where no hearsay objection was raised before Department].)

(C).) This accusation relies on subdivisions (a) and (b). (See exh. 1, Accusation, at pp. 1-3.) The defense appellant cites is inapplicable in this case.

Regarding subcount 9, the ALJ made the following findings of fact:

> [O]n June 5, 2015, at least two Newark Police officers responded to [appellant]'s premises at 1:01 a.m. in response to a reported battery. The statements in the investigative report indicated the suspect followed the victim out of the premises into the parking lot where the suspect battered the victim.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 9.) The ALJ noted no hearsay objection was raised to testimony referring to the police report. (*Ibid.*; see also *Kirby*, *supra*, at pp. 1018-1020].)

Appellant characterizes this incident as an "unfounded, unbelievable complaint" that was "never verified" and "proves nothing." (App.Br., at p. 39.) Appellant claims even the "investigating officer gave no credibility to the complaining witnesses['] testimony and discounted the complaint." (*Ibid*.) Appellant argues that because there was no "verifiable incident arising from the bar," this ALJ's findings on this subcount are not supported by substantial evidence. (*Id.*, at pp. 39-40.)

Lieutenant Macias, who referred to a report prepared by Officer Tyler to refresh her recollection, testified regarding the contents of that report. (RT, vol. I, at p. 107-109.) On cross-examination, the following exchange took place:

> [BY MR. CROWLEY:]
>
> Q. It appears the investigation shows one Tiffany Lathrop who was in the bar left the bar, and then she was accosted by some individual, Christopher Ruiz, in one of the areas of the parking lot. It may have even been closer to the liquor store and the Bermuda Triangle, as you refer to it.
>
> A. Most likely.

> Q. Was there any evidence showing that Christopher Ruiz came from O'Sullivan's Bar? Is there any evidence, any reliable evidence that that individual who accosted the woman came from the bar?
>
> A. May I see if there is?
>
> MR. CROWLEY: Sure.
>
> [¶ . . . ¶]
>
> THE WITNESS: Sir, the only place that I see that indicates that he was in the bar is in the beginning of the investigation section where it indicates that this subject followed them out of the bar and asked them if they wanted potato chips. So he follows them from inside the bar out to the parking lot where the incident occurred is how I read it.

(RT, vol. I, at pp. 108-109.) The statement made to officers by the individual alleging the battery connects the incident to the licensed premises. The evidence therefore supports the ALJ's findings of fact. Moreover, the call required Newark Police to expend time and resources responding to a call to appellant's premises and investigating, supporting the conclusion that appellant's premises constitutes a law enforcement problem.

Appellant misstates the testimony when he claims this incident was determined to be unfounded. (See App.Br., at p. 39, citing RT, vol. I, p. 109, l. 24 through p. 110; l. 5.) The testimony appellant refers to pertains to the incident described in subcount 10, *infra*, which took place on August 7, 2015, and not the present incident, which took place on June 5. (RT, vol. I, at p. 109.) There is nothing in the record that suggests the alleged battery described in subcount 9 was determined to be unfounded.

Regarding subcount 10, the ALJ made the following findings of fact:

> [O]n or about August 7, 2015, one or more of [appellant]'s personnel committed a battery against one of its patrons at [appellant]'s premises. The victim filed a report with Newark Police on or about August 7, 2015.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 10.) As with the previous subcount, the ALJ noted no hearsay objection was raised to testimony referring to the police report. (*Ibid.*; see also *Kirby*, supra, at pp. 1018-1020].)

Appellant argues Lieutenant Macias testified there was "no follow-up on this alleged incident and the complaint was deemed 'unfounded' by the police department." (App.Br., at p. 43.) Appellant contends that "[i]f the police do not consider the alleged complaint substantial and deem it 'unfounded,' the licensee should not be held responsible." (*Id.* at pp. 43-44.)

On direct examination, Lieutenant Macias gave limited information on this complaint:

> BY MR. NEWTON:
>
> Q. What was the call for on August 7th, 2015?
>
> A. So it was a call to the Newark Police Department lobby. The citizen had responded to the lobby to report that—to report a battery that occurred the night before at the bar involving one of the security personnel.
>
> Q. When you say "at the bar," you mean O'Sullivan's?
>
> A. O'Sullivan's Bar.
>
> Q. Did any officer go to investigate?
>
> A. Yes.
>
> Q. Do you know how many?
>
> A. Well, only one is dispatched for a call for service such as this. It's within our own building, and, you know, no need for extra security.

(RT, vol. I, at p. 74.) On cross-examination, Lieutenant Macias offered little additional information, but did concede the complaint was determined to be unfounded:

> BY MR. CROWLEY:

> Q. The next one I would like to talk about is August 7, 2015. This is a 242 battery, case No. 1502793.
>
> [¶ . . . ¶]
>
> Did you read the report? I'm sorry. This appears to be a complaint the day after by Anthony Rubio, and it seems like the investigating officer didn't give the complaining party much credibility after he did the investigation. Is that fair to say?
>
> [Objection; overruled.]
>
> BY MR. CROWLEY:
>
> Q. Okay. There was no followup on this alleged incident?
>
> A. No. It was just documented for—that it was determined to be unfounded. So no additional followup.
>
> Q. Right. That's what I was looking for. Determined to be unfounded; right?
>
> A. Yes, sir.

(RT, vol. I, at pp. 109-110.) No other information was offered regarding this incident.

Given that Lieutenant Macias testified unequivocally that the complaint was determined to be unfounded, and given that there is no contrary testimony on this point in the record, the ALJ's factual finding that "on or about August 7, 2015, one or more of [appellant]'s personnel committed a battery against one of its patrons" is not supported by the evidence. (See Findings of Fact, ¶ 10.) While it is true that the Newark Police Department was required to expend time and resources taking the complaint (see RT, vol. I, at p. 74), the effort was minimal, involved only one officer, and did not require a visit to the premises. Given the flaw in the findings of fact, we disregard this subcount and hold that it does not support the overall conclusion that appellant's premises constitutes a law enforcement problem.

With regard to subcount 11, the ALJ made the following findings of fact:

> [O]n August 16, 2015 at approximately 1:43 a.m., Officer Smith was at [appellant]'s premises on a security check. He heard [appellant]'s security officers try to get patron Gilberto Luna-Sosa (hereafter "Luna-Sosa") to leave the premises along with other patrons being cleared out for the night. Luna-Sosa was demanding to re-enter the premises. He was approximately 5-10 feet from the premises entrance. Luna-Sosa was not compliant. Officer Smith contacted Luna-Sosa who exhibited a belligerent nature. Ultimately, Officer Smith arrested Luna-Sosa for being intoxicated in public.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 11.)

Appellant contends Officer Smith "never inquired how much Mr. Lunagosa [*sic*] had to drink, how long he was in the bar, or if he was in the bar at all." (App.Br., at p. 44.) Paradoxically, appellant also concedes that Officer Smith approached because he "over-heard [*sic*] the security guard requesting a patron leave the premises," and that the patron, Luna-Sosa, "was being told he could not 'reenter' the bar because the bar closed at about 1:30 a.m." (*Ibid.*) Appellant also contends Officer Smith "never notified the licensee of the arrest or provided a report." (*Id.*, at p. 45.)

Appellant further argues that Officer Smith testified "he had never witnessed any conduct that was against the public morals, such as prostitution, solicitation for prostitution, 'b-girl' violations, gambling, or drug sales/consumption," but provides no citation to this purported testimony. (*Id.* at pp. 44-45.) Appellant contends Officer Smith "wants the premises to be successful" and that police are "not there to 'crucify them,'" but again provides no citation to this testimony. (App.Br., at p. 45.) Finally, appellant repeats his claim that his "reasonable steps" and cooperation with law enforcement constitute a defense under section 24200, subdivision (3). (*Id.*, at p. 46, citing § 24200(f)(3)(A)-(C).)

On direct examination, Officer Smith testified regarding the incident:

BY MR. NEWTON:

> Q. Were you at O'Sullivan's that night?
>
> A. I was.
>
> Q. What for?
>
> A. I was just at a security check, and I heard the security officers, bouncers, ask the subject to leave, and he was kind of giving him, you know, a bunch of lip service and not going along with their demands to leave.
>
> I contacted the subject, determined he was too intoxicated to care for himself, and I arrested him for being drunk in public.

(RT, vol. I, at p. 136.) On cross-examination, Officer Smith stated he took Luna-Sosa "into custody for being drunk in public" and for "disorderly conduct," including his "belligerent nature." (RT, vol. I, at p. 194.) While it is true that Officer Smith did not inquire of appellant's staff how many drinks Luna-Sosa had consumed or how long he spent in the bar, these details are irrelevant. (See RT, vol. I, at p. 195.) Officer Smith's testimony established that Luna-Sosa had come from—and was attempting to reenter—appellant's premises, and that he was drunk, disorderly, and belligerent. The evidence therefore supports the ALJ's findings of fact. Moreover, the incident required Officer Smith to intervene and ultimately arrest Luna-Sosa, supporting the conclusion that appellant's premises present a law enforcement problem.

As discussed above, subdivision (f) of section 24200 is inapplicable to this accusation. (See *supra*; see also Bus. & Prof. Code, § 24200(f).) Appellant attempts to avoid discipline by proving defenses to an irrelevant provision of law.

With regard to subcount 12, the ALJ made the following findings of fact:

> [O]n October 17, 2015 at approximately 1:56 a.m., Officer Simon received a call of a fight at the premises and an injured person in the parking lot.[fn.] All available Newark officers for that shift responded to the scene. The investigation determined a Mr. Sanchez had hugged Salvador Tapia's girlfriend, "Teresa", while they were all drinking inside [appellant]'s

> premises. Once outside, Sanchez attempted to kiss Theresa's [*sic*] hand, and Mr. Tapia either punched or pushed Sanchez to the ground resulting in a considerable laceration to the back of his head.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 12.)

Appellant counters that the statements surrounding this incident were "contradictory and confusing" and "there were no arrests." (App.Br., at p. 40.) Moreover, appellant contends the dispute did not begin until the parties left the premises, that it "occur[red] in the parking lot, out of sight of the licensee," and that "Officer Simon never verified the information with the security personnel of the bar and never examined the video." (*Id.*, at pp. 40-41.)

On cross-examination, Officer Simon described the sequence of events:

> [BY MR. CROWLEY:]
>
> So what evidence did you obtain that led you to believe that any of the individuals were in O'Sullivan's Bar?
>
> A. Statements.
>
> Q. And the statements of whom?
>
> A. The statements of Salvador Tapia and his girlfriend, Theresa.
>
> Q. So Salvador and Theresa were in the bar in O'Sullivan's Bar?
>
> A. Yes.
>
> Q. And when they exited, a third person accosted them?
>
> A. No.
>
> Q. How did it go?
>
> A. You are asking me what were the sequence of events?
>
> Q. Yes.
>
> A. So Salvador and his girlfriend, Theresa, were inside the bar, along with Mr. Sanchez. They are—they all know each other from some way or another from history. Okay? So they were all in the bar. And they left. As

> they were leaving—so while they were inside the bar, when Mr. Sanchez was talking to Theresa, gave her a friendly hug, which didn't sit well with Mr. Tapia—or Tapia.
>
> And when they left, they were all leaving together, and Mr. Sanchez was supposedly going home, and he went to kiss the hand of Theresa, which upset Salvador, and there were some words exchanged, and that's where, you know, the differences in the statements then become convoluted.
>
> Either—either Mr. Salvador got into the face of Mr. Tapia, and Mr. Tapia either, A, punched him, or, B, pushed him, and due to Mr. Sanchez's level of intoxication, he fell over and hit his head.
>
> Q. And that was in the parking lot?
>
> A. That was in the parking lot.
>
> Q. So the hug occurred in the bar?
>
> A. Yes, correct.
>
> Q. And there was no altercation in the bar that you are aware of?
>
> A. That I'm aware of, correct.

(RT, vol. II, at pp. 88-90.) Officer Simon's testimony, which was uncontradicted, is accurately reflected in the ALJ's findings of fact. The one point of inconsistency between statements—whether Sanchez was punched or pushed—is also accurately reflected in the ALJ's finding of fact. The findings regarding this count are therefore supported by substantial evidence.

Appellant appears to contend that because the actual punch or push, and resulting injury, occurred in the parking lot, this incident bore no relation to appellant's licensed premises. Officer Simon's uncontradicted testimony, however, indicated that all three individuals were patrons of O'Sullivan's, and that the dispute began with a hug inside the premises. Newark Police were required to expend time and resources responding to a call for an altercation that arose between appellant's patrons; once

again, appellant fails to explain why Newark police should be required to expend additional effort reviewing videotapes. Subcount 12 therefore supports the conclusion that appellant's premises constitutes a law enforcement problem.

With regard to count 13, the ALJ made the following findings of fact:

> [O]n November 15, 2015 at approximately 12:40 a.m., Officer Simon, then acting watch-commander, was patrolling the immediate area of [appellant]'s premises due to on-going problems there. He observed a fight among [appellant]'s security staff and approximately 25 patrons just outside the main entrance to [appellant]'s premises. He immediately radioed for an emergency response by other Newark police officers to [appellant]'s premises. Some patrons were throwing punches while others tried to pull people away from the fight. When added police arrived, [appellant]'s security guards backed off and the two patrons they had fought with began to walk away. Officer Simon then drew his taser at the two patrons who sat down and surrendered. It took about 15-20 minutes to break up the fighting and detain the appropriate parties to the incident. Eventually, Officer Simon interviewed both security staff and the involved patrons. The investigation revealed that after [appellant]'s security staff ejected two patrons, a fight erupted outside [appellant]'s premises involving one of the ejected patrons, his friend, and [appellant]'s security staff. Three intoxicated patrons were arrested. Two of those three were involved in the original fight, while a third man, a friend of theirs, was also arrested.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 13.)

Appellant claims that "[t]his fails as a 'police call,'" presumably because Officer Simon was on patrol rather than responding to dispatch. (App.Br., at p. 47.) Appellant further argues "[t]here was no proof that the licensee premises had anything to do with this alleged incident." (*Ibid.*) Finally, appellant again raises a "reasonable steps" defense under section 24200, subdivision (f). (*Id.*, at p. 48.)

Appellant does not materially dispute the findings of fact surrounding the subcount. Nevertheless, appellant downplays appellant's security staff involvement, arguing that "two patrons were fighting, and the security guards were present." (*Id.*, at

p. 47.) He further claims that upon Officer Simon's arrival, "the group dispersed." (*Id.* at p. 46.)

In fact, Officer Simon's uncontradicted testimony fully supports the ALJ's findings of fact. On cross-examination, Officer Simon testified as follows:

> [BY MR. CROWLEY:]
>
> Q. About how many people were congregated in that area—when we say "in that area," I assume that's the walkway in front of the door?
>
> A. You mean separate from the group that was involved in the fight?
>
> Q. No.
>
> A. So everybody that's involved in the fight, I would say there is probably 25 people that are involved.
>
> Q. Okay. And they are congregated in that—under the overhang in the walkway in front of the bar?
>
> A. Yeah.
>
> Q. And you say they are involved in a fight. Was everybody fighting?
>
> A. No. What typically happens is—or what I observed happen is *security is in a fight with the two subjects*. All the other patrons decide to be heros [*sic*]. So they come in to try to save everybody. So they all come in, and it's a mess of some people throwing punches and some people trying to pull other people away, and it's like a—
>
> Q. Melee?
>
> A. —a rugby scrum.
>
> Q. Okay. So that was going on when you walked up?
>
> A. Yes.
>
> Q. You somehow announced your presence?
>
> A. Yeah. I tried.
>
> Q. Okay. How long did it take to kind of quell the activity?
>
> A. To quell the activity?

Q. Yeah.

A. *Probably 20 minutes or so*. I mean, relatively—it would depend on what you determine to be quell the incident. So in order to get everybody detained and separated, and all the other patrons separated and all that kind of stuff, yeah, I would say 15 to 20 minutes.

Q. During that time, what did you witness?

A. So when I walked up, I was able to identify who the primary aggressors that were involved in fighting with the security, as opposed to who the patrons were. They had started to separate themselves. Once security had seen that I had walked up, they started to back off a little bit on what they were doing. Some of them went back into the bar. And the two suspects started walking their way down that vestibule area, that overhang. They were yelling at the security guards.

So I pulled out my Taser, which has a nice little red dot on it, and started pointing it at them, and when one of the suspects realized what was going on, because his other buddy was pretty heated and yelling at security, he pointed out to his buddy that I was there and that I was about to tase him, and his buddy gave up and sat down.

Q. Okay. And you did further investigation to find the origin of this engagement?

A. Correct.

Q. And what did you determine?

A. So we obtained—I obtained statements from the two security guards that were involved, as well as one of the suspects, and then a summary from the officer from one of the suspects in my asking him a couple of questions. I also looked at the CCTV video footage of what had occurred.

(RT, vol. II, at pp. 96-98, emphasis added.) Contrary to appellant's claims, security staff were involved in the fight and not merely "present"; the crowd did not disperse upon Officer Simon's arrival, but rather required 15 to 20 minutes of officer effort; and, most importantly, Officer Simon's uncontradicted testimony supports the findings of fact. Moreover, the findings regarding this incident support the conclusion that appellant's premises constituted a law enforcement problem. Finally, as discussed in multiple instances *supra*, appellant's "reasonable steps" are a defense to subdivision (f) of

section 24200, and not to subdivisions (a) and (b). (See Bus. & Prof. Code, § 24200; Exh. 1, Accusation, at pp. 1-3.)

With regard to subcount 14, the ALJ made the following findings of fact:

> [O]n December 13, 2015, at approximately 1:15 a.m., Officer Daniel Khairy and other officers were on patrol near [appellant]'s premises as it was closing business for the night. Officer Khairy and Officer Losier parked their cars so as to observe the crowd exiting [appellant]'s premises. Officer Smith saw and informed Officer Khairy via radio of a patron who exited [appellant]'s premises but was yelling, cursing, and harassing other patrons. This person was later identified as Mr. Hearold. (hereafter, "Hearold") Officer Khairy observed Hearold stumble as he walked and as he cursed and yelled at other people. Hearold appeared intoxicated as he headed back in the direction of [appellant]'s premises and met up with a second man. The two men met and together stumbled around the parking lot. In what appeared the result of friendly banter between the two men, Hearold fell to the ground. Officer Khairy then detained both men. He tried to facilitate a ride for them out of the area. Both men were intoxicated. Eventually, Officer Khairy placed Hearold, who was 20 years old, under arrest for being drunk in public. Although initially cooperative, both men become uncooperative. Hearold suddenly dropped to the ground and began to struggle with the officers in an attempt to escape from custody. Hearold started kicking and rolling his body. Officer Khairy and Officer Losier struggled with Hearold. With the help of four or five added officers, Hearold was eventually put into a full body restraint, also known as a "WRAP".[fn.] Hearold spit on Officer Losier's face during the struggle. The entire shift of six to seven Newark police officers responded to [appellant]'s business to handle this incident. Officer Khairy suffered a broken finger as a result of that struggle that caused him to be off-work for two months.

(Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 14.)

Appellant challenges the connection to the licensed premises, arguing that "Officer Khairy testified that he did not know if the suspect exited the bar," "never saw the suspect exit the bar," "did not recall if the suspect was with anyone," and "did not recall how many individuals were in front of the bar." (App.Br., at p. 49.) Appellant also implies that the suspect could have been a patron of the liquor store, but cites no evidence. (See *ibid.*) Appellant objects that he never received notice of this incident

from the Newark Police Department, and moreover, that the incident "fails as an 'excessive police' call," presumably because the officers were on patrol rather than responding to dispatch. (*Ibid.*)

Appellant is correct that Officer Khairy did not personally see Hearold exit appellant's licensed premises. Officer Khairy testified on direct that it was Officer Smith who informed him, by radio, that a male subject was walking away from the bar and was "causing an issue" by "yelling, cursing, and harassing other patrons." (RT, vol. II, at p. 7.) On cross-examination, Officer Khairy acknowledged that he did not see the individual exit O'Sullivan's Bar. (RT, vol. II, at p. 31.) The ALJ clarified Officer Khairy's testimony:

> JUDGE SAKAMOTO: Well, I'll tell you right now, my indication is—and maybe it needs some examination. My initial note was that he said he did see him leave the bar on direct. So let's get this cleared up right now.
>
> So, Officer, you mentioned that you were there checking like you described. You are in position. You got a radio call from Officer Smith, who reported a male walking away from the bar. You remember testifying about that?
>
> THE WITNESS: Yes.
>
> JUDGE SAKAMOTO: Okay. Now, when you got the radio call and Officer Smith was describing that person, did you have an awareness of that person like before you got the call or no?
>
> THE WITNESS: I don't believe so, no.

(RT, vol. II, at p. 31.) Appellant then questioned Officer Khairy on this point again, and Officer Khairy repeated that Officer Smith told him the suspect had exited the premises, and that that was the only source of his knowledge. (RT, vol. II, at pp. 38-39.) Appellant then moved to strike Officer Khairy's testimony regarding what Officer Smith told him on hearsay grounds. (RT, vol. II, at p. 40.) The ALJ declined to make a ruling, instead

opting to wait and see if the Department produced evidence to corroborate Officer Smith's hearsay statement regarding where Hearold had come from. (RT, vol. II, at p. 41.)

On the third day of hearings, however, the Department recalled Officer Patrick Smith, who testified unequivocally that Hearold came from O'Sullivan's Bar. (RT, vol. III, at p. 6.) Appellant conveniently omits any mention of this essential testimony. Officer Smith's confirmation that Hearold came from O'Sullivan's provides substantial evidence in support of the ALJ's findings of fact on this point.

As discussed several times *supra*, appellant cites no law in support of his argument that a law enforcement encounter derived from a patrol or security check somehow does not "count" for purposes of determining whether a premises constitutes a law enforcement problem. The argument is absurd. Where police have frequent problems with a premises, it is in the interests of public safety for officers to conduct security checks and patrol the premises. The fact that these increased patrols catch crime as it happens does not excuse the licensee from properly managing his premises.

In sum, with the exception of the incident described in subcount 10, the facts establish that appellant's premises constitutes a law enforcement problem such that continuance of the license would be contrary to public welfare and morals as set forth in the California Constitution and in section 24200, subdivisions (a) and (b).

II

Appellant repeats, without citation to law, that appellant's "reasonable steps" constitute a defense to a violation of section 24200(a) and (b). (App.Br., at p. 50, citing Bus. & Prof. Code, § 24200(f)(3)(A)-(C).) Appellant then extends this argument and

contends, again without citation to law, that "reasonable steps" also constitute a defense to a disorderly house violation under section 25601. (App.Br., at p. 50; Bus. & Prof. Code, § 25601.)

Appellant argues:

> in order to understand whether the same 11 supporting incidents qualify as substantial evidence [of a disorderly house violation], we must examine each incident; if the incidents arise to the level of constituting sufficient evidence of a violation, then we must look to the "reasonable steps" taken by the licensee that would, in essence, be a defense to each such allegation.

(App.Br., at p. 50.)

Appellant further argues that "[n]ot one incident involved conduct occurring in the bar itself," and that "[a]ll the calls for service . . . involved unsubstantiated complaints," which appellant describes as "parking lot disputes." (*Ibid.*) Appellant claims "good cause" for revocation is therefore lacking. (*Ibid.*)

Section 25601 provides,

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

(Bus. & Prof. Code, § 25601.)

The knowledge of the licensee is not required in a disorderly house case. "Section 25601 does not provide that the condition of the licensed premises denounced by it must be knowingly created." (*Harris*, *supra*, at p. 123, quoting *Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 511 [22 Cal.Rptr. 405].) "The word 'permit' implies no affirmative act. It involves no intent. It is mere passivity, abstaining

from preventative action." (*Harris*, *supra*, at p. 123, citing *Dorris v. McKamy* (1919) 40 Cal.App.267, 274 [180 P. 645].)

Furthermore, the offending circumstances need not be the fault of the licensee:

> As in applying the law of nuisance, fault is not relevant; the power of the Department derives from the police power, to prevent nuisances regardless of anyone's fault in creating them. Thus it is said that the licensee is charged with preventing his premises from becoming a nuisance and it will not avail him to plead that he cannot do so.

(*Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 296 [4 Cal.Rptr.2d 280], citing *Givens v. Dept. of Alcoholic Bev. Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

By extension, a licensee cannot claim he is located in a high-crime area and therefore has no control. As noted in *Yu*,

> The cases reject the argument that the licensee is in a high crime area and can't control the situation, because it proves too much. If location alone prevented revocation, “the license of offending premises in a notorious neighborhood could not be suspended or revoked unless that [sic] Department clearly demonstrated that the establishment was a worse offender than its competitors. Conceivably under such a policy, concerted action on the part of a number of licensees to harbor the drunken patron would render all immune from discipline under the umbrella of the resultant 'area' conditions.”

(*Yu*, *supra*, at p. 295, citing *Harris*, *supra*, at pp. 119-120.)

As discussed in detail in Part I, *supra*, we have reviewed the decision of the Department and determined that ten of the incidents alleged in the accusation are supported by substantial evidence, and therefore support the conclusion that appellant's premises constituted a law enforcement problem. They are not, as appellant suggest, "unsubstantiated complaints"; in many cases, the conduct resulted in an arrest, and in others no arrest was made only because the individuals involved did not wish to pursue charges.

With regard to whether these incidents support count 2, alleging appellant permitted his premises, only one issue gives us pause: whether discipline under section 25601 requires that the conduct in question occur *on the actual premises.* Appellant is correct that none of the cited incidents took place within his bar, although several appear to have begun as disputes inside the premises or as a result of patrons being expelled by security staff.

The statute itself only employs the language "in conjunction with a licensed premises," and does not explicitly require that the conduct at issue occur within the premises itself. (See Bus. & Prof. Code, § 25601.)

Case law does not clearly impose a requirement that the conduct occur inside the licensed premises, although some older cases employ that language. (See, e.g., *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 234 P.2d 969 [violation of predecessor statute required "proof of the commission of illegal or immoral acts on the premises"].)

In *Yu*, much of the general conduct that led to discipline under section 25601 took place outside the licensed premises. As the court observed,

> People tend to congregate in and about the premises parking lot directly in front of the entrance and along both sides of the building. Many of the disturbances reported to the police have occurred in that area, and drug dealers use the parking area for their transactions and often select certain areas to secrete their contraband.

(*Yu*, *supra*, at p. 290.) These incidents required local police to "make the calls, investigations, arrests or patrols" necessary to resolve the situation. (*Ibid.*) The court therefore appears to have considered conduct that took place in the area immediately surrounding the licensed premises and its effect on the community. It is true that each of the specific drug transactions the court described in detail took place *within* the licensed premises. (See *id.* at p. 290; see also *Harris*, *supra*, at pp. 114-118 [intoxicated persons

arrested inside premises, but congregated outside and, according to licensee, fled inside only to avoid police].) However, the court did not condition its holding on that finding. (See generally *Yu*, *supra*; see also *Harris*, *supra*.)

There are strong policy reasons for finding that conduct need not take place within the licensed premises to support discipline under section 25601. First, inserting such a requirement into the language of the statute would exceed this Board's authority. Second, and perhaps more importantly, such an interpretation would allow licensees to simply expel problem customers onto the adjacent streets—either at closing time or with the assistance of security—and thereby avoid discipline. The result is that the premises remain a nuisance to the community, with the added effect that controlling the illegal or immoral behavior becomes the responsibility of local police, rather than the licensee's employees or security staff. Indeed, that appears to have happened here; in many of the incidents described, the conduct at issue occurred immediately outside the licensed premises either at bar closing or following a patron's ejection.

We therefore find that appellant's premises merited discipline as a disorderly house under section 25601.

III

Appellant contends that "excessive police calls" cannot provide the basis for license revocation absent sufficient due process. (App.Br., at p. 51.)

According to appellant, "[u]nder California law, [a] liquor license issued pursuant to [the] Alcoholic Beverage Control Act is a valuable property right, and thus due process requires some form of hearing before liquor licensee[s] may be deprived of their property interest in a liquor license." (*Id.*, at p. 52, citing *Dash, Inc. v. Alcoholic Bev.*

Control Appeals Bd. (1982) 683 F.2d 1229.) Appellant "analogize[s] this 'taking' with other 'takings' by the government, including one's freedom." (App.Br., at pp. 52-53.)

Appellant further contends that article XX, section 22 of the California Constitution—permitting revocation where continuance of the license "would be contrary to public welfare or morals"—is void for vagueness. (App.Br., at p. 52.) Appellant also argues that the term "law enforcement problems" is "vague, ambiguous and arbitrary." (*Id.*, at p. 54.)

Appellant then argues that due process was not satisfied because "[t]hroughout the entire history of this case, not once was the Licensee/Appellant notified that police reports of any and all of the incidents were being collected and preserved." (*Id.*, at p. 53.) Appellant contends that "[f]undamental due process mandates that the licensee's knowledge is essential." (*Id.*, at p. 54.)

In *Dash, Inc.*, cited by appellant, the Ninth Circuit considered whether the administrative hearing process provided to alcoholic beverages licensees satisfied due process, particularly since the California Constitution prohibits administrative agencies from declaring statutes unconstitutional. (*Dash, Inc.*, *supra*, at pp. 1233-1234.) As the court wrote:

> Appellants contend that these two enactments, working in combination, deny licensees due process of law by forcing licensees to submit to revocations by an administrative body which may not act on constitutional defenses, while review of such decisions is limited to a discretionary petition for writ of review before the appellate courts.

(*Id.*, at p. 1234.)

The court rejected this argument. It held that, by virtue of the administrative hearing and discretionary writ procedures,

> appellants' constitutional claims were presented, considered and disposed of. The Department, through administrative hearings, was competent “to examine evidence before (it) in light of constitutional grounds,” [citation] and challenges to the Department's rules on constitutional grounds is not affected by section 3.5. [Citation.] As for constitutional challenges to California statutes, the Department may continue to receive evidence in light of such challenges and the California courts of appeal and California Supreme Court remain competent to review such challenges upon petitions for writ of review despite article III, section 3.5 of the California Constitution. We are therefore persuaded that the process received by these appellants, including the aforesaid avenues for raising and adjudicating constitutional defenses to liquor license revocations and an opportunity for review, satisfied the minimum procedural requirements of the Fourteenth Amendment Due Process Clause.

(*Id.*, at p. 1235.) In a similar ruling, the Ninth Circuit held that California's limitations on administrative discovery also do not offend due process. (*Shaw v. State of Cal. Dept. of Alcoholic Bev. Control* (1986) 788 F.2d 600, 606.)

California courts deviate from the Ninth Circuit's *Dash Inc.* language only insofar as they do *not* consider an alcoholic beverage license to be a property right. In one early case, for example, the court of appeal wrote,

> We are not unmindful of the rule that there is no inherent right in a citizen to sell intoxicants; that a license so to do is not a proprietary right within the meaning of the due process clause of the Constitution [citation]; that such license is not a contract, but a[s] characterized in *State Board of Equalization v. Superior Court* [citation], is “but a permit to do what would otherwise be unlawful”.

(*Irvine v. State Bd. of Equalization* (1940) 40 Cal.App.2d 280, 284 [104 P.2d 8847], citing *State Bd. of Equalization v. Superior Ct.* (1935) 5 Cal.App.2d 374, 377 [42 P.2d 1076].) [holding liquor license nevertheless cannot be revoked without hearing]; see also *Dave's Market, Inc. v. Dept. of Alcoholic Bev. Control* (1963) 222 Cal.App.2d 671, 680 [35 Cal.Rptr. 348 ["The power of the states to control the traffic in liquor under the Twenty-first Amendment is unconditional and includes complete prohibition as well as any restriction falling short of prohibition even if discriminatory in nature and

unconnected to public health, safety or morals."].) In *Yu*, a case that resulted in revocation of a license on the same grounds alleged against appellant, the court of appeal wrote,

> This interpretation of the power of the Department dates back to the very earliest decisions interpreting the Alcoholic Beverage Control Act, all of which held that there is no inherent right to sell intoxicating liquors, that the liquor business is fraught with danger to the community, and may therefore be either entirely prohibited, or permitted under such conditions as are prescribed by the regulatory agency, which has broad power in this respect. [Citations.] The courts viewed a liquor license as different from a license to conduct any other business, and believed that a license to sell liquor "is not a proprietary right within the meaning of the due process clause of the Constitution [Citation], nor is it a contract [Citation]; it is but a permit to do what would otherwise be unlawful, and consequently, a statute authorizing its revocation does not violate the due process clause, and it may be revoked without notice or hearing without invading any constitutional guarantees. [Citations.]"

(*Yu*, *supra*, at p. 296, citing *State Bd. of Equalization*, *supra*, at p. 377.)

Regardless of whether an alcoholic beverage license is, as appellant insists, a property right, California courts have consistently held that the administrative hearing process affords sufficient due process, even where it results in license revocation. (See, e.g., *Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 393–394 [184 P.2d 323] [approving pre-1995 administrative due process; see also *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Quintanar*) (2006) 40 Cal.4th 1, 8-9 [50 Cal.Rptr.3d 585] [explaining how 1995 APA revisions ensured a higher level of due process by, *inter alia*, prohibiting certain ex parte communications].) In sum, the level of due process required for revocation of alcoholic beverage license is considerably lower than that required before the government may deprive an individual of his life or liberty. (See, e.g., *Cornell v. Reilly* (1954) 127 Cal.App.2d 178, 185 [273 P.2d 572] [proceeding

to revoke alcoholic beverage license is a "disciplinary function" and "standards to be applied are not those applicable to criminal trials"].)

Appellant was subject to the very same level of administrative due process approved by the Ninth Circuit in *Dash, Inc.* and by numerous California courts. He cannot complain of a lack of due process.

Moreover, no courts have found that the language of either article XX, section 22, or its companion statute, section 24200, are unconstitutionally vague. Courts have specifically found that section 25601 is not void for vagueness. (See *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 337 [101 Cal.Rptr. 815] ["disorderly house" not "vague or uncertain"]; see generally *Harris*, *supra*; *Yu*, *supra*.) In any event, this Board lacks the authority to overturn a statute on constitutional grounds. (See Cal. Const., art. III, § 3.5.) Appellant's argument on this point lacks merit.

Finally, appellant cites no law requiring law enforcement to notify a licensee that it is retaining records of police activity at the premises. The sole case appellant cites involves a licensee's constructive knowledge, through employees, of sales to minors. (See App.Br., at p. 54, citing *Marcucci v. Bd. of Equalization* (1956) 138 Cal.App.2d 605 [292 P.2d 264].)

In any event, in virtually all of the incidents supporting discipline in this case, appellant's employees were aware of the incident as it was occurring or shortly thereafter.[12] In some of the incidents, appellant's staff were directly involved in the

12. The one exception is subcount 2, in which Officer Smith arrested Bradshaw, who had stumbled out of the premises and—despite Officer Smith's warning—gotten into his car, for driving under the influence. (See Findings of Fact Regarding the 17 Sub-Count Incidents, ¶ 2.)

altercation. (See Findings of Fact Regarding the 17 Sub-Count Incidents, ¶¶ 1, 4, 13.) To claim that appellant was not aware of these incidents is patently absurd; indeed, appellant seems to be objecting instead to the routine law enforcement practice of retaining a record of all incidents.[13]

Ultimately, the administrative hearing process, including the opportunity to cross-examine responding officers, was sufficient to guarantee that appellant was aware of each the specific factual allegations. Appellant's due process claims therefore lack merit.

IV

Appellant contends that a penalty of stayed revocation is an abuse of discretion. (App.Br., at p. 55.) According to appellant,

> Where neither the liquor licensee nor [his] employees 'know or reasonably should know' of specific transgressions . . . and where the licensee has taken all reasonable measures to prevent such transgressions, the license cannot be suspended or revoked on grounds that continued operation would be contrary to public welfare or morals.

(*Ibid.*) Appellant repeats his "reasonable steps" defense under section 24200, subdivision (f). Appellant then lists mitigating measures it has taken, argues that these satisfy the "reasonable steps" defense, and declares that "nothing more is required under [the] law." (*Id.*, at pp. 55-59.)

The Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd*. (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]) However, it will not disturb the Department's penalty order

13. Appellant later states that "management was informed that the Newark Police Chief decided to seek the closure of the bar because one of his officers broke his pinky finger." (App.Br., at p. 56.) This suggests appellant was indeed aware the Newark Police Department was keeping records of incidents at the premises.

absent an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd*. (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

As discussed *supra*, there is no "reasonable steps" defense to section 24200, subdivisions (a) and (b). That defense applies only to subdivision (f). Appellant was not charged under subdivision (f). (See generally exh. 1, Accusation.)

At best, appellant's efforts may be considered in mitigation of the penalty. The ALJ addressed mitigating evidence in his penalty determination:

> 7. However, the Department acknowledged there were some relevant factors in mitigation. The evidence established that [appellant] took steps to help reduce police problems. For example, [appellant]: regularly used a security staff of 4, increasing to 8 or more to help manage larger events; installed a gated smoking area to help prevent patrons from wandering into the off-premises public space or parking lot; welcomed police officers to view, visit, and inspect the premises as needed; used a high-quality surveillance system; closed the business for the day earlier than normal once a large or popular event had occurred, such as a high interest sports game, match, or event; would deny entrance to patrons already in possession of alcoholic beverages; would deny entrance to known motorcycle gang members; and would seek to maintain an open dialogue with police about their issues of concern regarding premises operations.
>
> 8. For several months prior to the hearing, the police have not deemed [appellant]'s premises a law enforcement problem, at least to the extent calls for service there seem more proportionate to the bar's size and popularity. The latter is an indication [appellant] can operate the premises in a fashion that does not cause it to be a disorderly house or a law enforcement problem. Yet, its more recent improved operations do not excuse it from the consequences of its prior poorer performance. The below Order and corresponding penalty resulted from a careful weighing of aggravating and mitigating factors and complies with Rule 144.

(Penalty, ¶¶ 7-8.) In light of this, the ALJ imposed a penalty of revocation conditionally stayed for four years provided no cause for disciplinary action arise during that time, and a concurrent penalty of fifteen days' suspension. The California Constitution grants the Department discretion to suspend or revoke a license if it determines "for good cause that the granting or continuance of such license would be contrary to public welfare or morals," including where, as here, the premises have become a law enforcement problem. (Cal. Const., art. XX, § 22.) For a disorderly house violation under section 25601, the recommended penalty for "Recurring/aggravated offenses" is revocation; for "Occasional or isolated offenses" it is 30 days' suspension. (Code Regs., tit. 4, § 144, Penalty Guidelines.) A penalty of stayed revocation with a 15-day suspension is lenient and clearly takes into account the evidence appellant offered in mitigation. If appellant has indeed improved his practices and instituted new preventative measures, then the stayed revocation will expire and appellant will continue with business. This Board has no grounds to reconsider the penalty imposed.

ORDER

The decision of the Department is affirmed.[14]

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

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14. 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.