

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

AB-9683

File: 47-513735 Reg: 17085503

C&B WILSHIRE, INC.,
dba CF Restaurant
3000 Wilshire Boulevard, #B100
Los Angeles, CA 90010-1136,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: October 4, 2018
Ontario, CA

ISSUED OCTOBER 19, 2018

Appearances: *Appellant.* Joshua Kaplan as counsel for C&B Wilshire, Inc., doing business as CF Restaurant.

Respondent. John P. Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

C&B Wilshire, Inc., doing business as CF Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking its license, with revocation conditionally stayed provided no cause for disciplinary action occur within one year of the effective date of the decision, and concurrently suspending the license for 45 days, because it violated three license conditions, each constituting a violation of Business and Professions Code section 23804.

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

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on February 14, 2012. Appellant executed its petition for conditional license subject to 20 conditions.

The license was subject to prior discipline for condition violations in February 2016² and in July 2016.³

On April 19, 2017, the Department filed a four-count accusation charging appellant violated four subparts of condition 16 on its alcoholic beverage license.

Condition 16 provides, in relevant part:

16. Private/semi-private (Karaoke) rooms (hereinafter "the rooms") constructed on the premises and depicted on the ABC-257 dated June 29, 2011, shall have the following characteristics:

[¶ . . . ¶]

b. No physical obstruction, including but not limited to planters, partitions or items of décor, shall be placed, attached, fastened, or connected in any manner to any section of the door or wall which covers any portion of the glass within the doors or walls.

c. No obstruction, other than clear glass, shall be placed, attached[,] fastened, or connected to either the walls, partitions or ceiling to separate booths/dining areas within the interior space of the licensed premises.

d. Doors or walls to said rooms must allow the activities in the interior of the rooms to be easily discernable at all times.

[¶ . . . ¶]

f. All windows between the rooms and the doors shall be of clear glass and measurements as depicted on the ABC-257 dated June 29, 2011.

(Exh. 8, Petition for Conditional License.)

2. See Reg. No. 16083796. Appellant's license was suspended for 15 days. This accusation was resolved by stipulation and waiver. (Exh. 2.)

3. See Reg. No. 16084497. Appellant's license was suspended for 30 days. This accusation was also resolved by stipulation and waiver. (Exh. 3.)

Count 1 alleged a violation of subpart (b); count 2, a violation of subpart (c); count 3, a violation of subpart (d); and count 4, a violation of subpart (f).

At the administrative hearing held on November 16, 2017, documentary evidence was received and testimony concerning the alleged violations was presented by Agent Jason Groff of the Department of Alcoholic Beverage Control and by Joong Yung Bae, president of appellant C&B Wilshire, Inc.

Testimony established that on January 21, 2017, Agent Groff entered the licensed premises. He contacted Gia Hoon Choi, identified himself as a peace officer, and informed Choi that he would be conducting an inspection of the licensed premises.

During his inspection, Agent Groff noticed that the doors to the karaoke rooms had an opaque panel in the middle of them. There was glass visible above and below the panel in each of the doors. Agent Groff took photos of three of the doors. From his observations, the panel appeared to be metal, although he conceded it might have been wood. The coloring of the panel differed from that of the surrounding door.

Agent Groff approached karaoke room #3. He could not see into the room because of the panel in the door. He entered the room and noticed some patrons with a bottle of Grey Goose vodka and some food on the table in front of them. He took a photo of the table and seized the receipt.

Joong Young Bae testified that a fire destroyed a portion of the interior of the licensed premises. There was also water damage from the sprinkler system. Agent Groff, during a prior visit to the licensed premises, observed damage to the interior of the licensed premises. The employees told him that it was from a sewage problem.

Regardless of the source of the damage, the doors to the karaoke rooms had to be replaced. Bae hired a contractor to rebuild the interior, including replacing the doors. Bae did not design the doors; he left that to the contractor.

Bae made a variety of measurements of the door to karaoke room #3. These measurements were transferred to a photo of the door. This photo indicates that the door measures 36 inches wide by 80 inches tall. The measurement from the left-most edge of the glass within the door to the right-most edge is 27 inches. The measurement from the bottom edge of the lowest portion of the glass to the top of the highest portion is 66 inches.

After the hearing, the Department issued a decision sustaining counts 1, 3, and 4. Count 2, alleging a violation of condition 16, subpart (c), was dismissed.

In light of appellant's two recent prior disciplinary actions for similar violations, the ALJ imposed a penalty of revocation, conditionally stayed provided no cause for discipline occurs within one year of the effective date of the decision, and a concurrent 45-day suspension.

Appellant then filed this appeal contending (1) the evidence was insufficient to sustain the remaining counts; (2) the accusation violates due process by failing to clearly define the factual allegations; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends the record lacks substantial evidence to support the findings, and that "the findings themselves are of no ponderable legal significance, are totally

unreasonable," and are "totally incredibly in light of the actual evidence." (App.Br., at p. 9.)

Appellant argues count 1 was not proven because the panels in the doors did not have any glass beneath them, undermining the finding that the panels covered a portion of the glass in the door. (*Id.*, at pp. 9-10.) Appellant also insists the panels were made of wood, and not metal, as Agent Groff claimed. (*Id.*, at p. 10.) Appellant contends paragraph 7 of the ALJ's Conclusions of Law is not based on evidence in the record and is instead based on "rank speculation." (*Ibid.*)

Appellant argues count 3 is not supported by the evidence because the interior of the room was "easily discernable" to anyone "5 feet tall or more," and that the license conditions do not mandate that the room be visible from every possible vantage point. (App.Br., at p. 11.)

With regard to count 4, appellant contends the license conditions require that the doors be made of glass, not that they be made *only* of glass. (App.Br., at p. 12.) Appellant argues the measurements for the doors on the ABC-257 are facially incorrect, as they would make the door too small to be safe, and therefore cannot support any finding of fact, undermining count 4. (App.Br., at pp. 12-13.)

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

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] 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].) Where there are conflicts in the evidence, the Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences in support of the Department's findings. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

Section 23804 provides,

A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license.

(Bus. & Prof. Code, § 23804.)

Each condition violation in this case emerged from the same set of facts, as observed and described in testimony by Agent Groff. Based on Agent Groff's testimony, Bae's testimony, and the documentary evidence, including photographs of the doors (Exhs. 5-7, A) and the original ABC-257 form (Exh. 4), the ALJ made the following relevant findings of fact:

7. During his inspection, Agent Groff noticed that the doors to the karaoke rooms had an opaque panel in the middle of them. There was glass visible above and below the panel in each of the doors. Agent Groff took photos of three of the doors. (Exhibits 5-7.) From his observations, the panel appeared to be metal, although he conceded that it might have been wood. The coloring of the panel differed from that of the surrounding door.

8. Agent Groff approached karaoke room #3. He could not see into the room because of the panel in the door. He entered the room and noticed some patrons with a bottle of Grey Goose vodka and some food on the table in front of them. He took a photo of the table and seized the receipt.

[¶ . . . ¶]

11. Based on his observations, Agent Groff concluded that the door had one large glass pane, covered in the middle by the panel. Bae testified that the panel was part of the framework of the door, with a glass pane above it and another below it. The glass is clear, not tinted.

(Findings of Fact, ¶¶ 7-8, 11.) Based on these findings, the ALJ reached conclusions of law sustaining counts 1, 3, and 4. (See Conclusions of Law, ¶¶ 5-7.)

Count 1 alleged a violation of condition 16, subpart (b). That condition states, "No physical obstruction, including but not limited to planters, partitions or items of décor, shall be placed, attached, fastened, or connected in any manner to any section of the door or wall which covers any portion of the glass within the doors or walls." (Exh. 8, Petition for Conditional License, at p. 3.) The ALJ reached the following relevant conclusions of law:

7. With respect to count 1, the testimony of Agent Groff and Joong Young Bae are in direct conflict with each other about the paneling in the middle of the door. From Agent Groff's observations, it appeared to be a covering placed over the glass pane. Bae testified that it was part of the door and did not cover any portion of the two panes of glass (one above, one below). The photos are of no use in resolving this conflict, with one exception—the frame surrounding the glass is beveled on all sides. The only area which is not beveled is the top and bottom of the panel. If the panel separated two panes of glass, as Bae testified, then it should have been beveled in a similar manner. The lack of beveling supports Agent Groff's testimony that the panel is a covering installed over the glass. Such a covering violates condition 16b, which prohibits physical obstructions from being "placed, attached, fastened, or connected in any manner to any section of the door."

(Conclusion of Law, ¶ 7.)

Appellant urges this Board to reconsider these findings and instead favor Bae's testimony that the panels did not have glass under them. According to appellant, because there was no glass beneath the panels, the panels did not "cover" any portion of the glass in the door and therefore did not violate subpart (b) of condition 16. (App.Br., at pp. 9-10.) Appellant argues the ALJ "has never demonstrated any expertise in door construction, carpentry nor glazing," and his conclusions therefore lack substantial evidence. (*Id.*, at pp. 10-11.)

This Board, however, lacks the authority to reweigh the evidence or the credibility of witnesses. The ALJ properly evaluated the testimony and the documentary evidence and found that the panel was "a covering installed over the glass." (Conclusions of Law, ¶ 7.) While it is true the ALJ may not be an expert in carpentry or glazing, he is not required to be one, and his lack of professional-level expertise on a subject does not undermine his findings and conclusions. To reverse the ALJ's conclusion on count 1, this Board would have to find error in the ALJ's determination of witness credibility and the inferences he reached based on photographic evidence—something it cannot do.

Appellant also argues the panels were made of wood, and not metal, as Agent Groff testified. (App.Br., at p. 10.) It directs this Board to a portion of the testimony in which Agent Groff conceded he was uncertain of the material. (App.Br., at p. 6, citing RT, at pp. 20-22.)

The material out of which the panels were constructed is irrelevant. The condition prohibits any "physical obstruction" "which covers any portion of the glass." It does not excuse the violation simply because the obstruction was made of wood. (See Part II, *infra.*)

In essence, appellant asks this Board to reweigh the evidence and reach a different conclusion regarding the construction of the door. The ALJ's evidentiary inferences and credibility determinations, however, are entitled to deference. Substantial evidence, both photographic and testimonial, supports the conclusion that appellant violated condition 6, subpart (b). We therefore affirm count 1.

Count 3 alleged a violation of condition 16, subpart (d). That condition states, "Doors or walls to said rooms must allow the activities in the interior of the rooms to be easily discernable at all times." (Exh. 8, Petition for Conditional License, at p. 3.) The ALJ reached the following relevant conclusions of law:

5. With respect to count 3, the evidence established that the panel in the middle of the door obscured the view into the interior of the karaoke rooms. Although the glass above and below the panel allowed a clear view into the top and bottom portion of the room, the panel obstructs the view of the middle of the room. A person standing outside the room would not be able to see the activity taking place at the table without standing next to the door and peering over the top of the panel. The ability to see feet and, if the people inside the room are standing, heads is insufficient. Condition 16d, by its own terms, requires that the construction of the doors "must allow the activities in the interior of the room to be easily discernable at all times." The doors, as constructed, do not do so.

(Conclusions of Law, ¶ 5.)

Appellant counters that "there was no condition violation because the interior of those rooms was easily discernable at all times. One can simply walk up to the door and look through the glass into the room assuming that one is 5 feet tall or more." (App.Br., at p. 11.)

Again, appellant would have this Board reweigh the evidence. A review of the photographic evidence establishes that the ALJ's inferences on count 3 are supported by the evidence. The panel is more than two feet wide and situated in the middle of the door. (Exh. A.) It was reasonable for the ALJ to find that an individual standing outside

the door could only see the feet (or heads, if they were standing) of the patrons inside, and to conclude that this violated the license condition.

Appellant argues the condition requires only that "activities in the interior of the rooms" be "easily discernable at all times," and not that the interior of the rooms be "easily discernable from every single vantage point throughout the licensed premises." (App.Br., at pp. 11-12, emphasis omitted.) Appellant is correct. The language "easily," however, is subject to interpretation, and that interpretation lies in the hands of the ALJ. The ALJ's conclusion that a 24.5" obstruction in the center of the door did not allow for activities inside to be "easily discernable" was reasonable. We therefore affirm count 3.

Count 4 alleged a violation of condition 16, subpart (f). That condition states, "All windows between the rooms and the doors shall be of clear glass and measurements as depicted on the ABC-257 dated June 29, 2011." (Exh. 8, Petition for Conditional License, at p. 3.) The ALJ reached the following relevant conclusions of law:

6. With respect to count 4, the evidence established that the doors do not meet the requirements set forth in condition 16f. It is unusual for a condition to require that doors comply with specific measurements. Condition 16f, however, does just that. By its own terms, this condition requires that the windows in the doors "shall be of clear glass and measurements as depicted in the ABC-257 dated June 29, 2011." The ABC-257 has a series of measurements on it. All of the doors to all of the karaoke rooms bear the measurement "27 x 66." (Exhibit 4.) Logically, these dimensions are too small (2'3" wide by 5'6" tall) to represent the measurements of the entire door. A photo of the door to karaoke room #3 indicates that door measures 36 inches wide by 80 inches tall (3 feet wide by 6 feet, 8 inches tall). Focusing on the measurements relating to the glass, however, reveals that the measurement from the left-most edge of the glass within the door to the right-most edge is 27 inches, while the measurement from the bottom edge of the lowest portion of the glass to the top of the highest portion is 66 inches. (Exhibit E.) This matches the dimensions on the ABC-257 exactly.

The problem, once again, is the panel in the middle of the door. Condition 16f requires that the entire 27" by 66" portion of the door "shall be of clear

glass." The doors in this case are not—they have a panel in the middle of them and, therefore, violate this condition.

(Conclusions of Law, ¶ 6.)

Appellant relies on the measurements in the ABC-257 to construct a tortured reading of the condition. By appellant's logic, the condition requires that the door be made of glass, and further, that the glass door conform to the measurements, 27 inches by 66 inches, listed on the ABC-257. (App.Br., at p. 12.) Appellant then accurately points out that 27 inches by 66 inches is too small to "realistically represent the measurement of the entire door." (*Id.* at p. 13.) Appellant's logic then tracks the ALJ's in concluding that these too-small measurements must indicate that the door need not be constructed *entirely* of glass. (App.Br., at p. 12.) At that point, however, appellant's interpretation of the condition's language diverges from the ALJ's. According to appellant, because the condition does not require the *entire* door to be made of clear glass, the large opaque panel in the center of the door did not violate the condition. (*Ibid.*)

There are several problems with this reasoning. First, it renders the condition toothless; under appellant's preferred interpretation, as long as *some portion* of the door, however insignificant, is constructed of clear glass, appellant is in compliance. In light of the overall aim of condition 16—to ensure visibility into the karaoke rooms—that interpretation is untenable. Second, it ignores the language of the condition referring to measurements on the ABC-257 (exh. 4), as well as the measurements themselves (exh. A). It was reasonable for the ALJ to interpret this language, and the actual measurements, to mean that the clear glass portion of the door must conform to those size requirements.

Which leads to the final, most significant flaw in appellant's interpretation: this Board cannot overturn the inferences and interpretations reached by the ALJ simply because appellant wishes to substitute its own more favorable conclusions. The ALJ's interpretation of condition 16, subpart (f), was reasonable, and we therefore affirm count 4.

II

Appellant contends the accusation in this case failed to accurately inform appellant of the substance of the charges against it. (App.Br., at p. 14.) In particular, appellant points out that all counts of the accusation allege appellant attached "metal plates" to the "windows" of the karaoke rooms. (*Ibid.*) Appellant argues the Department "utterly failed to prove that any 'metal plates' were utilized in any fashion and utterly failed to prove that any metal plates were attached to any windows." (*Ibid.*) Appellant contends the decision sustaining three of the counts despite this "terminal failure in proof" was a prejudicial violation of due process. (*Ibid.*)

Section 11503 of the Government Code provides:

The accusation . . . shall be a written statement of charges that shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, *to the end that the respondent will be able to prepare his or her defense*. It shall specify the statutes and rules that the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of those statutes and rules.

(Gov. Code, § 11503, emphasis added.) As the courts have observed,

The principal objective of [section 11503] is to safeguard the licensee against an accusation which does not sufficiently enable him to prepare his defense. (*Rolfe v. Munro*, 165 Cal.App.2d 726, 730, 332 P.2d 404; *Burako v. Munro*, 174 Cal.App.2d 688, 691, 345 P.2d 124.) Adherence to technical rules of pleading is not required. (*Wright v. Munro*, 144 Cal.App.2d 843, 848, 301 P.2d 997, 1000.) As stated by Mr. Justice Peters, in the case last cited: 'In these administrative proceedings the

courts are more interested with fair notice to the accused than they are to adherence to the technical rules of pleading."

(*Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 306-307 [33 Cal.Rptr. 305].)

In *Stoumen*, the court found that because the licensee proceeded with his defense without protest, he could not complain that he was not "fully and fairly apprised of the charges with sufficient certainty to prepare his defense thereto." (*Id.*, at p. 307.) Similarly, in *Rolfe v. Munro*, cited by appellant, the licensee objected that the accusation "did not state the acts or omissions upon which the respondent department could proceed," and instead merely "paraphrase[d] the language of the statutes and rules alleged to have been violated." (*Rolfe v. Munro* (1958) 165 Cal.App.2d 726, 729-730 [332 P.2d 404].) The court found that while the statute did require a clear articulation of the acts or omissions with which the licensee was charged, the dispositive language was the clause "to the end that the respondent will be able to prepare his defense." (*Id.*, at p. 730, citing previous version of Gov. Code, § 11503.) The court then found that no relief was merited, as the licensee had in fact been able to prepare his defense:

The first consideration under [section 11503] should be whether or not the respondent was in fact able to prepare his defense after reading the accusation. In this case there are two indications that such was the case. First of all, if the respondent had not been able to prepare his defense because of some alleged insufficiency of the accusation, then it would seem reasonable that at or before the time of the hearing he would make his lack of preparation known to the hearing officer. This was not done. The second and conclusive consideration as to whether or not the respondent was able to prepare his defense is found in the complete transcript of the proceedings before the hearing officer. Nowhere in that transcript does there appear any surprise as to the any of the charges or evidence produced against the licensees.

(*Rolfe, supra*, at pp. 730-731.)

In the case at hand, there is nothing in the record to suggest the accusation was insufficient to allow appellant to prepare its defense. Counsel for appellant made no

objection to the form or content of the accusation either before the administrative hearing or at its commencement. (See generally exhs. and RT.) In fact, counsel prepared a photograph of the karaoke room door at issue, complete with measurements. (See Exh. A; RT at pp. 24-25.) Appellant's counsel proceeded to cross-examine Agent Groff in detail about the construction of the door. (RT at pp. 1-26.) Counsel also called appellant's president as a witness and questioned him regarding the size of the panel on the door, its material, and who constructed it. (RT at pp. 30-41.) There can be no doubt whatsoever that appellant knew exactly which panels on which doors were at issue in the accusation. In sum, the record indicates appellant was in no way prevented from preparing and presenting a thorough defense. Under the reasoning in *Rolfe*, no relief is merited.

Moreover, appellant makes much of the material out of which the offending panel was constructed. (See App.Br., at pp. 4-7, 13-14.) The material, however, is not an element of a violation in this case; the conditions at issue do not allow obstructions simply because they are made of wood and not metal. (See exh. 8, Petition for Conditional License.) In other words, the Department was not required to prove the panels were made of metal, or of any other material for that matter. Indeed, the Department could have omitted the alleged material from the accusation entirely.

Finally, because the panel material was not a necessary element of the Department's burden of proof, the ALJ did not make a clear finding on the question. Instead, he wrote, "From [Agent Groff's] observations, the panel appeared to be metal, although he conceded that it might have been wood." (Findings of Fact, ¶ 7.) Appellant would have this Board act as factfinder, determine the panel was made of wood, and

then overturn the entire disciplinary action based on that single irrelevant fact. We decline to do so, as it would far exceed the Board's authority.

III

Appellant contends the penalty is excessive. (App.Br., at pp. 14-15.) Appellant claims a penalty of stayed revocation plus a concurrent 45-day suspension offends due process and constitutes cruel and unusual punishment in violation of the California constitution. (*Id.*, at p. 15.) Appellant argues that "a long suspension is a punishment indeed out of all proportion to the offense and is extraordinarily disproportionate thus constituting cruel or unusual punishment." (*Ibid.*)

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 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].)

Rule 144 provides penalty guidelines for Department discipline. That rule provides, in relevant part:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act [citation] and the Administrative Procedures Act [citation], the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by

reference. Deviation from these guidelines is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such a deviation—such as where facts in aggravation or mitigation exist.

(Code Regs., tit. 4, § 144, emphasis added.) The referenced penalty guidelines in turn state:

POLICY STATEMENT

It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.

PENALTY POLICY GUIDELINES

The California Constitution authorizes the Department, in its discretion, to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; *nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein*, in the proper exercise of the Department's discretion.

Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

(Code Regs., tit. 4, § 144, Penalty Guidelines, emphasis added.) Like the rule itself, the plain language of the penalty guidelines unequivocally entrusts the penalty to the Department's discretion. Moreover, the guidelines specifically permit the Department to impose a greater penalty if it finds such a penalty is warranted in light of aggravating circumstances. The guidelines go on to state that "[a]ggravating factors may

include . . . [p]rior disciplinary history" or "continuing course or pattern of conduct."

(Ibid.)

The penalty schedule incorporated by reference in rule 144 provides only a single recommended penalty for a violation of a license condition: a "15 day suspension with 5 days stayed for one year." (Code Regs., tit. 4, § 144, Penalty Schedule.) It does not list escalating penalties for subsequent similar violations. *(Ibid.)* This is not unusual, however; the majority of violations listed in the penalty schedule do not include recommended penalties for subsequent similar violations. (See generally *ibid.*)

This does not indicate, however, that escalating penalties are improper, as rule 144 itself authorizes "[h]igher or lower penalties . . . based on the facts of individual cases where generally supported by aggravating or mitigating circumstances." (Code Regs., tit. 4, § 144.) This flexibility allows the ALJ to adapt the penalty where violations are repetitive or egregious. Indeed, escalating penalties based on aggravating circumstances—including repeated violations—are a necessary deterrent.

In this case, it is undisputed that appellant committed two similar violations within the previous 17 months, making it appellant's third offense in an unusually short period of time. The ALJ explained his reasons for imposing an aggravated penalty:

The Department requested that the Respondent's license be revoked, with the revocation stayed for one year, and that a 60-day suspension be imposed. In the Department's view, an aggravated penalty is necessary since this is the third case in which the Respondent violated the conditions attached to its license and the second time it has violated the provisions of condition 16. The Respondent argued that, if the accusation were sustained, the penalty recommended by the Department was excessive.

An aggravated penalty is clearly warranted—this is the third time in 17 months that the Respondent has been caught violating the conditions attached to its license. The first time its license was suspended for 15 days; the second time it was suspended for 30 days. A significant penalty is warranted for yet another violation, particularly one so close in time to

the prior violations. The Respondent is responsible for ensuring compliance with all of the conditions attached to its license, even where, as here, it delegated that responsibility to an outside contractor. Its failure to do so indicates an ongoing problem. The penalty recommended herein complies with rule 144.^[fn.]

(Department Decision, at p. 5, Penalty.) The ALJ then assigned a penalty of revocation, conditionally stayed for one year, and a concurrent 45-day suspension.

Appellant's license was suspended for 15 days following its first condition violation in August 2015, and for 30 days following its second condition violation in March 2016.⁴ A 45-day suspension for the third violation in January 2017 seems a logical and reasonable escalation of the penalty for repeated violations.

Moreover, the stayed revocation is necessary to ensure compliance. The revocation will not go into effect unless cause for discipline arises within a year of the effective date of the Department decision. Appellant has a pattern of violating license conditions; the stayed revocation provides a strong incentive for the appellant to immediately alter its course of conduct. We find the penalty is reasonable and does not constitute an abuse of the Department's discretion.

ORDER

The decision of the Department is affirmed.⁵

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

4. Appellant stipulated to both penalties and thereby waived any right to object to them.

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

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

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST:

C & B WILSHIRE INC
C F RESTAURANT
3000 WILSHIRE BLVD
#B100
LOS ANGELES, CA 90010-1136

ON-SALE GENERAL EATING PLACE - LICENSE

CERRITOS ENFORCEMENT OFFICE
(CEO) DISTRICT OFFICE

File: 47-513735

Reg: 17085503

AB: 9683

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

CERTIFICATION

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

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

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


Office of Legal Services

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ABC APPEALS BOARD

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

**IN THE MATTER OF THE
ACCUSATION AGAINST:**

C & B WILSHIRE INC
C F RESTAURANT
3000 WILSHIRE BLVD, #B100
LOS ANGELES, CA 90010-1136

ON-SALE GENERAL EATING PLACE - LICENSE

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

CERRITOS DISTRICT OFFICE

File: 47-513735

Reg: 17085503

CERTIFICATE OF DECISION

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

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

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after March 7, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: January 25, 2018



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

C & B Wilshire Inc.	}	File: 47-513735
dba C F Restaurant	}	
3000 Wilshire Blvd, #B100	}	Reg.: 17085503
Los Angeles, California 90010-1136	}	
	}	License Type: 47
Respondent	}	
	}	Word Count: 8,500
	}	
	}	Reporter:
	}	Lisa Gutierrez
	}	California Reporting
	}	
<u>On-Sale General Eating Place License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on November 16, 2017.

John P. Newton, Attorney, represented the Department of Alcoholic Beverage Control.

Joshua Kaplan, attorney-at-law, represented respondent C & B Wilshire Inc. Joong Young Bae, the Respondent's president, was present.

The Department seeks to discipline the Respondent's license on the grounds that, on January 21, 2017, the Respondent failed to comply with four conditions attached to its license in violation of Business and Professions Code section 23804.¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on November 16, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on April 19, 2017.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on February 14, 2012 (the Licensed Premises).

3. The Respondent's license has been the subject of the following discipline:

Date Filed	Reg. No.	Violation	Penalty
2/12/2016	16083796	BP §§ 25632 & 23804	15-day susp.
7/20/2016	16084497	BP § 23804	30-day susp.

The foregoing disciplinary matters are final. (Exhibits 2-3.)

4. On November 9, 2011, the Respondent executed a petition for conditional license containing 20 conditions. (Exhibit 8.) Condition 16 imposed a variety of requirements related to karaoke rooms. Of the 10 subparts of this condition, four are at issue here:

“16. Private/semi-private (Karaoke) rooms (hereinafter “the rooms”) constructed on the premises and depicted on the ABC-257 dated June 29, 2011, shall have the following characteristics:

- ...
- b. No physical obstruction, including but not limited to planters, partitions or items of decor, shall be placed, attached, fastened, or connected in any manner to any section of the door or wall which covers any portion of the glass within the doors or walls.
 - c. No obstruction, other than clear glass, shall be placed, attached fastened, or connected to either the walls, partitions or ceiling to separate booths/dining areas within the interior space of the licensed premises.
 - d. Doors or walls to said rooms must allow the activities in the interior of the rooms to be easily discernable at all times.
- ...
- f. All windows between the rooms and the doors shall be of clear glass and measurements as depicted on the ABC-257 dated June 29, 2011.
- ..."

5. The ABC-257 dated June 29, 2011 has a series of measurements on it. All of the doors to all of the karaoke rooms bear the measurement “27 x 66.” (Exhibit 4.)

6. On January 21, 2017, Agent Jason Groff entered the Licensed Premises. He contacted Gia Hoon Choi, identified himself as a peace officer, and informed Choi that he would be conducting an inspection of the Licensed Premises.

7. During his inspection, Agent Groff noticed that the doors to the karaoke rooms had an opaque panel in the middle of them. There was glass visible above and below the panel in each of the doors. Agent Groff took photos of three of the doors. (Exhibits 5-7.) From his observations, the panel appeared to be metal, although he conceded that it might have been wood. The coloring of the panel differed from that of the surrounding door.

8. Agent Groff approached karaoke room #3. He could not see into the room because of the panel in the door. He entered the room and noticed some patrons with a bottle of Grey Goose vodka and some food on the table in front of them. He took a photo of the table and seized the receipt. (Exhibits 9-10)

9. Joong Young Bae, president of the Respondent, testified that a fire destroyed a portion of the interior of the Licensed Premises. There was also water damage from the sprinkler system. Agent Groff, during a prior visit to the Licensed Premises, observed damage to the interior of the Licensed Premises. The employees told him that it was from a sewage problem.

10. Regardless of the source of the damage, the doors to the karaoke rooms had to be replaced. Bae hired a contractor to rebuild the interior, including replacing the doors. Bae did not design the doors, he left that to the contractor.

11. Based on his observations, Agent Groff concluded that the door had one large glass pane, covered in the middle by the panel. Bae testified that the panel was part of the framework of the door, with a glass pane above it and another below it. The glass is clear, not tinted.

12. Bae made a variety of measurements of the door to karaoke room #3. These measurements were transferred to a photo of the door. (Exhibit A.) This photo indicates that the door measures 36 inches wide by 80 inches tall. The measurement from the left-most edge of the glass within the door to the right-most edge is 27 inches. The measurement from the bottom edge of the lowest portion of the glass to the top of the highest portion is 66 inches.

13. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

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

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

3. Section 23804 provides that the violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on January 21, 2017, the doors to the karaoke rooms inside the Licensed Premises did not comply with conditions 16b, 16d, and 16f as alleged in counts 1, 3, and 4 in violation of section 23804 (Findings of Fact ¶¶ xx.)

5. With respect to count 3, the evidence established that the panel in the middle of the door obscured the view into the interior of the karaoke rooms. Although the glass above and below the panel allowed a clear view into the top and bottom portion of the room, the panel obstructs the view of the middle of the room. A person standing outside the room would not be able to see the activity taking place at the table without standing next to the door and peering over the top of the panel. The ability to see feet and, if the people inside the room are standing, heads is insufficient. Condition 16d, by its own terms, requires that the construction of the doors "must allow the activities in the interior of the room to be easily discernable at all times." The doors, as constructed, do not do so.

6. With respect to count 4, the evidence established that the doors do not meet the requirements set forth in condition 16f. It is unusual for a condition to require that doors comply with specific measurements. Condition 16f, however, does just that. By its own terms, this condition requires that the windows in the doors "shall be of clear glass and measurements as depicted in the ABC-257 dated June 29, 2011." The ABC-257 has a series of measurements on it. All of the doors to all of the karaoke rooms bear the measurement "27 x 66." (Exhibit 4.) Logically, these dimensions are too small (2'3" wide by 5'6" tall) to represent the measurement of the entire door. A photo of the door to karaoke room #3 indicates that door measures 36 inches wide by 80 inches tall (3 feet wide by 6 feet, 8 inches tall). Focusing on the measurements relating to the glass, however, reveals that the measurement from the left-most edge of the glass within the door to the right-most edge is 27 inches, while the measurement from the bottom edge of the lowest portion of the glass to the top of the highest portion is 66 inches. (Exhibit E.) This matches the dimensions on the ABC-257 exactly.

The problem, once again, is the panel in the middle of the door. Condition 16f requires that the entire 27" by 66" portion of the door "shall be of clear glass." The doors in this

case are not—they have a panel in the middle of them and, therefore, violate this condition.

7. With respect to count 1, the testimony of Agent Jason Groff and Joong Young Bae are in direct conflict with each other about the paneling in the middle of the door. From Agent Groff's observations, it appeared to be a covering placed over the glass pane. Bae testified that it was part of the door and did not cover any portion of the two panes of glass (one above, one below). The photos are of no use in resolving this conflict, with one exception—the frame surrounding the glass is beveled on all sides. The only area which is not beveled is the top and bottom of the panel. If the panel separated two panes of glass, as Bae testified, then it should have been beveled in a similar manner. The lack of beveling supports Agent Groff's testimony that the panel is a covering installed over the glass. Such a covering violates condition #16b, which prohibits physical obstructions from being “placed, attached, fastened, or connected in any manner to any section of the door.”

8. Cause for suspension or revocation of the Respondent's license was **not** established for the violation of section 23804 alleged in count 2. (Findings of Fact ¶¶ xx.)

9. Count 2 alleges a violation of condition 16c. That condition, by its own terms, applies to “walls, partitions[,] or ceilings.” Given the great care with which the Department has drafted the petition for conditional license, the exclusion of doors from this condition is significant. The only evidence presented relates to the doors—not to the walls, the partitions, or the ceilings. Accordingly, although the paneling violates other conditions, it does not violate condition 16c.

PENALTY

The Department requested that the Respondent's license be revoked, with the revocation stayed for one year, and that a 60-day suspension be imposed. In the Department's view, an aggravated penalty is necessary since this is the third case in which the Respondent violated the conditions attached to its license and the second time it has violated the provisions of condition 16. The Respondent argued that, if the accusation were sustained, the penalty recommended by the Department was excessive.

An aggravated penalty is clearly warranted—this is the third time in 17 months that the Respondent has been caught violating the conditions attached to its license. The first time its license was suspended for 15 days; the second time it was suspended for 30 days. A significant penalty is warranted for yet another violation, particularly one so close in time to the prior violations. The Respondent is responsible for ensuring compliance with all of the conditions attached to its license, even where, as here, it delegated that

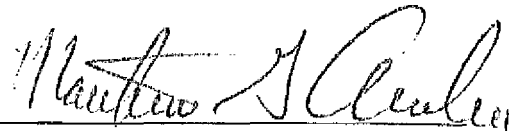
responsibility to an outside contractor. Its failure to do so indicates an ongoing problem. The penalty recommended herein complies with rule 144.²

ORDER

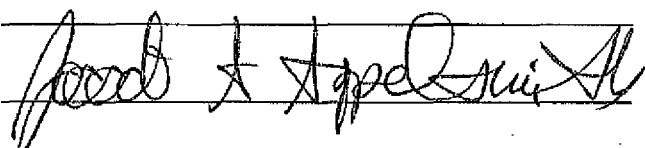
Counts 1, 3, and 4 are sustained. In light of these violations, the Respondent's on-sale general eating place license is hereby revoked, with the revocation stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his or her discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent. In addition, the Respondent's license shall be suspended for a period of 45 days.

Count 2 is dismissed.

Dated: December 1, 2017



Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: _____

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.