ISSUED MARCH 26, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MARIA DE JESUS CHAVEZ and URIEL CHAVEZ dba La Plaza Night Club 22164 Mission Boulevard Hayward, California 94541, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6788 File: 48-280783 Reg: 95033261 Administrative Law Judge at the Dept. Hearing: Jeevan Ahuja Date and Place of the Appeals Board Hearing: March 4, 1998 San Francisco, CA

Maria de Jesus Chavez and Uriel Chavez, doing business as La Plaza Night Club (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered appellants' on-sale general public premises license revoked, with revocation stayed for 180 days on condition that appellants transfer the license to a premises and a person or persons acceptable to the Department, the license to be suspended for 30 days, followed by an indefinite suspension until the license is transferred, for having permitted the premises to be operated as a

[1] The decision of the Department, dated December 12, 1996, is set forth in the appendix.

disorderly house, and in such manner as to constitute a law enforcement problem, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25601 and 24200, subdivision (a).

Appearances on appeal include appellants Maria de Jesus Chavez and Uriel Chavez, appearing through their counsel, Jesse J. Garcia and Thomas W. McDonnell, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's license (a re-issue of an existing license with conditions added pursuant to a stipulation and waiver) was issued on April 6, 1994.[2] Thereafter, the Department instituted an accusation, subsequently amended, alleging, in two counts, that appellants permitted the premises to be operated as a disorderly house and in a manner which created a law enforcement problem. Count 1 of the amended accusation, the disorderly house charge, contained 28 subcounts alleging

[2] The original license was held by Ruben Chavez, Uriel Chavez's brother. Prior to the issuance to appellants in 1993, it had been the subject of a stayed revocation to be in effect until February 20, 1995, the result of a decision entered pursuant to stipulation and waiver which determined that the then licensee had violated or permitted the violation of numerous provisions of the Business and Professions Code, Penal Code, and Health and Safety Code. (See exhibit 21.) The petition for conditional license submitted by appellants recited that the premises were located in an area which has permitted a significant law enforcement problem. (See Exhibit 2.)

incidents occurring between February 1994, and July 1995. Count 2, which alleged that the premises created a law enforcement problem, listed 75 instances of police activity allegedly necessitated by appellants' operation. In addition, count 2 incorporated by reference the 28 subcounts of count 1.[3]

An administrative hearing was held on a total of 12 days over an 11-month span, during which time extensive oral and documentary evidence was received, generating a total of 1,742 transcript pages of testimony and colloquy,[4] and 41 documentary exhibits containing a total of 342 pages. At that hearing, testimony was presented concerning numerous incidents which took place in or near

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[3] The original accusation contained 19 separate allegations in count 1 and 17 police contacts in count 2.

[4] Several different court reporting firms were used in the course of the extended hearings in this matter. As a result, there is not a uniform system of page numbering, and the volumes of transcript are not numbered. For reference purposes, we have cited to volume numbers which correspond to the hearing dates as follows:

August 29, 1995	Volume I	June 11, 1996	Volume VII
January 17, 1996	Volume II	June 12, 1996	Volume VIII
January 18, 1996	Volume III	June 20, 1996	Volume IX
April 9, 1996	Volume IV	July 8, 1996	Volume X
April 10, 1996	Volume V	July 9, 1996	Volume XI
April 11, 1996	Volume VI	July 16, 1996	Volume XII

appellants' premises over a 17-month period commencing in February 1994, as well as numerous police contacts, some of which resulted in arrests. The Department presented 26 witnesses in support of its charges; appellants presented 10 witnesses in their defense. Appellants raised numerous evidentiary objections, most of which have been renewed on this appeal.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which determined that appellants had permitted the premises to be operated as a disorderly house and in a manner which created a law enforcement problem. The ALJ found that the Department had by a preponderance of the evidence established 18 of the 28 subcounts in count 1 (disorderly house, and, as realleged in count 2, law enforcement problem), and that 64 of the 73 police responses set forth in count 2 (law enforcement problem) were caused by appellants' operation.[5] He further found that the evidence showed numerous problems involving nearby residents' complaints about loud music; fights between persons who were intoxicated; intoxicated persons on the premises unable to care for their own safety or the safety of others; loitering about the premises; and harassment of patrons of a neighboring establishment. The Department adopted

[5] Subcounts 3, 29, 30, 33, 34,38, 40, 55, 57, and 64 of count 2 were stricken by the Department. Of the remaining 65 subcounts of count 2, only subcount 26 was found not to have been established at the administrative hearing.

the proposed decision in its entirety, and appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise six broad issues: (1) they were denied due process of law because the Department and the Hayward Police Department acted in an arbitrary and capricious manner by unlawfully stacking complaints against appellants with the intent of revoking appellants' license; (2) the attempts by the Department and the Hayward Police Department to revoke appellants' license constitute discriminatory enforcement, in violation of the 14th Amendment to the United States Constitution; (3) Count 2 of the accusation fails to comply with the guidelines contained in Government Code §11503; (4) appellants were denied due process by the Department's failure to provide them timely and adequate discovery; (5) the findings are not supported by substantial evidence; and (6) the decision of the ALJ is not supported by the findings.[6]

We think that, before addressing the numerous issues raised by appellants, it is useful to offer a brief overview of the scope and content of the Department's decision.

Count 1 of the amended accusation set forth 28 subcounts charging various sorts of wrongdoing in support of the disorderly house claim. Count 2

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[6] Appellants raise a large number of subsidiary issues in conjunction with the contentions listed in the text, and have discussed them at length in their 65-page opening brief and 23-page reply. To the extent necessary, these subsidiary issues will be addressed in connection with the principal issue to which they relate.

realleged the subcounts from count 1, and, in addition, alleged 75 instances of police activity involving the licensed premises during the period of time covered by the amended accusation, in support of the law enforcement problem allegation.

The original accusation alleged nineteen subcounts of disorderly house activity in count 1, and seventeen instances of law enforcement activity in count 2. The amended accusation added nine additional subcounts to count 1, only one of which involved activity post-dating the filing of the original accusation. Only one of these additional nine subcounts was sustained by the ALJ, that involving events which occurred prior to the filing of the original accusation.

The amended accusation added 56 additional allegations of necessary law enforcement activity involving the licensed premises, 11 of which involved events which occurred after the original accusation was filed. Ten of the police activity entries in count 2 were stricken by the Department. Of the remaining 63 subcounts, the ALJ found all but one (subcount 26) to have been established by the evidence. Thirteen of these subcounts involved arrests for public intoxication (Penal Code §647, subdivision (f)), and 23 involved peace disturbances (Penal Code §415). The remainder consisted of bar checks, Vehicle Code violations, and miscellaneous entries.

Eighteen subcounts of count 1 were found by the Department to have been established. Recurring violations charged in count 1 involved music disturbances and the presence of obviously intoxicated patrons. Five subcounts charged music

disturbance violations, two of which involved a live band. All were found to have been established by the evidence. Thirteen subcounts charged violations involving obviously intoxicated patrons; the ALJ found four of the subcounts established by the evidence. The other subcounts which were sustained involved such things as refilling a bottle of distilled spirits (subcount 4); disturbance caused by patron or patrons (subcounts 6 and 21); patron battery on patron (subcount 8); patron exiting with beer (subcount 10); minor permitted to enter and remain (subcount 7); security guard assault on patron (subcount 14); and patron under influence of controlled substance (subcount 19).

DISCUSSION

I

Appellants contend they were denied due process and equal protection, in violation of their constitutional rights, because the Department and the Hayward Police Department acted in an arbitrary and capricious manner by accumulating numerous allegations over an extended period of time prior to filing an accusation.

Appellants contend that, in so doing, the Hayward Police Department arbitrarily departed from its operating guidelines governing the procedures for its Problem Oriented Policing ("POP") program. Appellants contend that, instead of working with appellants to help them take corrective measures, the police instead solicited the assistance of neighboring residents and businesses in reporting problems associated with appellants' business, with the ultimate objective of

revocation of appellants' license. The Department, appellants allege, assisted the police in their effort by withholding any enforcement action until the police had accumulated enough violations to support a disorderly house charge, all the while failing to inform appellants they had been targeted, and failing to assist appellants in resolving the problem.

A. Alleged stacking of violations.

Appellants cite Walsh v. Kirby (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1], where the California Supreme Court held that the Department of Alcoholic Beverage Control abused its discretion by accumulating evidence of repeated violations of then-existing fair trade laws which banned sales below specified minimum retail prices, with the intent of revoking the seller's license. The statute there involved expressly provided for a progression in the level of the fine which could be assessed for the first and succeeding violations, and did not provide for license suspension or revocation in the case of single or repeated violations. The vice seen by the court was the accumulation of financial penalties to the point where a licensee unable to pay them would be forced into bankruptcy, the equivalent of having his license revoked, coupled with the failure to give the licensee a chance to mend the error of his ways before that occurred. The violations occurred when Department investigators made purchases of wine at prices below what at that time were mandatory minimum prices.

In past cases the Appeals Board has declined to overturn Department disciplinary actions where licensees have claimed violations were unfairly accumulated for the purpose of imposing harsher disciplinary measures, distinguishing Walsh on the basis it involved a statute where additional violations increased monetary penalties which could be assessed. (See, e.g., Felcyn and Suarez (1996) AB-6560.) Walsh is also distinguishable on the ground the Department was aware of, and involved in, the violations as they occurred, akin to a sting operation, rather than merely a passive collector of violations occurring independently of Department involvement.

The Board has stated that the process whereby the Department investigates possible unlawful conduct is within the exercise of its discretion to suspend or revoke an alcoholic beverage license if it shall determine for good cause that the continuation of such license would be contrary to public welfare and morals. That process should not be disturbed except upon a showing of illegal, arbitrary or abusive conduct on the part of the Department. (Felcyn and Suarez, supra.)

The extent to which Department investigators should have contacted appellants concerning the investigation is a matter of discretion within the police powers granted the Department. In the absence of clearly unreasonable delay, it is not for the Appeals Board to mandate at what point in an investigation the Department must inform a licensee that the licensed premises are under scrutiny. A continuing investigation may very well be needed to determine the existence of

violations or the degree to which a law is being, or has been, violated. This principle is particularly applicable when the subject premises are suspected of operating as a disorderly house, and where violations of similar nature occur on a repetitive or habitual basis. Where the licensee is aware of the problem-causing activity, as in the instant case, he is not in a strong position to complain.

Indeed, an investigation of a possible disorderly house violation, as explained in the testimony of Department investigator Robert Farrar [XII RT 84], necessarily must continue over a period of time, since it is the habitual character of the conduct which implicates the disorderly house statute. (See Los Robles Motor Lodge, Inc. v. Department of Alcoholic Beverage Control (1966) 246 Cal.App.2d 96 [54 Cal.Rptr. 547.) Moreover, the kinds of conduct which give rise to a disorderly house violation are usually of the sort of which the licensee must be aware of their occurrence - excessive noise, obviously intoxicated patrons, fights and disturbances, and the like.

B. The POP program.

Appellant contends that the Hayward police department targeted it for closure through the misuse of a law enforcement mechanism referred to as "problem oriented policing," or by the acronym "POP." Their attack is focused for the most part on the activities of officer Fraser Ritchie, who was the officer overseeing the program as it related to appellants. Appellant contends that, although the POP program contemplated the utilization of certain procedural steps,

the police failed to take those steps. Appellants characterize their alleged failure to do so as arbitrary and capricious, and allege that as a result they were prevented from taking corrective action in a timely fashion.

Officer Ritchie described the POP program as one which contemplated that the police would work with the citizens of the community affected by a problem warranting police attention. The tactical component of the program involved the use of a model bearing the acronym "SARA," denoting four stages of handling: scanning, analysis, response, and assessment. Ritchie explained what each of the steps entailed.

Scanning, in this case, was the receipt of complaints registered at a community meeting held in February of 1994, attended by nearby residents, merchants, police, and Department representatives. The analysis phase consisted of the compilation of the summaries of the specific incidents Ritchie and other fellow officers reported. The response phase included his contacting the owner of La Plaza in an attempt to resolve the problems, as well as alerting the Department of Alcoholic Beverage Control. The assessment phase, not explained by Ritchie, would appear, as the term suggests, to involve an appraisal of the success of the particular project in resolving the problems for which it was instituted.

We think appellant has exaggerated the degree of its unawareness of the fact it was attracting the attention of law enforcement. Specifically, police officer Ritchie testified that in a meeting on March 11, 1994, with Uriel Chavez, the new

owner[7] of La Plaza, he advised Chavez of the community meeting which had taken place a month earlier, and of the concerns expressed about incidents occurring at La Plaza [VII RT 103-104]. According to Ritchie, Chavez was warned at the outset that he would have to take steps toward solving the problems associated with La Plaza's operation, or risk the loss of his license [XII RT 115-116]. Ritchie also testified that he suggested measures Chavez should take to deal with problems,[8] and that he discussed his concerns about La Plaza's noise problems with Chavez on at least four or five occasions [VII RT 167-168], without visible results. Other than adding some insulation to reduce noise levels, Ritchie testified, Chavez did not show him any steps he had taken to address other problems. Ritchie's frustration is seen in his testimony:

> "Each time I contacted him I explained to him, this is the problem that was from the onset. And like you [apparently referring to counsel], asked

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[7] Although a new owner, Chavez is in no position to disclaim awareness of existing and potential problems with the police and the Department. He was the manager of La Plaza when it was owned by his brother [X RT 113-114], during which time the licensee was charged with violating or having permitted the violation of the disorderly house and numerous other statutes, and an order entered pursuant to stipulation imposing a stayed revocation, a suspension, and a lengthy probationary period.

[8] Officer Ritchie cited an example where he spoke to Chavez regarding a group of people gathered along the sidewalk, telling him: "See, this is part of the problem. These people need to get in the bar or leave." Ritchie said he never saw Chavez do anything to address this problem. (See also, XII RT 152-153 for other examples of advice Ritchie gave to Chavez concerning the problems in question.)

> earlier, we'd adopt a wait and see attitude. That's exactly what it was when I first contacted Mr. Chavez.
>
> My goal at the beginning of this project was not to close La Plaza down. It was to resolve the problems to make it a good establishment for the neighborhood to make them both work because it would - it wouldn't help the city of Hayward to have a vacant building or vacant business. ...

There is nothing to indicate that had the Department taken action early on with respect to specific instances of violation, appellants would have eliminated the problems upon which the Department now relies as the reason for license revocation. The number of contacts by the police, coupled with Ritchie's warnings, should have put them on notice that their license was at risk.

II

Appellants contend the actions of the Hayward police and the Department were racially motivated, in that they relied on witnesses whose testimony reflected racial bias. Appellants argue that the witnesses' references to the ethnicity of La Plaza's patrons, or to the type of music which was bothering them, as the basis for their conclusion that La Plaza was the source of their problems, tainted the evidence and the conclusions reached by the ALJ and the Department.

We are unpersuaded by this argument.

Jessy Allen testified that he has lived since March of 1993 in a residence located on a hill directly above and across the alley from La Plaza. Beginning with the very first night he moved into the home he had purchased, he has heard music emanating from La Plaza, particularly brass instruments, bass, and drums [VII RT

11-12]. The noise continued, every Thursday, Friday, Saturday and Sunday evening [VII RT 12]. Allen also cited noise and parking problems which he associated with La Plaza patrons, since these problems were only encountered on the days of the week La Plaza was open for business.

Appellants' brief suggests (App.Br. 19-20) that Allen's noise complaints were racially-tinged, because he was only bothered by the music from La Plaza, and not by the music from the Driftwood Lounge next door to La Plaza. Appellants also assert (App.Br. 20) that by identifying the music which he complains is too loud as "Spanish music," and the people making noise as patrons of La Plaza by the fact they are of Spanish and Hispanic appearance, Allen evinces an attitude of racial bias.

We believe appellants have unfairly accused Allen. Appellants themselves acknowledge (App.Br. 17) that La Plaza is the only business in the surrounding community which "attempts to cater to the culture, interests and preferences of Hispanic citizens," and the only one "which attracts a large number of Hispanic clientele." For Allen to assume that Spanish-speaking people he observed causing noise and parking problems did so only on the nights La Plaza was open for business were patrons of La Plaza is not an unreasonable assumption, especially when viewed against a factual record of noise problems otherwise associated with La Plaza. As for the music complaints, it is plain that what Allen is saying [VII RT 33] is that music from the Driftwood Lounge had not been loud enough to be a

problem for him, while La Plaza's practice of leaving the back door open was the root of the problem.

Appellants also attack the testimony of Joan Scopas, owner of the Driftwood Lounge, a bar located next door to La Plaza. They contend that she assumed the people whose behavior she found objectionable were patrons of La Plaza because they appeared to be Hispanic, and spoke in a foreign language, or in Spanish. They conveniently ignore her testimony that the people coming into her bar and causing trouble "walk out my front door and walk directly into La Plaza" [IV RT 175; see also IV RT 181].

Appellants similarly criticize the testimony of Deborah Souza, but overlook her testimony that:

> "The bar that - the Driftwood Bar is predominantly a women's bar. 95 percent of our patrons are female. These men - well, these were all men. They were also all Hispanic males, and I have seen them on other occasions entering or leaving La Plaza." [VIII RT 41.

Souza also told how she had to escort female patrons to their automobiles because of harassment from men standing on the sidewalk in front of the two bars. She referred to a specific incident involving one member of a group of males outside the two establishments, stating: "I have gotten to know quite a few faces and people that are in and out of La Plaza on a regular basis" [VIII RT 45], and identified that person as one of them. With respect to another incident, Souza observed four or five men drinking beer in the public driveway at the rear of La

Plaza, and described them as "Hispanic males that I saw leaving La Plaza and walking then congregating at that location." [VIII RT 48-49].

Naturally, this Board is and should be alert to any Departmental action that may be racially motivated, and be quick to condemn it. But where the references to ethnicity are relevant, and are free of bigotry, as we believe they are here, and are used solely in a descriptive manner, as a means of identification, there is no basis for condemnation.

In Balayut v. Superior Court (1996) 12 Cal.4th 826, 832 [50 Cal.Rptr.2d 101], the California Supreme Court reaffirmed its earlier decisions holding that unequal treatment which results from a laxity in enforcement or which reflects a nonarbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement. To establish discriminatory prosecution "a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion." Appellant has not made such a showing here.

III

Appellants contend that count 2 of the accusation lacks the specificity required by Government Code §11503, because it states in a vague and general manner that they permitted the licensed premises to become a law enforcement problem. Appellants assert they were not provided adequate notice of the specific incidents upon which the allegation was based.

Section 11503 provides, in pertinent part:

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

The accusation in this case states:

> "That within 17 months last past and immediately prior to the date of the accusation, respondent-licensee(s), directly or by and through their agents, employees, or servants, permitted or suffered the above-designated premises to be used in a manner which did create a law enforcement problem for the law enforcement officials of the San Leandro [sic - Hayward] Police Department, in that such officials were required to make numerous calls, investigations, arrests or patrols concerning the conduct or acts occurring in or about said premises, and which thereby created conditions then and there contrary to the public welfare and morals in violation of article XX, Section 22 of the Constitution of the State of California and Section 24200(a) of the Business and Professions Code. Without limitation to the foregoing, it is more specifically alleged as follows: ..."

The allegation then continues, incorporating by reference the allegations of count 1, and then sets forth a list of incidents by date, report number, and summary statements describing the reason for the police contact and its disposition.

Appellants cite Salkin v. California Dental Association (1986) 176 Cal.App.3d 1118 [224 Cal.Rptr. 352] for the general proposition that the right to adequate notice is of constitutional stature, and Roenblit v. Superior Court (1991) 231 Cal.App.3d 1434 [282 Cal.Rptr. 819] for the point that the duty to provide

adequate notice is not excused simply because the respondent managed to present a defense.[9]

Appellants further assert that the specific allegations in the subcounts do not cure the notice defect because they, too, are not alleged in "ordinary language." The fact that the Department called two police officers who testified as expert witnesses to interpret documents containing entries similar to the subcounts, appellants argue, is proof that the allegations of count two are not capable of being understood by an ordinary citizen.

The allegations of the law enforcement count are stated in the style customarily used by the Department, in that they put the licensees on notice that they were charged with a violation of Business and Professions Code §24200, subdivision (a), by having permitted the premises to be used in such a manner as to create a law enforcement problem contrary to the public welfare and morals.

Appellants have not cited any case closely on point, and the Appeals Board is unaware of any case holding that an accusation framed in the manner of the accusation in this case is procedurally deficient.

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[9] Salkin is pertinent only to the extent it holds that fair notice is a right of constitutional dimension. Roenblit is an extreme example of inadequate notice, involving a hospital denial of staff privileges and a refusal to inform the accused physician of which patient charts were the subject of criticism. The present case is very different.

The accusation effectively tells appellants they are charged with creating a law enforcement problem, which is the violation of §24200, subdivision (a), and that the proof will involve the incidents listed in the accusation. That the incidents may be listed in a summary form does not, at least in this Board's view, deprive appellants of fair notice. In effect, they inform appellants of the evidence the Department intends to present in support of the law enforcement problem allegation, not merely the charge against which they must defend.

In contrast to the Roenblit case, supra, where the hospital refused to identify the charts in issue, in this case the listing of the itemized incidents is the equivalent of furnishing the charts.

IV

Appellant asserts it was denied due process as a result of the Department's failure to provide timely and adequate discovery, claiming the Department "repeatedly ambushed [appellants] by eliciting testimony and introducing evidence without providing them any notice." (App.Br. 30). Appellants argue further that they were prejudiced by the ALJ's failure and refusal to grant their timely requests for continuances to permit them the opportunity to prepare a defense by way of cross-examination.

Appellants cite only four examples from the voluminous record generated at the hearing to support their contention. Only three of the four involve witness testimony. The fourth matter involves document production, a subject with which the Board does not ordinarily get involved.

It is somewhat difficult to assess the merits of appellants' contentions because their briefs contain relatively few citations to specific pages of the 1,742-page transcript.

The substance of appellants' objection is that their counsel was unfairly surprised by the testimony, and had no time to prepare. However, given the prolonged nature of the hearings, the substantial periods of time between sessions, and the ALJ's demonstrated willingness to permit the recall of witnesses, the extent to which appellant suffered any real prejudice is questionable.

For example, appellants claim that they were prejudiced by the denial of a request for a continuance made after being told on January 17, 1996, that police officer Michael Hopfe would testify the following day about the contents of the document ultimately received in evidence as Exhibit 6, a document they received only one day earlier.

However, although Hopfe did testify the following day, his testimony was not concluded, and did not resume until more than two months later, on April 9, 1996. Appellants' counsel commenced his cross-examination of Hopfe on that day. Thereafter, when appellants' counsel again claimed surprise and lack of notice with regard to documents evidencing the officer's comparison of frequency of police responses to other establishments, the ALJ agreed he would be permitted to resume his examination of the officer on still another day [IV RT 116-118, 153]. Hopfe's examination was finally resumed, and concluded, on June 11, 1996 [VII

RT 72].[10] Given such a prolonged period during which to prepare for and conduct a cross-examination, it is extraordinarily difficult to see how appellants might have been prejudiced in any material way.

Other than the exhibits about which officer Hopfe testified, the only other document which appellants identify as having been denied them is referred to as "the Department file relating to La Plaza." An examination of the transcript reference cited by appellants indicates that appellants sought from the file internal Department documents which might bear on the proposed testimony of Robert Farrar, the Department investigator who assumed charge of the disorderly house investigation at the end of 1994 or the beginning of 1995. Department counsel represented there were no documents written to or by Farrar in the file. Nonetheless, the file was made available to appellants' counsel. Thereupon, appellants' counsel conducted his examination of Farrar without incident.

Appellants acknowledge they did not seek a continuance after having been given access to the Department file, and admit that they are unable to determine the exact nature of any prejudice they may have incurred as a result of their request not having been honored sooner. Quite frankly, we have the same difficulty, probably because there is none to identify. We are unaware of any requirement

[10] The transcript mistakenly records the name of the person whose testimony begins at the cited page as Michael Rowe Cofey, but the context clearly indicates that it is the same police officer Hopfe who testified in two earlier appearances.

that the Department turn over its internal correspondence, especially when the witness was not a party to it. Further, with no indication in the record of what was in the file, or what use might have been made of it, we are left only to speculate that it would have been helpful to appellants.

Finally, appellants contend that the testimony of witnesses Joan Scopas, owner of the Driftwood Bar, and Deborah Souza, an employee and patron of Driftwood, should not have been permitted, since the accusation did not contain any allegations which would have put appellant on notice of the subject matter of their testimony.[11] The ALJ made a finding based on their testimony that La Plaza patrons would loiter and harass patrons of Driftwood Bar, and that although appellant and its agents were aware of the problem, they did nothing to resolve it.

We are of the view that the contention that appellants were prejudiced by the denial of their requests for continuances lacks merit. The hearing extended over an 11-month period, giving appellants ample time to prepare. Moreover, Scopas first testified on April 10, 1996 [V RT 169 et seq.]. By agreement, the continuation of her testimony was deferred until a later time, and did not resume until June 11, 1996 [VII RT 50 et seq.]. This continuance gave counsel ample time to prepare for her cross-examination.

V

[11] Appellants have raised additional objections to the Scopas and Souza testimony; these objections are discussed below.

Appellants raise numerous evidentiary objections in support of their contention that the record lacks substantial evidence to support the findings of the ALJ. They argue that evidence of incidents not alleged in the accusation cannot be used to support findings; that certain evidence is inadmissible because it is irrelevant; that testimony was improperly admitted interpreting a document prior to its authentication by a witness not qualified to provide such interpretation; and that no nexus with the licensed premises was established with respect to certain of the findings.

While, as will be seen from the discussion which follows, we think that some of these objections have merit, we do not think they materially impaired the case presented by the Department

A. Evidence of incidents not alleged in accusation.

Appellants cite Linda Jones General Builder v. Contractors' State License Board (1987) 194 Cal.App.3d 1320 [240 Cal.Rptr. 180] in support of their argument that the ALJ improperly relied upon evidence of two witnesses that did not relate to any of the allegations in the accusation, and, thus, found appellants guilty of a charge that had not been made.

Appellants assert that the testimony of Joan Scopas and Deborah Souza should not have been permitted, since the subject of their testimony - problems encountered when patrons of La Plaza loitered outside the premises and harassed

patrons of the Driftwood Bar - was not set forth in one of the specific allegations of the accusation.

The case appellants cite is not on point. There, a building contractor was charged with violating subdivision (a) of Business and Professions Code §7109, (a willful departure from accepted trade standards) but was instead found to have violated subdivision (b) (a willful departure from or disregard of plans and specifications). (See 194 Cal.App.3d at 1326-1327). Since the two code sections addressed separate legal grounds for discipline, the court found a "fatal disability" in the disciplinary action having been founded upon a charge which had not been made.

Here, Business and Professions Code §25601 has no subdivisions. The statute makes it unlawful for a licensee to permit the premises to be operated as a disorderly house. That is the charge in the accusation, and it is the charge which the ALJ found had been established.

The testimony of the two witnesses that patrons of La Plaza loitered about the premises and harassed patrons of the neighboring Driftwood Bar is evidence that supports the charge that the premises were operated as a disorderly house. It also corroborates other evidence that La Plaza was the source of law enforcement problems, and was not the basis for a new or different charge.

Given the evidence in the case that the Driftwood Bar catered almost exclusively to a female clientele, and La Plaza to a predominantly Hispanic clientele, an inference reasonably follows that evidence about large numbers of Hispanic

males loitering in front of the two bars and harassing female patrons of the Driftwood Bar, and then returning to La Plaza, involves activity for which the management at La Plaza may reasonably be held accountable.

B. Evidence admitted that is claimed to be irrelevant.

Appellants' claim regarding the admission of irrelevant evidence again involves the testimony of witnesses Scopas and Souza, and is, essentially, a reiteration of their argument alleging that their testimony supported a charge that was not made.

We are of the view that this objection is without merit, for the reasons stated immediately above.

C. Evidence about a document allegedly admitted prior to its authentication and interpreted by a witness not qualified to do so.

Appellants complain that officer Hopfe, whose appearance as a witness has been discussed earlier (pp. 19-20, supra) should not have been permitted to explain the significance of the entries on Exhibit 6 (a summary listing calls for police assistance made to the Hayward Police Department during the period of time covered by the amended accusation), before the document had been properly authenticated. Appellants concede in their brief (App.Br. 42, 45) that the document was properly authenticated by the later testimony of police officer

Michael Dofy, a senior communications officer for the Hayward Police Department.[12]

Appellants' argument is premised on a literal reading of Evidence Code §1401, which provides that authentication of a document is required before secondary evidence of its content may be received. Since they concede the document was properly authenticated, it is apparent their quarrel is simply with the order in which the evidence was received, a subject well within the discretion of the ALJ.

Appellants also contend that officer Hopfe was not qualified to interpret the content of Exhibit 6, or to render any opinion regarding the extent to which the operation of La Plaza imposed any burden on the Hayward police. They contend he had never qualified as an expert, nor considered himself an expert, in the interpretation of police department documents. That, however, misstates the evidence.

The transcript pages to which appellants cite [IV RT 100-101] reveal that Hopfe was asked about his familiarity with the theory and design of the computer data system, and the computer protocol upon which the operation of the system was based - in counsel's words, "the operation and theory of the operation of the data entry system and retrievable [sic] system."

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[12] Appellants' brief erroneously refers to officer Hopfe on a number of occasions, when a correct reference should have been to officer Dofy. These erroneous references occur at the bottom of page 42 ; the first line of page 43; and in the complete paragraph in the middle of page 45.

Whether intentional or not, the thrust of this question was directed at the witness's technical knowledge about the hardware and software of the police message dispatch system, rather than at the descriptions of the events being transmitted and recorded. This is considerably different from his having been asked how well he understood the content of the data entries themselves. Officer Hopfe's years of experience as a police officer in the field undoubtedly influenced the ALJ to deem him sufficiently qualified to testify about the exhibits, experience which included both the transmission and receipt of information between the police in the field and the dispatchers at the police communication center [III RT 326].

The ALJ additionally concluded that Hopfe was sufficiently qualified to testify concerning the burden placed on the Hayward police department as a consequence of the number and type of calls for service, their length, the number of officers required to respond, and a comparison with other comparable premises. Since the ALJ has considerable discretion with respect to the admission of expert testimony, and the weight it is to be given, it cannot be said that he erred in his assessment of officer Hopfe's testimony.

D. Findings allegedly defective because of lack of nexus with licensed premises.

Appellants attack certain of the findings as lacking the requisite nexus between the substance of the specific allegation and the operation of the licensed premises. They argue that police reports were admitted without an adequate foundation having been established; that police reports containing hearsay were improperly relied upon; that some of the Department's exhibits are illegible, and,

thus, cannot be relied upon as proof of anything; and that witness testimony suffered from similar evidentiary flaws, the primary flaw being its reliance upon hearsay statements.

1. Police reports.

Appellants contend the ALJ erred in admitting into evidence a number of police reports, in reliance on the exception to the hearsay rule contained in Evidence Code §1280.

Appellants cite People v. Flaxman (1977) 74 Cal.App.3d Supp. 16 [141 Cal.Rptr. 799], arguing that unless the police officer was under a specific duty to write the report, it does not come within the statutory exception. Appellants state that exhibits 7, 4-21, 5-4, 5-15, 6 (as to those portions concerning subcounts 17, 18, 20, 22, 25 through 54, 57, 64 through 68 and 70 through 75 of count 2) and exhibit 10 (as to those portions concerning subcounts 17, 18, 20, 22, 25, 26 through 54, 56, 63 through 66, 68, 70, and 72 through 75 of count 2), were improperly admitted.

People v. Flaxman involved the question of the admissibility of an engineering and traffic survey in a case charging a violation of the speed law. The court reviewed the considerations governing the admissibility of public records under Evidence Code §1280, stating that the record must be made by an official pursuant to a governmental duty, and be based upon the observation of an informant having a duty to observe and report.

Appellants contend this means that the author of the record or report must be acting under a duty to create a writing documenting the incident or observation described in the writing. They argue that where the officer has discretion whether or not to produce a written report, any report he generates is not produced pursuant to any duty, and, therefore, lacks the requisite foundation under Evidence Code §1280.

The Department contends that as long as the report was prepared within the scope and course of the officer's employment, and does not rest on hearsay, it is capable of supporting a finding. We agree.

The Flaxman decision relies on the decision in MacLean v. City and County of San Francisco (1957) 151 Cal.App.2d 133 [311 P.2d 158], which differentiated between a report based upon the officer's own observations, and was, thereby, admissible, and a report based upon the observations of third persons. It is the latter that is inadmissible, because the third persons lack the duty to observe and report. The MacLean decision supports the admissibility of a police report where the officer is merely stating his own observations. (See McLean, supra, 311 P.2d at 164.)

This rationale disposes of appellant's objection on this ground to the following exhibits: Ex. 7 (officer's personal observation); Ex. 4-21 (although containing hearsay, supplements officer Wooley's testimony [VI RT 290-294] based upon his personal observation); Ex. 5-4 (officer's personal observation).

Exhibits 6 and 10 were offered to prove the burden on law enforcement from the operation of the premises, and not for the purpose of proving that the underlying incidents happened as the reports may have indicated. To that extent, then, appellants' objections miss the mark. Moreover, many of the entries in Exhibit 10 reflect the personal knowledge and actions of police officers, and are not hearsay.

Appellants object to Exhibits 4-8 and 4-14 on the ground they rely on hearsay to establish a nexus with the licensed premises. Appellant also asserts that Exhibit 4-8 is illegible.

We concede that Exhibit 4-8 is difficult to read, but it is not illegible. The report, prepared by officer Kraft, states that he was dispatched to La Plaza because of a reported fight. When he arrived, he found that a person had been placed under citizen's arrest. The officer had only the statements of the persons in the bar to go on, and his report is vague as to whether any of the remarks mentioned in his report came from appellant's employees.

However, Natasha Alberto, the victim of the assault, testified about the incident [III RT 291 et seq.]. Officer Craft's report, then, would be admissible under Government Code §11513, subdivision (c), to supplement her testimony.

Additionally, the fact that the officer was called to the bar because of a reported fight, and while in the bar took custody of the person allegedly involved in the fight, establishes a sufficient nexus with the premises in connection with the count alleging a law enforcement problem.

Appellants contend that a number of exhibits (Exhibits 5-7; 5-8, pp. 2-12; 5-11; 5-15, p.2; 5-16; 5-19, p.2; 5-21, p.2; 5-55, p.2; 5-67, pp.3-6), consisting of police reports and police department computer printouts relating to police calls to La Plaza, contain inadmissible hearsay declarations. We have examined these exhibits. While it is true these documents contain hearsay in various forms, we find enough admissible evidence in them to establish a sufficient nexus with the premises for such contacts to be considered in connection with the subcounts of count 2 to which they relate.

Appellants object to Exhibits 4-2; 4-6; 4-8; 4-20; 5-5; 5-60 and 5-62 on the ground they are illegible, and argue that the subcounts corresponding to such exhibits are, consequently, not supported by substantial evidence. We have reviewed these documents. Although difficult to read, some of them more than others, none can truly be said to be illegible.

Appellants contend that Exhibit 6 does not constitute substantial evidence in support of the law enforcement count of the accusation because it lists the address of the licensed premises only as a reference location. Appellants argue this fails to establish a nexus between the alleged call for police service and the operation of the licensed premises. Appellants attack Exhibit 10 on the same grounds. They concede that Exhibit 10 contains more information than does Exhibit 6, but assert that the "narratives" in the exhibit do not contain any information establishing the required nexus.

Appellant's contention must be rejected. The evidence clearly establishes a nexus between the loud noise and music problems and the operation of La Plaza. Although the entries on Exhibit 6 are keyed only to a street address (La Plaza's address), the call summaries in Exhibit 10 do show that activity relating to La Plaza was the genesis of the call.

We have reviewed Exhibits 6 and 10, and the police reports which relate to some of the instances listed on those two exhibits. Our review tells us that while there is insufficient non-hearsay evidence to sustain a number of the subcounts of count 2, to address each item individually would make this already too long decision even longer. Sacrificing detail for brevity, we think the following subcounts of count 2 to be deficient in proof: 3; 4; 6 through 8; 11 through 16; 18; 22; 26; 28 through 30; 34; 36; 38; 40; 42; 44; 45; 47; 48; 50; 51; 53 through 56; and 64 through 74.

On the basis of that same review, we believe the following subcounts were established by substantial evidence: 2; 5; 9; 10; 17; 20; 25; 27; 31; 35; 37; 39; 41; 43; 46; 49; 52; 63; and 75

Exhibits 6 and 10, when read together, clearly establish a relationship between at least 19 of the police responses and some activity reasonably associated with the operation of the La Plaza Bar. In addition, there is the testimony of a number of police officers regarding their having been dispatched to the bar to deal with problems, but for which no report was made. For example, Richard Camara, a 15-year veteran with the Hayward Police Department testified

that one of his duties was to review reports related to alcohol beverage enforcement, and based upon that review, he concluded that there appeared to be a significant crime problem at La Plaza.

Appellants challenge a number of the police reports included within Exhibit 4 on similar grounds. They single out Exhibits 4-6; 4-14; 4-21; 5-1; 5-6; 5-8; 5-11; 5-12; 5-13; 5-14; 5-15; 5-16; 5-19; 5-21; 5-55[13]; and 5-67, contending that the subcounts to which they relate lack substantial evidence to support any finding. Appellants contend that, because these exhibits do not contain first-hand knowledge of the reporting officer, they fail to establish a nexus with the licensed premises.

We have reviewed each of these exhibits, and have concluded appellants' objections are well taken as to exhibits 5-1 (traffic stop of vehicle leaving driveway near La Plaza); 5-6 (loud music from vehicle in rear of La Plaza); 5-8 (assault on pedestrian 50 yards from La Plaza); 5-11 (traffic stop); 5-12 (traffic stop); 5-13 (security check); 5-15 (disturbance reported outside Driftwood Bar); 5-19 (intoxicated person at retirement center).

As to the remainder, however,we believe that there is a sufficient nexus between the content of the exhibit and La Plaza to overcome appellants' objections: 4-6 (report summarizes statements of security guard Hobson. Hobson testified on same subject); 4-14 (the victim also testified about this incident); 4-21 (officers

[13] As noted earlier, the subcount to which this exhibit relates was stricken by the Department.

responded to report of disturbance, separated participants inside La Plaza and interviewed them outside bar); 5-14 (response to music disturbance at La Plaza); 5-16 (response to disturbance in progress at La Plaza); 5-21 (response to La Plaza for report on stolen vehicle); 5-67 (response to La Plaza to report of group of males fighting outside).

Appellants next challenge subcounts 5, 6, 7, 10, 14, 17, 18, and 21 of count 1, and subcount 31 of count 2 as lacking the necessary nexus between the alleged violation and the operation of the licensed premises.

Again, we have reviewed the documents and testimony bearing on these claims. Unfortunately, appellant has merely asserted without elaboration that either there is no evidence to support these subcounts or the evidence which does is hearsay, without explaining its reasoning with respect to any specific subcount, leaving it up to the Board to attempt to discern its position.

Subcount 5 of count 1 involved the arrest of an intoxicated person. While officer Kraft testified the arrest took place outside the bar [II RT 108], the testimony of officer Lage [II RT 199-202] shows that he encountered the intoxicated person inside the bar, and caused his removal, after which the arrest took place.

Subcount 6 of count 1 concerns an incident in which a patron ejected from La Plaza smashed a window on a vehicle owned by one of the security guards employed by La Plaza. Appellants cite the testimony of officer Beal to the effect that an individual wearing a gun reported the incident as having occurred a week

earlier. They overlook the report of officer Garrick (Exhibit 4-6) and the testimony of security guard Hobson [VI RT 333-335], which are sufficient to support the allegations.

Subcount 7 of count 1 involves the presence of a minor in the premises. Officer Coffey, who issued the citation [V RT 247-248; Exhibit 4-7], checked the minor's identification against Department of Motor Vehicle records and confirmed the minor's statement (itself an exception to the hearsay rule as a declaration against interest) that he was only 20.

Subcount 10 of count 1 involves the arrest of a patron leaving La Plaza with an open can of Budweiser beer. The incident is established by the testimony of officer Ritchie [VII RT 108-110] and his written report (Exhibit 4-10).

Subcount 14 of count 1 alleges an assault with a deadly weapon, a flashlight, on a patron by a security guard. Teresa Garcia testified she was "pushed in the back of the head with a flashlight" in the course of being forced to leave the premises because she was not 21. Officer Craft acknowledged that the security guard had denied the assault occurred. In his report (Exhibit 4-14), Craft states that Garcia's companion corroborated Garcia's report of the assault, but that he could find no one else in the bar to corroborate the allegations of the complaining witness.

Subcount 17 of count 1 alleges that an intoxicated person was allowed to remain in the premises, in violation of Business and Professions Code §647, subdivision (f). Officer Mark Ducker, the officer who made the arrest, described

the symptoms of obvious intoxication which led him to make the charge [VI RT 389-390].

Subcount 21 of count 1 alleged a disturbance between two women. Officer Wooley's testimony [VI RT 305] indicates that, although he was unable to hear what was being said, he was able to determine from the appearance of the two that they were quarreling. Their remarks to him, although hearsay, are admissible as supplemental to his visual observations.

Subcount 18 of count 1 alleged an assault with a firearm by one patron upon another patron. Appellants cite the testimony of officer Robert Hibaugh [VI RT 326-329] and security guard Clifford Hobson [337]. Hibaugh's testimony indicates he was called to the scene after the fact, and observed the victim being attended to by firemen and then removed by paramedics to be transported to a hospital. Hibaugh followed the ambulance to the hospital, and interviewed the victim. Hibaugh also observed what he identified as "a definite bullet hole" in the wall of the bathroom [VI RT 329]. Hobson testified that after hearing "a pop, a couple of pops" [VI RT 337] and being told a shooting had occurred in the restroom [VI RT 336-337], he went there and found two men struggling, one with a gun in hand. Hobson handcuffed one of the participants [VI RT 337]. In addition, officer Lawrence Montour testified he was dispatched to the bar on an emergency basis in response to a reported shooting, and upon arrival observed a manager and a security guard, and a person in handcuffs [II RT 136-137]. Officer Gary Tabke, who was also called to the scene, took custody of the weapon involved, a Glock

.40 caliber semi-automatic containing live rounds and one expended shell in the chamber of the weapon II RT 151].

Subcount 31 of count 2 alleges a response concerning a reported disturbance in La Plaza between two females. The Department's evidence with respect to this charge consisted of a computer-generated summary of a police report. Appellants cite, without explanation, to the testimony of Deborah Souza [VIII RT 50]. The testimony, insofar as we can ascertain, does not appear to relate to the incident in question.

Appellants challenge a number of the findings (those relating to subcounts 5 and 28 of count 1, and subcounts 12, 22, 28, 29, 66, 67, 68, 69, 72, 73, and 74 of count 2) on the ground they pertain to incidents which are alleged to have occurred on days or at times the premises were not open. Appellants assert that the premises were open for business only on Friday, Saturday and Sunday evenings between the hours of 9:00 a.m. and 2:00 a.m.

Appellants cite the testimony of Rejinaldo Lehota Moreno, a witness presented by the Department. Moreno testified that he worked part time on Fridays, Saturdays and Sundays, but there is nothing in his testimony that establishes the premises were only open those days. On the other hand, the testimony of Uriel Chavez [XI RT 56] tends to indicate that the bar is open other evenings as well:

"Q. As part of your duties as the owner of the La Plaza Bar, are you regularly at the bar when it's open?

A. Not exactly at 6:00 when we open, but when the business starts to pick up after 9:00 I have to be there.

Q. And that's every day that the bar is open.

A. Sometimes, yes, but we only have three days where we have music."

Although not evidence, at one point in the hearing, appellants' counsel asked the ALJ to "keep in mind that the licensed premises are only open on Thursday through Sunday" [IV RT 59-60].

This is consistent with the testimony of Jessy Allen [VII RT 19-20], who said the noise and parking problems in the neighborhood only occurred on the days the bar was open for business, specifying the same four days stated by counsel.

The record does not indicate there were any restrictions, other than the general law applicable to all licensees, regarding the days or hours during which the bar could operate.

Even assuming the evidence is sufficient to show the bar was not open Mondays, Tuesdays, and Wednesdays, appellants' argument is otherwise flawed as to some of the subcounts they challenge. For example, subcount 5 of count 1 involved an arrest in front of the bar sometime in the early morning of a Monday, at a time when the bar would still have been open for business. (See Exhibit 4-5). This is also true as to subcounts 22 and 28 of count two.

Appellants contend the ALJ erred in admitting evidence of calls for police assistance made by agents or employees of appellants. Appellants cite Business

and Professions Code §24200, subdivision (f)(3)(a), which states that timely calls to a law enforcement agency placed by the licensee or his employees shall not be construed by the Department as evidence of objectionable conditions that constitute nuisance. Thus, appellants argue, evidence of any such calls is irrelevant and inadmissable.

The cited code section is part of legislation enacted in 1994, and effective January 1, 1995. It is part of a new subdivision added to §24200, making it a basis for suspension or revocation for a licensee to fail to take reasonable steps to correct objectionable conditions which occur during business hours on any public sidewalk abutting a licensed premises and constitute a nuisance. This subdivision applies only where the Department has given prior written notice, which notice may be given only upon a determination by the Department or a request from local law enforcement agency, supported by substantial evidence, that persistent objectionable conditions are occurring. This section was not utilized by the Department, and there is nothing in the pertinent subdivision indicating the requirement of notice or the limitation upon the evidentiary use of phoned reports initiated by a licensee or agents or employees of a licensee. Nor is this Board aware of any case authority construing this new statute in such manner.`

Appellants challenge subcounts 4, 13, 36, 44, 45, 50, 54 and 66 of count two, contending they are discretionary bar checks and cannot be considered calls

for service contributing to an undue demand on the time of the Hayward Police Department.

This claim has merit. The Board customarily disregards bar checks in assessing the demand for police services generated by a licensee. However, there were enough instances where a police response was necessary that elimination of the instances of bar checks is of little assistance to appellants.

Appellants, relying upon McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], allege that they took all reasonable steps to prevent objectionable conditions from occurring in and around the licensed premises. As a result, they contend, they cannot be accused of having permitted the violations within the meaning of that term as interpreted in Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal. Rptr. 74].

Appellants cite the fact that they installed soundproofing in the rear of the premises, stationed a security guard at the rear door of the premises to ensure that the door remained closed at all times, and conducted hourly sound checks by exiting the building to check on the noise levels emanating from the premises.

However, based upon the complaints from the residents, and the observations of the police officers responding to noise complaints, the sound continued to escape at objectionable levels. Appellants could have eliminated live music, which they did not, or could have taken other steps to be sure that the musical groups producing the entertainment played at lower or unamplified levels.

Hence, it can hardly be said that appellants did all they could reasonably do to control noise problems.

Similarly, appellants contend they had an agreement with the Hayward police, which the police allegedly honored only in the early stages, pursuant to which intoxicated patrons would be escorted from the premises and a taxi called to take them to their appropriate destinations if no sober patron was available to transport them. Appellants contend that even though the procedure had been suggested to them by the police (for which there is only the testimony of appellant Uriel Chavez), the police prevented appellants from complying with their suggestion by arresting the intoxicated patrons as they waited on the sidewalk.

Of course, appellants, and appellants' bartenders, always had the capability of monitoring the alcohol consumption of their patrons to minimize or eliminate the need to remove patrons to the front sidewalk where they would cause problems for nearby businesses or residences, and attract law enforcement interest.

Appellants also stress their policies of refusing entry to intoxicated persons, searching patrons for weapons before permitting them to enter, and preventing the entry or exit of patrons with open beverage containers.

There is no doubt that incidents occurred in spite of appellants' efforts. The question really is whether appellants did all they reasonably could to prevent them. There is substantial evidence to the contrary.

The evidence showed that on the evenings when appellants offered live music, the number of patrons reached as high as 200 to 250. Yet, there were only three security personnel provided, one of those being the manager himself. This, in the experience of this Board, appears to be inadequate on its face. Where the presence of an adequate security force might have made a difference in appellants' ability to prevent fights, shootings, excessive intoxication, excessive noise or overly loud music, patrons leaving the premises with open containers, and the like, it cannot be said appellants took all reasonable steps to prevent violations.

Rejinaldo Moreno, employed by appellants as a part-time security guard from February 1994 until March 1995, testified there were only two security guards on duty on Friday and Saturday nights, and, until shortly before he left, only one on Sunday [IX RT 11]:

> "And just prior to my leaving in '95, they agreed to have two men on Sunday nights. We all recommended that it was extremely necessary, and we needed even more. We were trying to get more to work the outer perimeter such as parking lots and stuff."

Moreno said he himself had been involved in four or five fights in the bar during the time he was employed, attempting to quell patron disturbances and assaults [IX RT 21-22]. He also testified that as a result of the way the two security guards were stationed, they were unable to monitor the drinking by

patrons, resulting in patrons being allowed to drink until intoxicated [IX RT 22-25].[14]

Moreno also testified La Plaza had a live band virtually every Friday and Saturday night. At times the bar was very loud, and Hayward police officers would contact him or his partner about noise violations. He would then have the band lower the volume. This could have occurred at any time during his tour of duty, which extended until 2:00 a.m. [IX RT 21].

Cecile Huntzinger, a nearby resident, testified that she complained frequently, both to the police and to the bar itself, about loud music from the bar [IX RT 49, 53-54, 57-58]. She said this was a problem on most Saturday nights, and while the sound level would be reduced after she complained, it would rise again 15 minutes later. This suggests a failure or inability to control the sound levels of the live music being offered by the club.

We conclude that the Department established 16 of the subcounts alleged in count 1, and that viewed as a whole, these are sufficient to support the

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[14] Appellants' counsel initially objected to Moreno's testimony unless it was related to specific subcounts. However, after Department counsel indicated in an offer of proof the subject matter he intended to cover in his examination (loud music, fights and intoxicated persons in the bar), counsel stated he had no objection [IX RT 20].

Appellants' counsel also stated it was his intention to call Moreno as a defense witness, and would reserve his cross-examination until that time. However, Moreno was never recalled, so his testimony stands unchallenged.

determination that the premises were operated as a disorderly house. Our views as to specific subcounts, briefly stated, are as follows:

Subcount 1: there is sufficient evidence in support of this subcount. See VII RT 9-12; II RT 177-180.

Subcount 2: the ALJ found against the Department on this subcount.

Subcount 3: the ALJ found against the Department on this subcount.

Subcount 4: there is not sufficient evidence in support of this subcount. Torn or smudged labels alone do not reasonably support an inference that brands were substituted or bottles refilled. See VII RT 149-150.

Subcount 5: there is not sufficient evidence in support of this subcount. There is no evidence the symptoms of intoxication were displayed in circumstances or for such a period of time that bartenders or other employees could have observed them.

Subcount 6: there is sufficient evidence in support of this subcount. See VIII RT 149, 156-157; VI RT 334-335; Exhibit 4-6.

Subcount 7: there is sufficient evidence in support of this subcount. See V RT 247-249; Exhibit 4-7.

Subcount 8: there is sufficient evidence in support of this subcount. See III RT 290-292, 296; II RT 96-98, 114-115; Exhibit 4-8.

Subcount 9: there is sufficient evidence in support of this subcount. See II RT 102-104; VII RT 13-15; Exhibit 4-9.

Subcount 10: there is sufficient evidence in support of this subcount. See VII RT 108-110; Exhibit 4-10.

Subcount 11: there is sufficient evidence in support of this subcount. See VII RT 9-13, 110-113; Exhibit 4-11.

Subcount 12: there is sufficient evidence in support of this subcount. See VII RT 115-116; Exhibit 4-12.

Subcount 13: the ALJ found against the Department on this subcount.

Subcount 14: there is sufficient evidence in support of this subcount. See IX RT 27-32; II RT 104-107; Exhibit 4-14.

Subcount 15: there is sufficient evidence in support of this subcount. See VII RT 12-13; Exhibit 4-15.

Subcount 16: there is sufficient evidence in support of this subcount. See II RT 149-150, 158; Exhibit 4-16.

Subcount 17: there is sufficient evidence in support of this subcount. See II RT 383-384; Exhibit 4-17.

Subcount 18: there is sufficient evidence in support of this subcount. See II RT 137-144; VI RT 344-345, 349-350; Exhibit 4-18.

Subcount 19: there is not sufficient evidence in support of this subcount. The sole basis for this subcount is the police officer's testimony that he was told by a security guard that he called police after seeing a patron drop a baggy suspected of containing a controlled substance. It cannot be said appellants permitted this activity.

In addition, questions are raised by Business and Professions Code §24202, subdivision (b), which provides as follows:

> "The department may not open or add an entry to a file or initiate an investigation of a licensee or suspend or revoke a license (1) solely because the licensee or an agent acting on behalf of a licensee has reported to a state or local law enforcement agency that suspected controlled substance violations have taken place on the licensed premises or (2) solely based on activities described in such a report, unless the violations reported occurred with the actual knowledge and willful consent of the licensee."

Subcount 20: the ALJ found against the Department on this subcount.

Subcount 21: there is sufficient evidence in support of this subcount. See VI RT 290, 291-294.

Subcount 22: the ALJ found against the Department on this subcount.

Subcount 23: the ALJ found against the Department on this subcount.

Subcount 24: the ALJ found against the Department on this subcount.

Subcount 25: the ALJ found against the Department on this subcount.

Subcount 26: the ALJ found against the Department on this subcount.

Subcount 27: the ALJ found against the Department on this subcount.

Subcount 28: there is sufficient evidence in support of this subcount. See Exhibit 4-28.

Appellants knew from the beginning that the premises was a problem location, it having been the subject of a disorderly house proceeding immediately

prior to their ownership, while under the management of appellant Uriel Chavez himself. Under such circumstances, there is no excuse for the failure to provide adequate security, and there is no basis for appellants to claim they took all reasonable steps to prevent problems from occurring.

Appellants object to the findings with respect to a number of subcounts of count 2 which, they contend, did not result in any investigations, arrests or patrols, so cannot be said to have placed any demand upon police resources. They list subcounts 28, 48, 53, 71 and 73 as vulnerable on such grounds.

We have reviewed the entries in Exhibits 6 and 10 relating to these subcounts. It would appear that appellants' objections are well taken. The entries reflect either a cancellation shortly following the initial report (subcounts 28 and 53, a failure to show the assignment of any unit (subcounts 28, 48, 53, 71 and 73), or merely identify the report as a "follow up" to an unidentified matter (subcount 73). On the whole, it cannot be said that these particular subcounts added to any law enforcement burden.

Finally, with respect to the law enforcement counts, appellants contend that only 6 of the subcounts withstand attack, and assert that number will not support a charge that the operation of the premises created a law enforcement problem. Appellants cite Yu v. Alcoholic Beverage Control Appeals Board (1992) 3 Cal.App.4th 286, 293 [4 Cal.Rptr.2d 280], where the court noted that the Board had held that proof of 19 incidents over a 14-month period was insufficient to demonstrate that the operation of the premises imposed an undue burden on law enforcement.

CONCLUSION

As discussed supra, at pp. 43-45, we are satisfied that the Department established 16 incidents in support of the disorderly house allegations, extending over slightly less than 18 months. In addition, there is testimony that the problems involving disturbances to the neighborhood resulting from noise and loud music persisted throughout the accusation period.

There is also little doubt that La Plaza tended to create a law enforcement problem. Such a determination is not an exact science, and the evidence typically offered in support of such a claim is not always the strongest. Nonetheless, numerous police responses were shown to have been required in connection with the operation of the licensed premises, clearly enough to support a determination that the premises were operated in such a manner as to create a law enforcement problem.

For these reasons, we have concluded that the decision of the Department must be affirmed.[15]

RAY T. BLAIR, JR., CHAIRMAN
BEN DAVIDIAN, MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[15]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.