

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

AB-9834

File: 21-455093; Reg: 19088555

KULDIP KAUR and HARSUKHBIR SINGH,
dba Vista Liquors
1484 South White Road
San Jose, CA 9512704749,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 3, 2020
Telephonic

ISSUED APRIL 8, 2020

Appearances: *Appellants:* Dean R. Lueders, of ACTlegally, as counsel for Kuldip Kaur and Harsukhbir Singh,

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

OPINION

Kuldip Kaur and Harsukhbir Singh, doing business as Vista Liquors, appeal from a decision of the Department of Alcoholic Beverage Control¹ revoking their license because their employee sold alcoholic beverages while the license was under suspension, in violation of Business and Professions Code section 23300, and possessed (with the intent to deliver, furnish, or transfer) drug paraphernalia, in violation of Health and Safety Code section 11014.5.

¹ The decision of the Department, dated July 30, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on March 25, 2009. There have been three prior instances of departmental discipline against the license.

On February 15, 2019, the Department instituted a four-count accusation against appellants charging that on two separate occasions appellants' employee sold alcoholic beverages while the license was under suspension, and possessed (with the intent to deliver, furnish, or transfer) drug paraphernalia.

At the administrative hearing held on May 16, 2019, documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Brandon Knott, Francisco Gonzalez, and Ricky Barone. Appellant Harsukhbir Singh; the employee who sold the alcohol, Baljit Singh; and appellant's son, Star Banwait testified on behalf of appellants. Appellants were not represented by legal counsel at the administrative hearing. Appellant Harsukhbir Singh² represented himself, assisted by his son, Star Banwait.

Testimony established that as a result of prior disciplinary action, an indefinite suspension of appellants license began on October 18, 2018. While the suspension was in place, the Department received a complaint that alcoholic beverages were being sold at the licensed premises.

On January 11, 2019, Agent Knott visited the premises in an undercover capacity and was able to purchase beer. One week later, on January 18, 2019, agents returned to the premises to see if the licensees were abiding by the suspension order. Agent Gonzalez entered the premises in an undercover capacity and was able to

² His co-licensee, Kuldip Kaur is now deceased.

purchase tequila. During a search of the premises, following notification of the clerk that a violation had occurred, Department agents found drug paraphernalia on a back counter display shelf. These facts are not at issue in this appeal.

The administrative law judge (ALJ) issued his proposed decision on June 3, 2019, sustaining counts 1, 3, and 4 of the accusation, dismissing count 2, and recommending that the license be revoked. The Department adopted the proposed decision in its entirety on July 16, 2019 and issued a certificate of decision on July 30, 2019.

Appellants then filed a timely appeal contending the ALJ erred as a matter of law by allowing appellants to be represented by someone who is not an attorney.

DISCUSSION

Appellants contend that the ALJ violated the Administrative Procedures Act (APA) when he allowed Mr. Banwait to assist his father, appellant Harsukhbir Singh, during the administrative hearing. Appellants maintain this assistance by a non-attorney was both unfair and unlawful, and as a result the decision should be reversed. (AOB at pp. 2-4.)

Appellants cite an opinion by the California Attorney General, and append it to their opening brief, for the proposition that the APA does not permit a lay representative — meaning someone who is not an active member of the California State Bar — to represent a party in an administrative action. (Ops.Cal.Atty.Gen. 14-101 (2017).) This is true. However, it is also true that a party may choose to represent themselves, as is the case in this matter.

At the beginning of the administrative hearing, the following discussion took place:

JUDGE SAKAMOTO: . . . So prior to going on the record this morning, it was discussed that - - whether or not Mr. Singh would be representing himself today along with the assistance of his son. And there was an indication that they were going to represent themselves. . . .

[¶ . . . ¶]

Okay. And so that extent, then, Mr. Singh, you're ready to go on with the help of your son?

MR. HARSUKHBIR SINGH: Yes, yes.

(RT at pp. 11-13.) After a lengthy explanation of the procedural aspects of the hearing, the discussion continued:

JUDGE SAKAMOTO: . . . does your dad prefer to you be his, like, spokesperson as we do this?

MR. BANWAIT: Uh-huh.

JUDGE SAKAMOTO: Is that okay with you, Mr. Klein? It's the relative so - - I'm not as concerned as if this was somebody else.

MR. BANWAIT: Well, I would say my father can't fully put into context and words. He is a naturalized citizen. He understands everything. His English is good, but I wouldn't say it would do him justice.

JUDGE SAKAMOTO: Right.

MR. KLEIN: I think that there are - - there are issues with having - - I mean, this is not a corporation or anything.³

JUDGE SAKAMOTO: No.

MR. KLEIN: So there are issues with having him represent.

JUDGE SAKAMOTO: All right.

³ The concern raised by Department counsel was addressed in an analogous case which held that the general common law rule requiring corporations to be represented by counsel in proceedings before courts of record other than small claims courts does not extend to proceedings before administrative agencies and tribunals. (See *Caressa Camille, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1096 [121 Cal.Rptr.2d 758].)

[¶ . . . ¶]

Okay. So I'll let you - - part of the problem is, we don't want it to be - - we want your dad to have a fair hearing. We get that. But part of it is, we are in a slightly gray area because you're representing yourself, or he is representing himself, technically, and you're just helping him, but we don't want it to be as though, you know, you're kind of practicing law without a license kind of issue. . . .

MR. BANWAIT: It is a family business, though.

JUDGE SAKAMOTO: Yeah. So that aside, I'll let you assist your dad. But I want our dad to know that if you have any questions or issues, just work through your son, okay?

MR. HARSUKHBIR SINGH: Okay.

(RT at pp. 19-20.)

In short, the record reflects that the appellant understood that he was representing himself in this matter, with the assistance of his son. It does not reflect the picture appellants' counsel paints, which is that Mr. Banwait was allowed to be a non-attorney representative of a licensee, in violation of the APA

In *Borror*, the Court of Appeal determined that due process of law was not denied when an appellant represented herself in an administrative hearing, because there is no constitutional right to counsel in an administrative proceeding:

[W]e conclude that in a proceeding to revoke or suspend a license or other administrative action of a disciplinary nature the licensee or respondent is entitled to have counsel of his own choosing, which burden he must bear himself, and that he is not denied due process of law when counsel is not furnished him, even though he is unable to afford counsel. Such a proceeding does not bear a close identity to the aims and objectives of criminal law enforcement, but has for its objective the protection of the public rather than to punish the offender. There is no constitutional requirement, therefore, that the hearing officer or the agency advise a party that he is entitled to be represented by counsel and that if he cannot afford counsel one will be afforded him. In proceedings under the Administrative Procedure Act there is a statutory requirement, however, that a party be advised that he is entitled to be represented by counsel chosen and employed by him. (§ 11509.) In the present case the licensee does not maintain that she was deprived of this right.

Since the requirements of due process are satisfied in a proceeding under the Administrative Procedure Act, insofar as representation by counsel is concerned, if a party is advised that he is entitled to be represented by counsel employed by him and such attorney is permitted to represent him in the proceeding, there is no requirement, in the event that the party does not choose to be represented by counsel, or does not have the funds with which to hire an attorney, that the analogies of the criminal law be followed in ascertaining whether there has been an intelligent waiver of counsel. Accordingly, there is no requirement that the hearing officer determine whether the accused understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishment or penalty which may be exacted. In this regard we apprehend that as to all of the elements, other than the last mentioned, these are adequately specified under the Administrative Procedure Act in the accusation (§ 11503) and the notice of defense (§ 11506). As to the penalties involved, it is inconceivable that a licensee is not aware by virtue of the licensing procedures of the sanctions which may be imposed for violation of his duties and obligations as such licensee.

(*Borror v. Dept. of Investment* (1971) 15 Cal.App.3d 531, 543-544 [92 Cal.Rptr. 525].)

As the Court in *Borror* explains, the requirements of due process and the APA are satisfied once the licensee is advised of his right to be represented by counsel. The licensee in the present case was provided with the notice required by the APA (See Exhibit 1, at p. 1). We see no violation of the APA.

Furthermore, we find it does not constitute the unauthorized practice of law for an appellant's son to assist his father in an administrative proceeding. As the Board explained in a nearly identical case:

. . . Many of the licensees who appear before the Appeals Board are accompanied by a family member, relative, or close friend who, in varying degrees, represents them before the Board without compensation. There are a number of reasons why this happens. Often there is a language barrier. Sometimes, economics prevent the hiring of an attorney familiar with ABC practice. In other cases, like this one, the license is held in the name of one or both parents, but the adult (and, often, even minor) children are immersed in the operation of the business and equally or sometimes even more capable than the named licensee to address the Appeals Board. This is particularly true, where, as in this case, the dispute involves no more than competing versions of the facts.

This is not a case where a licensee hired a layperson passing himself off as an attorney or one intending to provide legal services. This is a case where a family member involved in a family business acted as a spokesperson for the family. We think it exalts form over substance to say that a family business operated as a sole proprietorship cannot enjoy the same opportunities afforded an incorporated family business, that is, to be able to choose one of the family members to speak on its behalf. And, certainly, we do not think it in the interest of this licensee to avoid a suspension by winning a ruling that her son engaged in the illegal practice of law.

In the absence of any direct contrary authority, this Board is unwilling to tell the Department it should not have permitted lay representation by an “authorized representative” in this case. It is clear that the “authorized representative” layperson had such a close relationship with the licensee, family or otherwise, as to negate the danger that the unlicensed practice of law was being encouraged.

(*Lucia Penilla* (2009) AB-8835, at pp. 5-6.) We believe the same conclusions must be reached in the instant matter.

ORDER

The decision of the Department is affirmed.⁴

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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:

Kuldip Kaur and Harsukhbir Singh
Dba: Vista Liquors
1484 S. White Road
San Jose, CA 95127-4749

Respondent

} File: 21-455093
}
} Reg: 19088555
}
} License Type: 21
}
} Word Count: 46,405
}
} Reporter: Christy Curry, CSR-13982
} (Emerick and Finch Reporters)
}

Regarding Their Type-21 Off-Sale General License
Under the State Constitution and Alcoholic Beverage
Control Act.

PROPOSED DECISION

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Jose, California, on May 16, 2019.

Sean Klein, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (Hereafter the Department)

Harsukhbir Singh, co-licensee and respondent, represented himself. (Hereafter Respondent or Respondent Singh)¹ Respondent was assisted by his son, Star Banwit.

The Department's accusation alleged cause for suspension or revocation of Respondent's license exists under California State Constitution, article XX, section 22, and California Business and Professions Code section 24200, subdivision (a) and (b), based on the following grounds:²

¹ Harsukhbir Singh indicated co-licensee Kuldip Kaur was his wife, who passed away a few years ago.

² All further section references are to the California Business and Professions Code unless noted otherwise.

Count 1: "On or about January 11, 2019, respondent-licensee's agent or employee, Baljit Singh, sold, furnished or permitted, upon the premises, consumption of an alcoholic beverage, to-wit: beer, while the license was under suspension, in violation of Business and Professions Code Section 23300."

Count 2: "On or about January 11, 2019, and while upon the licensed premises, respondent-licensee's agent or employee, Baljit Singh, possessed with intent to deliver, furnish or transfer, drug paraphernalia, as defined in Health and Safety Code Section 11014.5, in violation of Health and Safety Code Section 11364.7(a)."

"IT IS FURTHER ALLEGED that on or about January 11, 2019, respondent-licensee(s) held Alcoholic Beverage Control License number 455093, within the meaning of Health and Safety Code Section 11364.7(d)."

Count 3: "On or about January 18, 2019, respondent-licensee's agent or employee, Baljit Singh, sold, furnished or permitted, upon the premises, consumption of an alcoholic beverage, to-wit: distilled spirits, while the license was under suspension, in violation of Business and Professions Code Section 23300."

Count 4: "On or about January 18, 2019, and while upon the licensed premises, respondent-licensee's agent or employee, Baljit Singh, possessed with intent to deliver, furnish or transfer, drug paraphernalia, as defined in Health and Safety Code Section 11014.5, in violation of Health and Safety Code Section 11364.7(a)."

"IT IS FURTHER ALLEGED that on or about January 18, 2019, respondent-licensee(s) held Alcoholic Beverage Control License number 455093, within the meaning of Health and Safety Code Section 11364.7(d)."³

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued by the parties and submitted for decision on May 16, 2019.

³ At the hearing, this paragraph was amended to read "January 18, 2019" instead of "January 11, 2019". The ALJ marked the correction in the copy of the Accusation in Exhibit 1.

FINDINGS OF FACT

1. The Department filed the accusation on February 15, 2019 and received Respondent's Notice of Defense on March 4, 2019. The matter was set for a hearing. (Exhibit 1: Pre-hearing pleadings)
2. On March 25, 2009, the Department issued Respondent a type-21 off-sale general license for its premises known as Vista Liquors located at 1484 S. White Road, San Jose, California. (Hereafter the Licensed Premises) Respondent's type-21 license permitted it to retail in beer, wine, and distilled spirits for consumption off the Licensed Premises.
3. Since being licensed, Respondent suffered the following disciplinary actions:

Date of Violation	Violation	Reg. Date.	Reg. Number	Penalty Imposed
11/08/2017	Bus. & Prof. Code §24200(d)	05/02/2018	18086876	Revocation, stayed for 180 days to transfer license, with indefinite license suspension until license transferred.
06/01/2012	Bus. & Prof. Code §§25658(a) and 24200 (a & b)	08/24/2012	12077404	25 day suspension with 10 days stayed.
04/30/2011	Bus. & Prof. Code §§25658(a) and 24200(a & b)	06/23/2011	11075309	15 day suspension.

All the above prior disciplinary actions are final.

4. As the result of discipline imposed in Respondent's prior case under Reg: 18086876, its license was revoked, but the revocation stayed for 180 days for Respondent to transfer the license to another person(s) acceptable to the Department. Also, license privileges were suspended until the license was so transferred. (Exhibit 2: Prior discipline for Reg: 18086876.) In the event the license was not transferred as specified in that Decision, the Director could revoke the license.

5. On October 18, 2018, Alcoholic Beverage Control Agents Barone and Elvander went to the Licensed Premises and posted three "Notice of Suspension" notices.⁴ This indicated the indefinite suspension imposed under Reg:18086876 commenced that day. One notice was posted behind the sales counter, one was posted on a beer cooler, and one was posted on the exterior of the main entrance door of the Licensed Premises. ABC Agent Elvander expressly told co-licensee Harsukhbir Singh this meant he could no longer sell any alcoholic beverages at the Licensed Premises.

6. On January 10, 2019, the Department received an anonymous complaint that alcoholic beverages were being sold at the Licensed Premises even though the license was suspended. The complainant reported the clerk sold alcoholic beverages and ignored the complainant's inquiry about the posted suspension notice.

7. On Friday, January 11, 2019, at approximately 8:00 p.m., Alcoholic Beverage Control Agents Barone, Elvander, Carpenter, and Knott responded to the Licensed Premises to follow up on the anonymous complaint.

8. Agent Knott entered the Licensed Premises in an undercover capacity. He removed one 25 oz. can of Bud Light beer from a refrigerated cooler. On a nearby cooler door a Notice of Suspension sign was posted. (Exhibit 6: Photo of cooler and sign.) Agent Knott took his beer to the sales counter. Behind the sales counter, another Notice of Suspension sign was posted. (Exhibit 7: Photo of clerk Baljit Singh and sign.) Agent Knott put his beer on the counter. Respondent's clerk, Baljit Singh (Hereafter clerk Singh), indicated the beer costs \$2.50. Agent Knott paid him \$5.00 cash. Clerk Singh took the purchase money, gave Agent Knott some change, and put the beer in a paper bag. Agent Knott then exited the Licensed Premises with his beer and met his partners outside.

9. Agents Knott, Elvander, Carpenter, and Barone then re-entered the Licensed Premises and identified themselves to clerk Singh as police officers/agents. They informed him the license was under suspension and he had just sold an alcoholic beverage to Agent Knott. Clerk Singh had no explanation or response why he did that.

10. During a search of the Licensed Premises back counter, Agent Barone found a small box on the clerk's side of the counter, 3-4 feet from the cash register, and just below the top of the sales counter. The box held some assorted crumpled paper and also 50 small brown paper bags each containing a glass pipe used to smoke/ingest methamphetamine.

⁴ California Code of Regulations, title 4, section 108, calls for the posting of at least two suspension notices at a licensed premises when the license is suspended by order of the Department.

(Exhibit 13A, 13B, 13C, 14A, 14B, and 14C: Photos of box containing the glass pipes, the glass pipes in their small paper bags, and two exemplar pipes.) The glass pipes were 3" to 6" long with a glass bulb at one end. In Agent Barone's opinion, all of the glass pipes were illegal drug paraphernalia.⁵ When used, the methamphetamine is inserted in the bulb portion of the pipe and flame heated. Once heated, the methamphetamine begins to smoke and the user inhales the smoke from the opposite end of the tube, like a traditional pipe or cigarette. Agent Barone also found 13 glass tubes in the same box used to smoke crack cocaine. He also noted clerks like to conceal drug paraphernalia pipes like these pipes in just the fashion they were discovered at the Licensed Premises. The Agents seized the drug pipes that were in the box.

11. Agent Barone spoke to co-licensee Harsukhbir Singh (Hereafter Respondent Singh) by phone that night and told him clerk Singh sold an alcoholic beverage to an ABC agent and repeatedly told Respondent Singh the license was still suspended and he could not sell alcoholic beverages. Respondent Singh gave no explanation why the sale occurred.

12. Clerk Singh was issued a citation for selling alcoholic beverages under a suspended license and illegal possession of drug paraphernalia. Prior to leaving the Licensed Premises, Agent Knott expressly warned clerk Singh not to sell any more alcoholic beverages because the license remained suspended and neither possess nor sell drug paraphernalia at the Licensed Premises.

13. One week later, on January 18, 2019, at approximately 8:00 p.m., ABC Agents Barone, Elvander, Gonzalez and Knott returned to the Licensed Premises to see if Respondent was abiding by the indefinite license suspension order.

14. At approximately 8:05 p.m., Agent Gonzalez entered the Licensed Premises in an undercover capacity. Inside, he noticed a small yellow cord or rope was strung across some of the refrigerated cooler doors. (Exhibit 12: Photo of cooler doors and yellow cord.)

15. Clerk Singh inquired if Agent Gonzalez wanted beer and Agent Gonzalez responded he did. Clerk Singh indicated there was no more beer and he could not sell beer. Clerk Singh recommended some other stores to Agent Gonzalez where he could get beer. Agent Gonzalez then left the premises.

⁵ Agent Barone testified he received: 40 hours of narcotics training in his police academy; 80 more hours of narcotics training with the Department; attended at least three California Narcotics Officers' Association classes; served two years on a narcotics task force; and made at least 5 arrests related to methamphetamine.

16. At approximately 8:40 p.m., Agent Gonzalez re-entered the Licensed Premises in an undercover capacity and told clerk Singh he had already obtained some beer elsewhere, but wanted to get some tequila. Clerk Singh gestured towards the selection of tequila on display behind the sales counter. Agent Gonzalez indicated to clerk Singh which bottle he wanted, a 750 ml. bottle of Jose Cuervo tequila. Clerk Singh obtained the bottle and indicated it cost \$18.00. Agent Gonzalez paid clerk Singh for the tequila. Clerk Singh placed the tequila into a paper bag and gave it to Agent Gonzalez. Agent Gonzalez exited the Licensed Premises and met outside with his partner agents.

17. Agents Elvander, Barone, Gonzalez, and Knott promptly entered the Licensed Premises, all wearing their tactical vest marked "Police". Agent Knott contacted clerk Singh and told him they were there because he had just sold tequila to Agent Gonzalez under a suspended license. Clerk Singh was handcuffed and detained while the agents continued their investigation.

18. During a search of the Licensed Premises, Agent Elvander found certain sales receipts from Southern Glazer's Wine and Spirits, a well-known alcoholic beverage distributor. The receipts were dated 11/24/18, 12/22/18, and 1/16/19. Sometime after January 18, 2019, Agent Knott obtained from Southern Glazer's Wine and Spirits six added sales receipts all dated after the license suspension commenced.⁶

19. Also on January 18, 2019, while Agent Knott was assisting in seizing some distilled spirits on a back counter display shelf, he found 15 glass methamphetamine smoking pipes stored in a Hennessy cognac box. (Exhibit 9: Photo of box and pipes.) The glass pipes were approximately 3" long with a bulbed portion at one end. These were nearly identical to the drug paraphernalia smoking pipes found by the agents during their January 11, 2019 investigation at the Licensed Premises when Agent Knott told clerk Singh not to possess or sell any drug paraphernalia at the Licensed Premises.

20. At approximately 11:00 p.m., Respondent Singh arrived at the Licensed Premises. Agent Knott told Respondent Singh that clerk Singh was going to be issued a citation for selling alcohol without a license and possession of drug paraphernalia. Agent Knott felt that Respondent Singh only gave excuses, appeared unapologetic, and expressed no remorse for what occurred.

⁶ Neither the receipts nor copies of them were made exhibits at the hearing. Therefore, it was not clearly established at the hearing exactly what items the receipts applied to other than some quantities of distilled spirits. Agent Knott testified that some of the same types and sizes of distilled spirits reflected on the three sales receipts discovered on January 18, 2019 were found on the Licensed Premises, and at least some of those distilled spirits were seized as evidence that day.

21. On January 18, 2019, Agent Knot also photographed the Notice of Suspension sign posted on the front door to the Licensed Premises. (Exhibit 10: Photo of sign and door). That sign was also present when Agent Knot purchased beer from clerk Singh at the Licensed Premises on January 11, 2019.

22. The agents issued clerk Singh a second set of citations for selling an alcoholic beverage under a suspended license and possession of drug paraphernalia.

23. Respondent Singh testified he purchased the fully stocked Licensed Premises in 2009. His wife was co-licensee Kuldip Kaur, who passed away approximately 3-5 years ago. She worked at outside employment until she was laid off. She then worked more at the Licensed Premises. She was more involved in the running of the store and keeping it organized and orderly as compared to Respondent Harsukhbir Singh.

24. The Licensed Premises is open 365 days a year. Respondent Singh generally worked in the morning hours and clerk Singh usually worked during the afternoon up to closing, usually 12:00 a.m. Over the years, the Licensed Premises has been robbed and assaults committed against Respondent Singh and Licensed Premise's employees. Respondent or his employees have called the police several times for assistance with crimes, people stealing from the Licensed Premises, or other disorderly conduct by patrons or others at or near the Licensed Premises.

25. Respondent Singh indicated that prior to the indefinite suspension, he began efforts to transfer the license. He hung a cord or rope across the cooler-doors to try and prevent sales of alcoholic beverages. On October 18, 2018, he recalled ABC agents telling him not to sell alcoholic beverages and that he told clerk Singh not to sell alcoholic beverages.

26. Respondent Singh testified the invoices the agents found reflected purchases of alcoholic beverages that were used for a private event and not for items for re-sale at the Licensed Premises.

27. Clerk Singh testified he worked at the Licensed Premises for about seven years. He usually worked the afternoons up to the end of the business day. He admitted he sold beer to Agent Knott, and that Agent Knott told him not to sell beer anymore.

28. As to January 11, 2019, clerk Singh testified that Oscar Rosales (Hereafter Rosales) was a regular but often trouble-making patron/visitor of the Licensed Premises who acted in an aggressive or offensive manner. That day, he had stolen beer from the Licensed Premises. Clerk Singh called the police who responded to the Licensed Premises but they could not locate Rosales. Rosales later returned to the Licensed Premises and stole more beer.

Clerk Singh called the police again who responded to the Licensed Premises and located Rosales and took him away. The ABC agent's visit occurred subsequently to clerk Singh's dealing with Rosales.

29. As to January 18, 2019, clerk Singh recalled telling Agent Gonzalez that he could not sell him beer. Clerk Singh testified that before the ABC agents' visit that day, someone came into the store and reported that someone tried to steal their car at gun-point in the parking lot and asked clerk Singh to call the police. Clerk Singh called the police who responded and eventually even made a copy of the Licensed Premises video that had a view of the parking lot.⁷ Clerk Singh recalled that later, when Agent Gonzalez returned to purchase tequila, Agent Gonzalez was wearing a hat and sunglasses. Some unknown person at the front door said that Agent Gonzalez did not "look right" or that something was wrong with him and to just sell Agent Gonzalez the tequila he wanted. Clerk Singh, who testified he felt somewhat scared or nervous, did just that. Clerk Singh testified that when he refused to sell beer to some customers, they became upset and sometimes stole the beer anyway or even threw bottles.

30. Respondent's son, Star Banwit (Hereafter Banwit) testified he had seen Rosales steal beer from the Licensed Premises and threaten Respondent or its employees in the past. He had seen Rosales act in a threatening and aggressive manner and it seemed he did whatever he wanted. Banwit has tried to act as polite as possible in dealing with Rosales, but that was to no avail.

LEGAL BASIS OF DECISION

1. Article XX, section 22, of the California Constitution and California Business and Professions section 24200, subdivision (a), provide that a license to sell alcoholic beverages may be suspended or revoked for good cause if continuation of the license would be contrary to public welfare or morals.
2. California Business and Professions Code section 24200, subdivision (b), generally provides that a licensee's violation, or causing or permitting of a violation of any Department rule and 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. California Health and Safety Code section 11364.7, subdivision (a) states: "Except as authorized by law, any person who delivers, furnishes, or transfers, possesses with intent to deliver, furnish, or transfer, or manufactures with the intent to deliver, furnish, or

⁷ Exhibit C, a police incident card for that date refers to camera footage from 1:30 to 2:00 p.m. Assuming this is when the reported car-jacking occurred, the ABC Agent's visit was not until approximately 8:00 p.m. that night.

transfer, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance, except as provided in subdivision (b), in violation of this division, is guilty of a misdemeanor."

4. California Health and Safety Code section 11364.7, subdivision (d) states: "The violation, or the causing or the permitting of a violation, of subdivision (a), (b), or (c) by a holder of a business or liquor license issued by a city, county, or city and county, or by the State of California, and in the course of the licensee's business shall be grounds for the revocation of that license."

5. Health and Safety Code section 11014.5, subdivision (a) contains a broad definition of drug paraphernalia as "all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this division." A non-exhaustive list of items is set forth immediately after this definition

6. Health and Safety Code section 11014.5, subdivision, (b) provides that: "the phrase 'marketed for use' means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances."

7. Health and Safety Code section 11014.5, subdivision (c), provides that: "[i]n determining whether an object is drug paraphernalia, a court or other authority may consider, in addition to all other logically relevant factors, the following: (1) Statements by an owner or by anyone in control of the object concerning its use. (2) Instructions, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body. (3) Descriptive materials accompanying the object which explain or depict its use. (4) National and local advertising concerning its use. (5) The manner in which the object is displayed for sale. (6) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products. (7) Expert testimony concerning its use."

8. Business and Professions Code section 23300 states: "No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division."

9. Business and Professions Code section 23355 states: "Except as otherwise provided in this division and subject to the provisions of Section 22 of Article XX of the Constitution, the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no others at the premises for which issued during the year for which issued."

10. California Code of Regulations, title 4, section 108, (Hereafter rule 108) provides: "Every licensee whose licenses have been suspended by order of the department shall post two notices in conspicuous places, one on the exterior and one on the interior of his premises, for the duration of the suspension. The notices shall be two feet in length and 14 inches in width, and shall be in the following form:

**NOTICE OF SUSPENSION
ALCOHOLIC BEVERAGE LICENSES ISSUED
For These Premises Have Been Suspended by Order of the
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
For Violation of the Alcoholic Beverage Control Act**

"Advertising or posting signs to the effect that the premises have been closed or business suspended for any reason other than by order of the department suspending alcoholic beverage license, shall be deemed a violation of this rule."

DETERMINATION OF ISSUES

1. As to Count 1 of the Accusation, good cause for suspension or revocation of Respondent's license exists under article XX, section 22, of the California State Constitution and Business and Professions Code sections 24200, subdivision (a), because on or about January 11, 2019, Respondent-licensee's agent or employee, Baljit Singh, sold an alcoholic beverage, to-wit: beer, while the license was under suspension, in violation of Business and Professions Code section 23300. (Findings of Fact ¶¶ 4-9)

2. The evidence established that on January 11, 2019, the license was under indefinite suspension when Respondent's employee, Baljit Singh, sold an alcoholic beverage, beer, to Agent Knott. The suspension had been in effect since October 18, 2018 and Respondent Singh then advised clerk Singh not to sell alcoholic beverages. Pursuant to rule 108, three large "Notice of Suspension" notices were hung at the Licensed Premises to inform and remind all of the fact of the suspension.

None of the evidence or testimony Respondent presented at the hearing established any defense to Count 1 or established any kind of extenuating circumstances that compelled clerk Singh to sell beer to Agent Knott in violation of the suspension order.

3. As to Count 2 of the Accusation, good cause for suspension or revocation of Respondent's license does not exist, under article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200, subdivision (a), because there was insufficient evidence to establish that on or about January 11, 2019, Respondent's agent or employee, Baljit Singh, possessed with intent to deliver, furnish, or transfer, drug paraphernalia on the licensed premises in violation of Health and Safety Code section 11364.7, subdivision (a)(1). (Findings of Fact ¶¶ 10)

4. Based on the testimony of Agent Barone, it was proven that drug paraphernalia in the form of glass pipes uniquely fabricated for smoking methamphetamine and glass pipes used to smoke crack cocaine were found in a box under the front sales counter of the Licensed Premises.

5. As to whether clerk Singh or Respondent could be said to have possessed them, as discussed in *People v. Showers* (1968) 68 Cal.2d 639, 643, 68 Cal.Rptr.459: "Possession may be actual or constructive. (E.g., *People v. White*, 50 Cal.2d 428, 431, 325 P.2d 985; *People v. Prescott*, 257 A.C.A. 960, 962, 65 Cal.Rptr. 366; *People v. Hokuf*, 245 Cal.App.2d 394, 397, 53 Cal.Rptr. 828.) The accused has constructive possession when he maintains control or a right to control the contraband. Possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to his dominion and control. (E.g., *People v. Finn*, 232 Cal.App.2d 422, 426, 42 Cal.Rptr. 704 (in defendant's bathroom); *People v. Van Valkenburg*, 111 Cal.App.2d 337, 340, 244 P.2d 750 (in defendant's mattress); *People v. Noland*, 61 Cal.App.2d 364, 366, 143 P.2d 86 (in a vase in defendant's room).) Even if the accused does not have exclusive control of the hiding place possession may be imputed if he has not abandoned the narcotic and no other person has obtained possession. (*People v. Cuellar*, 110 Cal.App.2d 273, 242 P.2d 694 (defendant buried the narcotic on a public playground covering the hiding place with leaves); *People v. Bigelow*, 104 Cal.App.2d 380, 385, 231 P.2d 881.) The accused is also deemed to have the same possession as any person actually possessing the narcotic pursuant to his direction or permission where he retains the right to exercise dominion or control over the property. (E.g., *People v. White*, supra, 50 Cal.2d 428, 431, 325 P.2d 985; *People v. Blunt*, 241 Cal.App.2d 200, 204, 50 Cal. Rptr. 440; *People v. Graves*, 84 Cal.App.2d 531, 534—535, 191 P.2d 32.)"

6. In this instance, the cardboard box containing the individually bagged drug paraphernalia-smoking pipes were stored on the employee side of the sales counter on a low shelf within a few feet of the cash register, a location immediately accessible by Respondent and its employees. The glass pipes were neither in a public area of the Licensed Premises nor accessible by the public. The evidence was that generally Respondent Singh worked during the earlier part of the day at the Licensed Premises and clerk Singh worked the balance of the day until closing. Clerk Singh had generally worked that shift for approximately seven years. Prior to her passing away several years ago, co-licensee Kuldip Kaur was the only other person who regularly worked at the Licensed Premises. Therefore, the glass pipes were in an area under Respondent's dominion and control and it is determined the drug paraphernalia was constructively possessed by Respondent Singh and clerk Singh on the Licensed Premises.⁸

7. However, it was not sufficiently proven clerk Singh possessed them with the state of mind required under section 11364.7 subdivision (a)(1).⁹ That section indicates "...any person who...possess with intent to deliver, furnish or transfer...drug paraphernalia, knowing or under circumstances where one reasonably should know, that it will be used to...ingest, inject, inhale...a controlled substance...is guilty of a misdemeanor". Simple possession of drug paraphernalia, whether actual or constructive, is not an offense under this section. It has a state-of-mind component. It requires the accused to possess drug paraphernalia knowing or under circumstance where one should reasonably know, it will be used to "ingest, inject, inhale...a controlled substance." In this case, there was insufficient evidence presented clerk Singh intended to deliver, furnish, or transfer the pipes to anyone and no evidence he knew, or should have known, they would be used to ingest a controlled substance. Thus, there was insufficient evidence to sustain Count 2.

8. As to Count 3 of the Accusation, good cause for suspension or revocation of Respondent's license exists under article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200, subdivision (a), because on or about January 18, 2019, Respondent-licensee's agent or employee, Baljit Singh, sold or furnished an alcoholic beverage, to-wit tequila, while the license was under suspension, in violation of Business and Professions Code Section 23300. (Findings of Fact ¶¶ 13-17.)

⁸ As to Count 2, Respondent presented neither evidence nor argument in defense to Count 2. Respondent offered no explanation why drug paraphernalia was on the Licensed Premises on January 11, 2019.

⁹ Count 2 only focused on clerk Singh's wrongful conduct.

9. The evidence established that on January 18, 2019, Respondent's clerk, Baljit Singh, sold an alcoholic beverage, a bottle of tequila, to Agent Gonzalez. The suspension had been in effect since October 18, 2018 and clerk Singh had been advised at that time by Respondent Singh not to sell alcoholic beverages. Pursuant to rule 108, three large "Notice of Suspension" notices still hung in the Licensed Premises on January 18, 2019. Clerk Singh and Respondent Singh had also been reminded by the ABC agents on January 11, 2019 not to sell any alcoholic beverages due to the suspension order. While an unrelated crime may have been committed earlier that day in the vicinity of the Licensed Premises, the agents' visit was not until several hours later. That incident played no significant role concerning clerk Singh's sale of tequila to Agent Gonzalez. None of the evidence or testimony Respondent presented at the hearing established any defense to Count 3 or established any extenuating circumstances that caused clerk Singh to sell tequila to Agent Gonzalez in violation of the suspension order.

10. As to Count 4 of the Accusation, good cause for suspension or revocation of Respondent's license exists under article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200, subdivision (a), because on January 18, 2019, Respondent's agent or employee, Baljit Singh, possessed with intent to deliver, furnish or transfer drug paraphernalia on the licensed premises in violation of Health and Safety Code section 11364.7, subdivision (a)(1). (Findings of Fact ¶¶ 13-20)

11. On January 11, 2019, after the ABC agents seized the methamphetamine glass smoking pipes from the Licensed Premises, Agent Knot told clerk Singh it was illegal to possess and sell drug paraphernalia. Clerk Singh was also issued a citation for illegal possession of drug paraphernalia that same day. Therefore, as of January 11, 2019, clerk Singh was specifically made aware that such type of glass pipes were pieces of drug paraphernalia used with controlled substances.

12. On January 18, 2019, Agent Knott found 15 more drug paraphernalia glass pipes in a Hennessy cognac box on a back shelf of the Licensed Premises. As discussed in *People v. Showers* (1968) 68 Cal.2d 639, 643, 68 Cal.Rptr.459: "Possession may be actual or constructive. (E.g., *People v. White*, 50 Cal.2d 428, 431, 325 P.2d 985; *People v. Prescott*, 257 A.C.A. 960, 962, 65 Cal.Rptr. 366; *People v. Hokuf*, 245 Cal.App.2d 394, 397, 53 Cal.Rptr. 828.) The accused has constructive possession when he maintains control or a right to control the contraband. Possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to his dominion and control. (E.g., *People v. Finn*, 232 Cal.App.2d 422, 426, 42 Cal.Rptr. 704 (in defendant's bathroom); *People v. Van Valkenburg*, 111 Cal.App.2d 337, 340, 244 P.2d 750 (in defendant's mattress); *People v. Noland*, 61 Cal.App.2d 364, 366, 143 P.2d 86 (in a vase in defendant's room).) Even if the accused does not have exclusive control of the hiding place possession may be imputed if he has not abandoned the narcotic and no other person has obtained possession.

(People v. Cuellar, 110 Cal.App.2d 273, 242 P.2d 694 (defendant buried the narcotic on a public playground covering the hiding place with leaves); People v. Bigelow, 104 Cal.App.2d 380, 385, 231 P.2d 881.) The accused is also deemed to have the same possession as any person actually possessing the narcotic pursuant to his direction or permission where he retains the right to exercise dominion or control over the property. (E.g., People v. White, supra, 50 Cal.2d 428, 431, 325 P.2d 985; People v. Blunt, 241 Cal.App.2d 200, 204, 50 Cal.Rptr. 440; People v. Graves, 84 Cal.App.2d 531, 534—535, 191 P.2d 32.)”

13. In this instance, the Hennessey cognac box containing 15 additional glass smoking pipes was stored behind the sales counter on a shelf immediately accessible by Respondent and its employees. The Hennessey cognac box was displayed on a shelf with other boxes containing distilled spirits. The box with the glass pipes was not in a publically accessible area of the Licensed Premises. It was in a box meant to hold a bottle of cognac. Respondent had been licensed for almost 10 years so had plenty of time to familiarize itself with what the store held. The evidence was that Respondent Singh generally worked the early part of the day at the Licensed Premises and clerk Singh worked the balance of the day until closing. Prior to her passing away a few years ago, co-licensee Kuldip Kaur was the only other person who regularly worked at the Licensed Premises. As clerk Singh was specifically advised a week earlier by ABC agents that such type glass pipes were illegal drug paraphernalia, there was sufficient evidence to conclude on January 18, 2019 he possessed the added drug paraphernalia glass pipes found at the Licensed Premises with the intent to deliver or transfer them knowing, or under circumstances where he should have known, they would be used to ingest controlled substances contrary to section 11364.7, subdivision (a)(1). Respondent presented no evidence the glass pipes were on the Licensed Premises for any other purpose.

14. Except as set forth in the decision, all other contentions raised by the Department in the accusation and those raised by Respondent in defense thereto lack merit.

PENALTY

1. In assessing an appropriate measure of discipline, the Department’s penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter “rule 144”)
2. Under rule 144, the presumptive penalty for a first violation for possession for sale of drug paraphernalia is license revocation, stayed for three years, and a 20-day license suspension.
3. Under rule 144, the presumptive penalty for selling alcoholic beverages while under suspension ranges from double the original suspension up to license revocation.

4. Rule 144 permits imposition of a penalty different than those set forth therein based on the presence of aggravating or mitigating factors "...in the proper exercise of the Department's discretion." Rule 144 contains a non-exhaustive list setting forth some of the factors that can be considered in assessing an appropriate penalty.
5. At the hearing, the Department recommended the license be revoked. It contended that while Respondent's license was under an indefinite suspension based on a prior accusation, there were two occasions when Respondent's clerk violated the suspension order and sold an alcoholic beverage. Further, on those two dates, illegal drug paraphernalia was on the Licensed Premises, some individually packaged as though to be sold. It also argued that sales receipts evidenced Respondent purchased distilled spirits from a supplier-wholesaler while under the license suspension order and some of those distilled spirits were found on the Licensed Premises. It argued that troublesome patrons and general neighborhood conditions were irrelevant to the violations alleged in this case.
6. Respondent contended the case against it was circumstantial and it could not afford to fully litigate the prior disciplinary actions. It argued that if the license transfer had occurred as planned, then no violation would have occurred. It argued one of the local people, Oscar Rosales, caused them trouble and that if the police had handled him better, it would have avoided or prevented Respondent's current problems. This matter has also caused great stress for Respondent.
7. In assessing the penalty for this matter, there were several aggravating factors. A continuing course or pattern of conduct is an aggravating factor listed in rule 144. The fact that there were two separate sales of alcoholic beverages while the license was under an indefinite suspension certainly was an aggravating circumstance in this matter.
8. The indefinite suspension order had been in effect for approximately three months prior to when the violations herein occurred so this was not an instance of a respondent's innocent misunderstanding regarding when it believed a temporary suspension was to begin or end. Respondent Singh and clerk Singh knew all along they were not to sell any alcoholic beverages during the suspension.
9. Both violations occurred while the Licensed Premises had large "Notice of Suspension" signs posted at the Licensed Premises. These should have, at the very minimum, been a constant reminder to Respondent Singh and clerk Singh not to sell any alcoholic beverages at all. Further, on January 11, 2019, the ABC agents personally reminded Respondent Singh and clerk Singh not to sell any alcoholic beverages as the license was still suspended, yet another alcoholic beverage sale occurred a week later.

10. Rule 144 lists "Prior warning letters." as a factor in aggravation. While the Department issued no warning letter to Respondent regarding the January 11, 2019 incident, the personal admonishment given by the ABC agents to Respondent Singh and clerk Singh that very day to not sell alcoholic beverages while under the suspension along with clerk Singh's citation for that offense had the same effect as a warning letter as applied to the subsequent violation on January 18, 2019. This was an aggravating circumstance as to the January 18, 2019 violation.

11. None of Respondent's evidence established a sufficient basis or other reasonable explanation why either of the sale-under-suspended-license violations occurred. As to January 11, 2019, Respondent's attempt to somehow blame a local troublesome patron for the violation was unpersuasive. That person was not involved in that violation at all. As to the January 18, 2019 violation, there was insufficient evidence that the sale-under-suspended-license violation involved any compelling duress, extenuating circumstances, or other excusable neglect warranting a defense to the violation or in mitigation to any penalty. Even if a car-jacking was committed in a nearby parking lot it was not shown that caused or justified clerk Singh selling tequila to Agent Gonzalez.

12. For selling alcoholic beverages under a suspended license, rule 144 calls for a minimum penalty of double the penalty of the original suspension and, in this instance, that original penalty was already a stayed revocation with an indefinite suspension. When considering the penalty set forth in rule 144 and that the aggravating circumstances described above vastly outweighed the mitigating circumstances offered by Respondent, revocation of the license is warranted as to Counts 1 and 3.

13. As to the illegal possession of drug paraphernalia specified in Count 4, that was also an aggravated violation because ABC agents specifically warned clerk Singh regarding the illegality of possessing drug paraphernalia for sale or selling drug paraphernalia on January 11, 2019. The agents seized the glass-pipes found that day and issued clerk Singh a citation for illegal possession of drug paraphernalia. However, only seven days later, near identical types of drug paraphernalia pipes were found in a cognac box on the employee side of the sales counter under clerk Singh's dominion and control.

14. Respondent presented no evidence in defense to or in mitigation of Count 4. Respondent presented no explanation why drug paraphernalia was present on the Licensed Premises on January 11, 2019 and again on January 18, 2019. Therefore, Count 4 also warrants an aggravated penalty beyond that set out in rule 144.

15. Respondent also suffered two prior accusations for a violation section 25658, subdivision (a), selling or furnishing alcohol to a minor.

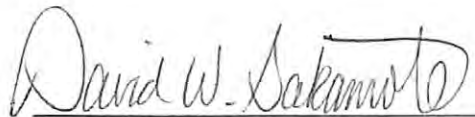
16. The penalty ordered below reflects a careful weighing of the factors in aggravation and those in mitigation and complies with rule 144.

17. Except as set forth in this decision, all other contentions raised by the parties with respect to the penalty lack merit.


ORDER

1. Count 1 is sustained and the license is revoked.
2. Count 2 is dismissed.
3. Count 3 is sustained and the license is revoked.
4. Count 4 is sustained and the license is revoked.

Dated: June 3, 2019



David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/>	Adopt
<input type="checkbox"/>	Non-Adopt: _____
By:	
Date:	7/10/19