

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

AB-9813

File: 75-516767; Reg: 18087556

WALTER'S BUNGALOW, LLC,
dba The Goose and The Gander
1245 Spring Street
Saint Helena, CA 94574-2023,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 5, 2019
Sacramento, CA

ISSUED DECEMBER 17, 2019

Appearances: *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for Walter's Bungalow, LLC,

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

OPINION

Walter's Bungalow, LLC, doing business as The Goose and The Gander, appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking its license (with revocation conditionally stayed for a period of 48 months provided no further cause for discipline arises during that time) and concurrently suspending its license for 45 days as to all privileges of the license except the production of beer as required by Business and Professions Code section 23396.3(a), because appellant

¹The decision of the Department, dated May 7, 2019, is set forth in the appendix.

made retail sales of alcoholic beverages during a period when it failed to meet its 100 barrel minimum beer production requirement, in violation of Business and Professions Code sections 23300² and 23396.3, subdivision (a).³

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general brew-pub license was issued on April 18, 2012. There is one prior instance of departmental discipline against the license in 2016 for the same violation alleged in the present matter. That accusation was resolved via a Stipulation and Waiver for a fine in lieu of a 15-day suspension. (Exh. 2.)

On September 27, 2018, the Department instituted a single-count accusation against appellant charging that it made retail sales of alcoholic beverages during the period from January through December 2017 during which it failed to meet its 100

² This section provides:

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.

(Bus. & Prof. Code § 23300.)

³ This section provides, in pertinent part:

A brewpub-restaurant license is a retail license which may be issued to a bona fide public eating place, as defined in Section 23038. The licensed premises shall have a minimum seven-barrel commercial brewing system located permanently onsite that is capable of producing at least seven barrels of beer per brewing cycle, and the licensee shall produce not less than 100 barrels nor more than 5,000 barrels of beer annually on the licensed premises. The license authorizes the sale of beer, wine, and distilled spirits for consumption on the premises, and the sale of beer produced by the brewpub-restaurant licensee for consumption on the premises. . . .

(Bus. & Prof. Code §23396.3(a).)

barrel minimum beer production requirement.

At the administrative hearing held on January 29, 2019, documentary evidence was received and testimony concerning the violation charged was presented by: Department Agent Christopher Vale; Jason Savage, managing partner of the licensed premises; and Andrew Florsheim, principal owner and managing member of appellant Walter's Bungalow, LLC.

Testimony established that appellant holds a type-75 brew-pub license which permits it to sell beer, wine, and distilled spirits for consumption on the premises while operating as a bona-fide eating place. Under this type of license, it must also produce at least 100 barrels of beer, but no more than 5,000 barrels of beer, on the premises annually.

In early 2018, the Department requested appellant's records regarding sales of food and alcohol during the previous year, as well as documents regarding the production of beer. (Exh. 2.) On February 14, 2018, Department Agent Chris Vale met with members of appellant's LLC. The members were informed that the LLC had failed to produce the minimum 100 barrels of beer in 2017. (RT at pp. 33-34.) Instead, the production for 2017 was between 20 and 24 barrels. (Exhs. 5 & 6.) These facts are not in dispute.

The administrative law judge (ALJ) issued his proposed decision on February 11, 2019, sustaining the accusation and recommending that the license be revoked, with the revocation conditionally stayed for 48 months, and concurrently suspending the license for 45 days.

The Department advised the parties on February 25, 2019 that the decision had

not been adopted by the Department and that it would issue a decision pursuant to Government Code 11517(c). The parties were invited to submit comments and both parties did so. Thereafter, on May 6, 2019, the Director issued an Order adopting the proposed decision dated February 11, 2019, but reducing the penalty so that during the 45 days of suspension the licensee would be permitted to produce beer as required by Business and Professions Code section 23396.3(a). A Certificate of Decision was issued on May 7, 2019.

Appellant then filed a timely appeal arguing that the penalty is excessive.

DISCUSSION

Appellant contends, “the penalty has crossed over from enforcing compliance to being punitive.” (AOB at p. 2.) Appellant also argues the penalty is arbitrary and capricious. (*Id.* at p. 4.) We agree.

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) “‘Abuse of discretion’ in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]” (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].) The California Supreme Court has defined abuse of discretion as an “. . . arbitrary determination, capricious disposition or whimsical thinking.” (*Harris v. Superior Court* (1977) 19 Cal.3d 786, 796 [140 Cal.Rptr. 318].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic

Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq.*), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

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

(*Ibid.*) The guidelines also include the following policy statement:

Policy Statement:

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

(*Ibid.*) The Board does not believe the penalty in this matter comports with the Department's published policy of seeking to impose penalties which encourage compliance with the law and which are not punitive.

In the ALJ's proposed decision, he recommended revocation of the license, conditionally stayed for a period of 48 months provided no further cause for discipline arose during that period, and a concurrent 45-day suspension of the license. The Director declined to adopt the proposed decision in its entirety. Instead, he issued an Order adopting the proposed decision, but modified the penalty slightly so that during the 45 days of suspension the licensee would be permitted to produce beer as required by Business and Professions Code section 23396.3(a).

The Board may not disturb a penalty order unless it is so clearly excessive that any reasonable person would find it to be an abuse of discretion in light of all the circumstances. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

In the instant matter, the Department has seemingly lost sight of its policy goal of encouraging compliance with the law when it imposed the draconian penalty of both a 45-day suspension and a four year period of stayed revocation during which *any*

violation during the four year period will result in the immediate revocation of the license — despite the uncontroverted evidence in the record that appellant has *already demonstrated* that it has come into compliance with section 23396.3(a).

The decision acknowledges that appellant came into compliance with the minimum beer production requirements in 2018 (see: Penalty, ¶ 8), yet appellant was given no mitigation of the penalty for achieving compliance, nor any recognition of the fact that its “operations at the licensed premises were not shown to have caused an public safety harm or threat of harm.” (Penalty, ¶ 9.) This seems to us to be the very definition of an arbitrary and capricious penalty. While we understand that this is a second violation, and *some* penalty must be imposed, we also believe the penalty imposed here is so clearly excessive that any reasonable person would find it to be an abuse of discretion in light of all the circumstances.

If compliance with the law and the encouragement of good business practices is indeed the goal of the Department, the Board believes a less punitive penalty is mandated in this case — one which reflects that policy and which recognizes the fact that appellant has been in compliance since 2018. We encourage the Department to meet and confer with appellant in order to reach a final decision in this matter.

ORDER

The decision of the Department is remanded to the Department for reconsideration of the penalty.⁴

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

⁴This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.

APPENDIX

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

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

WALTER'S BUNGALOW, LLC
THE GOOSE AND GANDER
1245 SPRING STREET
SAINT HELENA, CA 94574

ON-SALE GENERAL BREW-PUB - LICENSE

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

SANTA ROSA DISTRICT OFFICE

File: 75-516767

Reg: 18087556

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on April 12, 2019. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

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

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

A representative of the Department will contact you on or after June 17, 2019 to pick up the license certificate.

Sacramento, California

Dated: May 7, 2019



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACUUSATION
AGAINST:

Walter's Bungalow, LLC
Dbas The Goose and Gander
1245 Spring Street
Saint Helena, CA 94574

Respondent(s)/Licensee(s).

File No.: 75-516767

Reg. No.: 18087556

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Alcoholic Beverage Control
Office of Legal Services

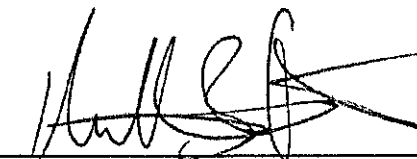
ORDER

The Department hereby adopts the Proposed Decision of the Administrative Law Judge dated February 11, 2019, in the above-entitled matter, and pursuant to Business and Professions Code section 24211, the Department reduces the discipline in this matter as follows:

1. Respondent's Type 75 brewpub-restaurant license is revoked, with such revocation stayed for a period of 48 months commencing the date when the decision in this matter becomes final upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and revoke the license, and should not such determination be made, the stay shall become permanent.
2. With the exception of the production of beer as required by Business and Professions Code section 23396.3(a), all privileges of Respondent's Type 75 brewpub-restaurant license are suspended for a period of 45 consecutive days.

Sacramento, California

Dated: May 6, 2019


for Jacob Appelsmith
Director

Walter's Bungalow, LLC
Dba The Goose and Gander
75-516767; 18087556
Page 2 of 2

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3; 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Walter's Bungalow, LLC
Dbas: The Goose and Gander
1245 Spring Street
Saint Helena, CA 94574

Respondent

Regarding Its Type-75 On-Sale Brew-Pub License
Under the California State Constitution and the
Alcoholic Beverage Control Act.

} File: 75-516767
}
} Reg: 18087556
}
} License Type: 75
}
} Word Count Estimate: 31,883
}
} Rptr: Kathleen Soloaga, CSR-6957
} Sims & Sims
}
} **PROPOSED DECISION**
}

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Napa, California on January 29, 2019.

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on January 29, 2019.

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

Dean Lueders, Esq., represented licensee/respondent Walter's Bungalow, LLC., doing business as the Goose and Gander. (Hereafter Respondent) Andrew Scott Florsheim, Respondent's principal owner and Managing Member, and Jason Savage, Respondent's managing partner, were also present.

As set forth in the Department's accusation, it seeks to discipline Respondent on the ground that:

Count 1: During the annual year 2017, between January 1, 2017 and December 31, 2017, respondent-licensee(s) made retail sales of alcoholic beverages, when respondent-licensee failed to produce a minimum of 100 barrels of beer, in violation of Business and Professions Code section 23300 and 23396.3(a). (Exhibit 1: Pleadings)

FINDINGS OF FACT

1. The Department filed its accusation on September 27, 2018. The Department received Respondent's Notice of Defense on November 5, 2018 and set the matter for a hearing.¹
2. On April 18, 2012, the Department issued Respondent a type-75 brew-pub license for its premises as captioned above. (Hereafter the licensed premises)
3. Section 23396.3, among other things, permits a type-75 brew-pub license holder to retail in beer, wine, and distilled spirits for consumption on the premises which must also operate as a bona-fide eating place as defined in section 23038. The licensee must also produce at least 100 barrels of beer but no more than 5,000 barrels of beer on the premises annually.² The accusation herein alleged Respondent failed to meet the minimum beer production volume of 100 barrels for 2017.
4. Under its type-75 license, Respondent suffered prior disciplinary action as follows:

Date of Violation	Section Violated	Registration Date	Registration Number	Penalty Imposed
04-14-2016	Bus. & Prof. Code 24200(a-b), 23396.3 and 23355	08-11-2016	16084592	15-day license suspension

5. The prior accusation against Respondent under Reg: 16084592 charged Respondent had not met its 100 barrel minimum beer production requirement spanning from April 2012 to April 2016. (Exhibit 2: Prior accusation pleadings) That accusation resulted in a 15 day

¹ At the hearing, Respondent raised an initial issue of whether this matter had been expedited for hearing based upon an ex-parte communication. The ALJ was not aware of any such communication. Based upon this ALJ's experience, the timing of the filing of the accusation, Respondent's Notice of Defense, and the hearing date did not seem unusually expedited. Their timing appeared consistent with other cases heard by the ALJ. The timing of events in this matter was not shown to have been materially prejudicial to Respondent. Respondent made no motion to continue the hearing before the ALJ to explore the ex-parte issue any further or to allow Respondent added time to prepare for the hearing.

² One barrel consists of 31 gallons of beer.

suspension. Under section 23095, the Department permitted Respondent to pay a \$3,000.00 fine in lieu of serving any suspension time.³

6. On January 31, 2018, Alcoholic Beverage Control Agent Vale (Hereafter Agent Vale) visited Respondent's premises as part of an investigatory audit to determine whether or not Respondent was operating in compliance with its type-75 license requirements.⁴ Upon his arrival at the licensed premises, it was open and operating.

7. Agent Vale contacted Respondent's employee, Brittany Cowley. She showed him Respondent's beer brewing equipment located in a small locked room on the licensed premises. The approximately 14 foot by 10 foot room contained two operational five-barrel beer production systems that were in use. She also showed Agent Vale how the beer was conveyed via tubing that ran from the beer production equipment through a wall to an actual pour tap at a bar service counter. Cowley pulled the tap and beer flowed out. Cowley indicated no records regarding the beer manufactured at the licensed premises were at the licensed premises. Agent Vale then delivered a "Notice to Produce Records" letter to Cowley which sought various records and documents pertaining to Respondent's beer production efforts. (Exhibit 3: Notice to Produce Records)

8. On February 14, 2018, Agent Vale returned to the licensed premises and met with Andrew Florsheim and Jason Savage. Florsheim informed Agent Vale that Respondent did not produce 100 barrels of beer during 2017, the focus of Agent Vale's audit. Florsheim added the delay in production was due to upgrades needed to the equipment and premises to comply with county requirements and the beer they had produced so far was not fit for consumption. Respondent did not want to present a poor tasting product to its customers. Florsheim and Savage collectively conveyed Respondent had to use different contractors to get the needed repair work done in preparation for beer production. Florsheim and Savage told Vale that they were going to do their best to produce at least 100 barrels of beer in 2018. Agent Vale perceived Florsheim and Savage to be cooperative in the investigation.

9. Florsheim presented some of Respondent's business records to Agent Vale including:

1. An annual sales revenue report for 2017. (Exhibit 4: Sales report) The report reflected that in 2017, Respondent had gross sales of alcoholic beverages just in excess of 1.7 million dollars and reflected its food sales revenues were just in excess of 2.2 million dollars.

³ Section 23095 permits the Department to allow licensees to pay a monetary fine under certain circumstances in lieu of serving a term of actual license suspension.

⁴ ABC Agent Vale testified at the hearing.

2) A California Board of Equalization Beer Manufacturer Tax Return report for 2017. In that report Respondent declared it produced 20 barrels of beer in 2017 (Exhibit 5: Report);

3) Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau quarterly reports for 2017. (Exhibit 6). Collectively, the reports reflected Respondent declared it produced 10 barrels of beer in 2017; and

4) A Sweet Wort Services invoice dated 10-5-2017. (Exhibit 7: Invoice) The invoice reflected Respondent purchased 10 barrels of IPA stock from the Sweet Wort Services company. The IPA stock referred to in the invoice is actually wort, a primary ingredient in making beer. The wort is added to yeast which begins the production of beer process. The actual production process usually last no less than seven days with approximately two added weeks needed for fermentation and final processing. Ten barrels of wort should result in approximately 10 barrels of beer.

10. Agent Vale participated with Agent Shaver in the earlier audit of Respondent that resulted in the prior accusation for not producing at least 100 barrels of beer at the licensed premises. (Exhibit 8: Investigation Report) That inquest led him to conclude Respondent had not produced any beer in 2012 through 2014. He also saw the same beer producing equipment then, in 2015, as he did on his January 2018 inspection of the licensed premises. However, during the prior investigation, the beer brewing equipment did not appear fully hooked up and operational, possibly due to some construction issues and/or local permit issues.

11. Jason Savage began working at the licensed premises in October 2014, as a food and beverage server.⁵ Currently, he works as a managing-partner for Respondent. In 2016, Respondent assigned Savage to get the brewing room and equipment fully operational. He found that some added work was required to do that, including: 1) modifications to the electrical wiring; 2) obtaining a glycol machine; 3) installing specific wall paneling; 4) added specialized metal fabrication related to the tanks; 5) installation of a hand-wash sink and 6) refinishing the brew-room floor. By October 2016, that work was completed and Respondent received final approval from the local health department to commence beer brewing.

12. Respondent commenced its beer brewing. However, the beer produced was of poor quality. Respondent also decided not to try and store its beer in kegs, but to run a direct line to supply a tap at the bar counter in the licensed premises. Connecting the beer manufacturing equipment to a pour tap required added equipment and related installation labor.

⁵ John Savage testified at the hearing.

13. In February 2017, Respondent contacted a vendor to supply and install the equipment necessary to bring the beer from the beer brewing equipment to a beer tap(s) in the licensed premises. However, that vendor was ultimately not able to do the work.
14. In August 2017, Savage contacted another vendor, Nor Cal Beverage, to get the work done. In September 2017, the vendor was able to supply and install the needed equipment to bring the beer from the two five barrel productions systems to supply a beer tap in the licensed premises at a cost of approximately \$7,200.00.
15. However, despite the new equipment, there were still some deficiencies that were ultimately traced to a leaky nitrogen supply line that was replaced/repaired.
16. In October 2017, Respondent was finally able to produce a quality beer product. Respondent has continued to brew beer up to the date of the hearing and the beer is sold and served at the licensed premises. Sweet Wort Services company has supplied Respondent with the necessary wort to make beer. (Exhibit B: invoices and payments) While in 2017 Respondent produced only 10-20 barrels of beer, in 2018, Respondent produced 115 barrels of beer. (Exhibit B: invoices and payments and Exhibit C: payment ledger)
17. Andrew Florsheim has been the managing member and primary owner of Respondent's business since 2012.⁶ Respondent initially leased the licensed premises property in 2012. It was originally a house. The house, which by 2012 was already approximately 100 years old, had already been converted for commercial uses. Respondent's premises, now called the Goose and Gander, has a patron capacity of approximately 110 diners inside and 60 diners on outside patio areas.
18. After Respondent took over the site in 2012, Florsheim found the property was in disrepair and needed much on-going repair work. Respondent ran into problems especially related to outdated or clogged plumbing and poor drainage on the property causing flooding.
19. In 2012, when the Department first issued a type-75 license to Respondent, Florsheim knew that Respondent needed to produce at least 100 barrels of beer annually on the licensed premises. However, not all of the drainage, plumbing, and sewage problems had been fully resolved. Respondent found that because some of the property was below grade, the sump-pump system was not operating properly resulting in clogged drain lines and flooding. In order to help address that problem, the floor of the beer brewing room had to be dug out so that new drain lines could be installed. Work also had to be done to clear the main drain line from the licensed premises to the street sewer system.

⁶ Andrew Florsheim testified at the hearing.

20. In 2016, Florsheim discussed with ABC representatives Respondent's inability to produce at least 100 barrels of beer annually. Respondent believed that the beer they were able to produce was of poor quality. Florsheim felt that it was futile to merely produce beer knowing it would likely just be dumped in the sewer as undrinkable. Florsheim was also alerted that the City of Saint Helena was concerned over damage to the city's sewer system caused by high volumes of beer with its yeast enzymes being dumped by Respondent and other local brew-pubs.

21. In 2016, Florsheim assigned Savage to focus on getting the beer brewing system fully operational. Florsheim testified that this time he wanted to be sure the system ultimately installed would produce a proper tasting beer. Florsheim testified that some delays were also caused by the need to get proper sign-offs from the health department and other system repairs. All modifications and repairs were finally completed by the fall of 2017. Respondent has successfully brewed an appropriate quality beer since then.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.⁷
2. Business and Professions Code Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. 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.
4. Section 23396.3 requires, among other things, that a brew-pub licensee, "...shall produce not less than 100 barrels nor more than 5,000 barrels of beer annually on the licensed premises..." It further requires the licensed premises to operate as a bona-fide eating place as defined in section 23038.

⁷ All further statutory references are to the California Business and Professions Code unless otherwise noted.

DETERMINATION OF ISSUES

1. 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(a) and (b) because during the annual year 2017, between January 1, 2017, and December 31, 2017, respondent-licensee(s) made retail sales of alcoholic beverages, when respondent-licensee failed to produce a minimum of 100 barrels of beer, in violation of Business and Professions Code section 23300 and 23396.3(a).

2. In this instance, the evidence established that for the annual year of 2017, Respondent, while exercising the privilege of selling beer, wine, and distilled spirits on the licensed premises did not produce at least 100 barrels of beer on the licensed premises as required under section 23396.3(a). Respondent was exercising privileges under its type-75 license when it should not have been doing so, not having meet its minimum beer production requirement, resulting in a violation of section 23300. Respondent's own business records and the testimony from its principal owner and its manager established Respondent did not meet its 2017 beer production requirement. Respondent did not present any evidence or testimony it fulfilled its beer production minimum of 100 barrels for 2017. Rather, the evidence established Respondent produced, at most, only 10-20 barrels of beer in 2017. There was sufficient credible evidence to sustain Count 1 of the accusation.

PENALTY

1. At the hearing, the Department recommended the license be revoked. It argued this was an aggravated case because Respondent had not met the minimum beer production requirement from when it was first licensed in 2012, up through 2017. The Department argued Respondent's nearly five-year delay in complying with the minimum beer production requirement was excessive and inexcusable despite those problems and issued Respondent indicated caused that extreme delay.

2. Respondent acknowledged that while its compliance did take a significant time to achieve, all equipment modifications and repairs to the property have been made and it has been regularly brewing beer since late 2017. Respondent noted that when Agent Vale made his first unannounced January 2018 visit to the licensed premises, the beer brewing equipment was present and operating. Respondent's brewed beer was available at a tap. Respondent argued it faced an unexpected myriad of maintenance and repair issues with the licensed premises' plumbing, drainage systems, and related beer brewing equipment that necessitated extensive repair work. Further, added delays were caused in order to receive appropriate health department approvals regarding beer production. Should the accusation be sustained, Respondent indicated a 30-45 day suspension, stayed for one year, was more appropriate.

3. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, division 1, article 22, section 144, commonly referred to as "rule 144". That rule declares: "It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law." The rule also sets forth standard penalties for a variety of specific disciplinary violations.

4. Under rule 144, there is no stated presumptive penalty for a violation of section 23396.3 with respect to failing to meet the minimum annual beer production requirement of 100 barrels as of 2017.⁸

5. Under rule 144, the penalty for a violation of section 23300 which states that: "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." ranges from a 5-day suspension up to revocation.

6. Rule 144 adds that: "Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances." Rule 144 also contains a non-exhaustive list of those factors. Relevant listed aggravating factors in this case include consideration of Respondent's prior disciplinary history and a continuing course of conduct. Relevant listed mitigating factors include positive action by the respondent/licensee to correct the problem and cooperation by the licensee in the investigation.

7. Respondent's extreme five-year delay in achieving the minimum beer production requirement is an aggravating factor of great weight. That delay was a lengthy continuing pattern of non-compliance. The evidence indicated there was no material production of beer on the licensed premises from 2012, when the Department first issued the type-75 license to Respondent, until the fall of 2017. During 2017, the focus of the current accusation, Respondent exercised the privileges of its type-75 license by retailing in beer, wine, and distilled spirits generating just over 1.7 million dollars in gross revenues. Yet, in 2017, Respondent produced only 10-20 barrels of beer, well short of the minimum 100 barrels required of type 75 brew-pub license holders. Therefore, Respondent unjustly benefited by fully exercising license privileges in 2017 while not fulfilling a core responsibility of a type-75 license holder.

⁸ Effective in 2019, the minimum beer production requirement increased to 200 barrels on an annual basis.

8. Although Respondent ran into some unexpected problems related to the property such as insufficient or problematic drainage, old plumbing, and the need for electrical upgrades, a five-year total delay before finally complying with the minimum beer production requirements for 2018 was unreasonable. As to the year at issue, 2017, it appeared Respondent was still able, despite all of the complained of problems, to generate significant sales revenues.

9. However, although extremely tardy in fulfilling its beer production requirements, Respondent's operations at the licensed premises were not shown to have caused any public safety harm or threat of harm. Respondent's deficiency in beer production was not shown to have resulted in any disturbance to local area residents, businesses, or the local community. At least for 2017, a reasonable percentage of Respondent's sales revenues derived from food sales, evidencing it was operating as a bona-fide eating place, as it was also required to do under its type-75 license. Respondent's personnel and management were also cooperative and forthcoming in the investigation.

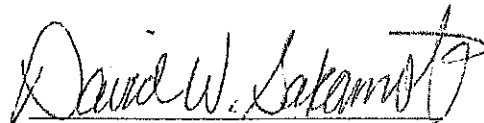
10. Respondent suffered a prior accusation for not meeting the minimum beer production requirement from April 18, 2012, the date the license was first issued, through April 14, 2016. That accusation basically covered a four year time-frame. However, the penalty imposed in that accusation was a 15 day suspension. Here, for a one-year time frame of non-compliance, the Department recommended revocation of the license. Rule 144 states, "It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law." As this was the second accusation for the exact same type violation it legitimately warrants a substantially higher penalty than the 15 day suspension imposed for the first accusation. However, an escalation from a 15 day suspension up to an unconditional license revocation is too extreme. Unconditionally revoking Respondent's license also seems inappropriate in that it was not shown public safety or health was ever at risk and Respondent has since made all necessary repairs and modifications and is now fully capable of meeting its minimum beer production requirement. Based upon weighing the factors in mitigation and aggravation, the penalty ordered below complies with rule 144.

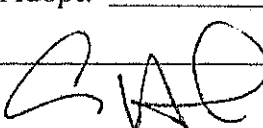
11. As to any other grounds of mitigation or aggravation raised by the parties at the hearing or in the pleadings, they are deemed without merit.

ORDER

1. Count 1 of the accusation is sustained.
2. Respondent's license is revoked, however such revocation is stayed for a period of 48 months commencing the date when the decision in this matter becomes final upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and revoke the license, and should no such determination be made, the stay shall become permanent.
3. Respondent's license is also suspended for 45 consecutive days.

Dated: February 11, 2019


David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt	Reduce discipline to allow brewing.
<input type="checkbox"/> Non-Adopt:	_____
By:	
Date:	04/12/19