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

AB-9819
File: 47-572261; Reg: 18086442

JP 23 HOSPITALITY COMPANY,
dba JP23 Smokehouse BBQ Sports Restaurant
101 South Harbor Boulevard, Suite A
Fullerton, CA 92832-1899,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: January 9, 2020
Los Angeles, CA

ISSUED JANUARY 21,2020

Appearances: *Appellant:* Ryan C. C. Duckett, of Nixon Peabody LLP, as counsel for JP 23 Hospitality Company,

Respondent: Colleen R. Villareal, as counsel for the Department of Alcoholic Beverage Control.

OPINION

JP 23 Hospitality Company, doing business as JP23 Smokehouse BBQ Sports Restaurant, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 30 days because its employees permitted entertainment to be audible beyond the area under the control of the licensee, required an admission fee or cover charge, and sold distilled spirits by the bottle, in violation of the conditions on the

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

license and Business and Professions Code[2] section 23804. Additionally, appellant did not have a duplicate license for the exterior patio bar in violation of section 24042.

FACTS AND PROCEDURAL HISTORY

Appellant's current on-sale general eating place license was issued on October 26, 2016. Appellant held a previous license at the premises from January 23, 2013 to October 27, 2016. There is a single instance of departmental discipline against appellant's prior license.

On February 8, 2018, the Department filed a 14-count accusation against appellant charging that on six occasions – March 3, 2017, April 28, 2017, May 26, 2017, October 20, 2017, October 27, 2017, and December 1, 2017, appellant failed to comply with the conditions attached to its license, in violation of section 23804. The Department also alleged that appellant failed to maintain a duplicate license at a second fixed bar, in violation of section 24042.

A two-day administrative hearing was held on August 27, 2018 and January 29, 2019, where documentary evidence and testimony concerning the violations was presented. Department Agents Bryan Rushing and Daniel Plotnik testified on behalf of the Department. Jacob Poozhikala, appellant's sole owner and CEO, Ernie Bituin, manager at the licensed premises, Jose Refugio Ochoa Corona, assistant manager, and server, Brittany Dannelley, testified on appellant's behalf.

Testimony established that appellant's CEO, Jacob Poozhikala, signed a Petition for Conditional License (Form ABC-172) on August 30, 2016. Three of the conditions on that petition provided:

[2] All statutory references are to the California Business and Professions Code unless otherwise stated.

> 1. "Entertainment provided shall not be audible beyond the area under control of the licensee(s) as defined on the ABC-257 dated 8-3-16."
> …
> 6. "Petitioner(s) shall not require an admission charge or a cover charge, nor shall there be a requirement to purchase a minimum number of drinks."
> …
> 8. "No distilled spirts shall be sold by the bottle."

(Findings of Fact, ¶ 4.) The petition further stated that appellant understood "any violation of the foregoing condition(s) shall be grounds for the suspension or revocation of the license(s)." (Exh. 4.)

Counts 1-3:

On March 3, 2017, Agents Rushing and Jennifer Gardena[3] arrived at the licensed premises to investigate a complaint they received regarding possible condition violations. When they arrived, the agents tried to enter through the front of the premises but were told by security that the entrance was in the back patio. As they walked around back, the agents observed a single-file line of patrons waiting to enter the premises. Agent Rushing heard hip-hop music emanating from the licensed premises. Agent Rushing then walked across Alley Road and stood approximately 62 feet from the nearest edge of the licensed premises. Agent Rushing heard the same hip-hop music from that location.

The agents then waited in line to enter the licensed premises. When they arrived at the front, security personnel told them it would be $10 to enter and asked for identification. After each of the agents paid $10, they were permitted to enter the

[3] In the Proposed Decision, the administrative law judge (ALJ) refers to Agent Gardena as "Gardea." We use the same spelling as used in the Reporter's Transcript. (RT at p. 14:17.)

licensed premises.

Once inside, agents observed a DJ playing the same general hip-hop style music Agent Rushing heard from outside. Agent Rushing then walked back outside to the patio's fixed bar and ordered a Jack Daniel's Whiskey and Coca-Cola[4] mixed cocktail, which he paid for. Agent Rushing observed that the licensed premises did not have a duplicate license for the exterior patio bar.

Counts 4-6:

Agent Rushing returned to the licensed premises on April 28, 2017 along with Agent Eric Silva. Again, Agent Rushing could hear hip-hop music emanating from inside, and walked across Alley Road where he could still hear the music.

Agent Rushing walked back to the licensed premises and waited with Agent Silva in line at the rear patio entrance. There were approximately 30-50 people in front of them, and the agents overheard patrons saying that a person could bypass waiting in line by paying $30 instead of $10 to enter. Agent Rushing asked security personnel if he could pay to skip the line and was told he could for $30. Agent Rushing paid the security officer $30 and entered the licensed premises while Agent Silva waited outside.

Once inside, Agent Rushing observed a DJ playing music before going outside to the exterior patio, where he ordered a Jack Daniel's Whiskey and Coca-Cola. Agent Rushing watched the bartender make his drink and serve it to him. Again, Agent Rushing observed that there was no duplicate license for the rear patio. Agent Rushing tasted the beverage served to him by the bartender and confirmed it was an alcoholic beverage.

4 Colloquially referred to as a "jack and coke."

Counts 7-9:

Agent Rushing returned to the licensed premises with Agent Eric Grey[5] on May 26, 2017. The agents walked to the rear patio of the licensed premises and saw a single-file line of patrons waiting to enter. Once again, Agent Rushing heard hip-hop music coming from inside. Agent Rushing, as he had on two prior occasions, walked across Alley Road to verify that he could hear the music from that location. After confirming that he could, he walked back across Alley Road and joined Agent Grey in the single-file line of patrons waiting to enter the licensed premises.

When he got to the front of the line, Agent Rushing handed his identification to the security guard and was told there would be a $15 cover charge. Agent Rushing entered the licensed premises and paid the $15 cover charge while Agent Grey waited outside. Once inside, Agent Rushing observed a DJ playing music while patrons danced. He went outside to the fixed patio bar and ordered a Jack Daniel's Whiskey and Coca-Cola, which he confirmed tasted like it had alcohol in it. Once again, the patio lacked a duplicate license.

Agent Rushing contacted Agent Grey and told him to meet at the rear patio entrance where they identified themselves as law enforcement and asked to speak to a manager. A short time later, the agents met with manager Ernie Bituin, and explained the condition violations they observed, such as failing to post a duplicate license at the exterior patio bar, charging a cover fee, and playing music that can be heard beyond the

[5] The ALJ spells Agent Grey's last name as "Gray." Again, we use the same spelling as the Reporter's Transcript.

area under control of the licensed premises. Agent Rushing also gave Bituin a copy of appellant's license, which listed said conditions. Bituin advised the agents that he had only been employed a short time and was unaware of the conditions.

Agent Rushing took Bituin across Alley Road so he could verify that music emanating from the licensed premises could be heard at that location. Agent Rushing also told Bituin that he could continue to operate the exterior patio bar for the rest of the evening, but that starting the following day, he could not operate it without having a duplicate license.

Approximately two weeks later, CEO Jacob Poozhikala contacted Agent Rushing and the two discussed the condition violations and the need for a duplicate license for the patio bar. Poozhikala advised Agent Rushing that he would apply for a duplicate license and inquired about a prepaid meal service, without specifically explaining what he meant. Agent Rushing told Poozhikala that he did not see any problem with charging for a prepaid meal or payment in advance for food. However, there was no discussion between Poozhikala and Agent Rushing relating the prepaid meal as a substitute for a cover charge.

Counts 10-11:

On October 20, 2017, Agent Rushing, along with Agent Daniel Plotnik and Supervising Agent Trung Vo, went to the licensed premises and waited in line outside the rear patio area. Again, Agent Rushing could hear music emanating from inside the licensed premises.[6] When Agent Rushing got to the front of the line, security

[6] Agent Plotnik would later walk across Alley Road and confirm the music could be heard from that location.

personnel told him there was a $10 cover charge. Agent Rushing paid the cover charge and was given a ticket, which the cashier explained could be exchanged inside for a hot dog.

Agent Rushing entered the licensed premises and observed a DJ playing music. Agent Rushing went to the internal fixed bar and ordered a Jack Daniel's Whiskey and Coca-Cola, which he paid for and was served. Agent Rushing also asked the bartender if he could exchange his ticket for a hot dog. The bartender told Agent Rushing that someone would bring hot dogs out and place them on the bar in about ten minutes. Agent Rushing did not see anyone with hot dogs, nor was he told by anyone that the $10 he paid to get in was a prepaid meal ticket.

Count 12:

Agents Plotnik and Amer Zeidan returned to the licensed premises on October 27, 2018 and were told there was a $5 cover charge to enter. The agents were not given the option to enter the licensed premises without paying the cover charge. Likewise, the agents were not informed that the $5 fee was for a prepaid meal. Both agents paid the $5 cover charge and entered the licensed premises.

Counts 13-14:

On December 1, 2017, agents Rushing and Zeidan returned to the licensed premises as the result of a complaint that distilled spirits were being sold by the bottle. Again, the agents walked to the rear patio entrance where there was a single file line. After waiting in the line, agents were told there was a $15 cover fee. Agent Rushing gave the cashier $30 for himself and Agent Zeidan. The cashier handed Agent Rushing two raffle-style tickets and told them they could exchange the tickets for a hot

dog inside the licensed premises. However, once inside the licensed premises, neither agent saw anyone serving or consuming hot dogs.

Inside the premises, the agents contacted a hostess and requested a table with bottle service. Once seated, the agents ordered a bottle of Absolut Vodka, which the waitress provided to them. The agents identified themselves as law enforcement to the waitress and asked to speak with a manager. Bituin came to the agents' table and the agents explained the violations to him (cover charge and serving distilled spirits by the bottle). The agents provided Bituin a copy of appellant's Petition for Conditional License (exh. 4) and asked for the receipt for the bottle of vodka, which Bituin retrieved.

The ALJ issued a proposed decision on March 13, 2019, sustaining all 14 counts in the accusation and recommending a 30-day suspension.[7] The Department adopted the proposed decision in its entirety on April 24, 2019 and issued a Certificate of Decision on May 7, 2019.

Appellant then filed a timely appeal contending: (1) The Department failed to provide adequate notice of the accusations; (2) the conditions of the license are arbitrary; (3) the findings are not supported by substantial evidence; (4) there is relevant evidence that could not have been produced at the hearing, and; (5) the penalty is excessive.

[7] Regarding counts 1, 2, 4, 5, 7, 8, and 10-14, the ALJ recommended a 15-day suspension for each count to be served concurrently. For counts 3, 6, and 9, the ALJ recommended an additional 15-day suspension for each count, also to be served concurrently. Finally, the ALJ recommended that the two separate 15-day concurrent suspensions be served consecutively, for a total of 30 days.

DISCUSSION

I

ISSUE CONCERNING ADEQUATE NOTICE

Appellant contends that the Department failed to proceed in the manner required by law because it did not give appellant adequate notice of the accusations. (AOB, at pp. 3-4.) Specifically, appellant claims the counts alleged for "each violation are indecipherable, convoluted, and improperly aggregated into multiple alleged offenses as opposed to a single offense … ." (*Id*. at p. 4.) Appellant cites to the fact that the First Amendment to the Accusation lists "Count 2" twice and claims that, although a typographical error, it was "impossible for JP23 to understand what violations applied to what counts, and therefore [could not] defend itself against the allegations." (*Id*. at p. 4, fn. 1.)

California Government Code section 11503 states, in pertinent part:

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

In administrative proceedings, "courts are more interested with fair notice to the accused than they are to adherence to the technical rules of pleading." (*Wright v. Munro* (1956) 144 Cal.App.2d 843, 848 [301 P.2d 997, 1000].)

A review of the record indicates that each of the counts listed in the Accusation and First Amendment to Accusation contain a factual statement that appellant violated one or more of the Alcoholic Beverage laws on a particular date. (Exh. 1A.) For example, Count 1 of the First Amendment to Accusation alleges:

> On or about March 3, 2017, respondent-licensee violated condition #1 on the license which states "Entertainment provided shall not be audible beyond the area under control of the licensee(s) as defined in the ABC-257 dates 8/3/16," in that entertainment provided was audible beyond the area under licensee's control, such as being a violation of the license condition and ground for license suspension or revocation under Business and Professions Code Section 23804.

(Exh. 1A.) The remaining counts in the First Amendment to Accusation are similar, only differing in dates, conditions violated, and Business and Professions Code section implicated. (*Ibid*.)

Here, the allegations in the operative accusation comport with Government Code section 11503. Each count contains a date and factual statement regarding the act and statute with which appellant is alleged to have violated. (Exh. 1A.) Further, the counts pertaining to condition violations include the number of the condition violated as well as the substance of that condition. (*Ibid*.) Appellant had fair notice to prepare its defense.

Further, the Board fails to see how titling two separate counts as "Count 2" made it "impossible" for appellant to prepare its defense. First, the second "Count 2" is listed in between the first "Count 2" and "Count 4." (Exh. 1A.) A reasonable assumption is that the Department simply mislabeled "Count 3" as a second "Count 2." Second, each "Count 2" alleges entirely different acts and statutory violations. The first "Count 2" alleges a violation of section 23804 (condition #6 violation for requiring a cover charge), while the second "Count 2" alleges a violation of sections 23300 and 23355 for selling distilled spirits on an outside patio without holding a duplicate license. In essence, each count provides appellant fair notice, regardless of how each count was numbered. Appellant's contentions, are therefore, rejected.

II

ISSUE CONCERNING MUNICIPAL REGULATIONS/CONDITIONS

Appellant contends that the license conditions are "arbitrary" as evidenced by the fact that the City of Fullerton is abolishing its own conditions and regulations forbidding appellant from requiring a cover charge, playing music that can be heard beyond the area of its control, and serving alcohol on the patio. (AOB, at p. 4-5.) Appellant seems to suggest that the Department cannot penalize it for violating conditions that are not also conditions for the City of Fullerton, where the licensed premises is located. (*Ibid*.)

Appellant has not provided any legal authority to support its position that it cannot be punished for violating license conditions that are not also conditions of the municipality where it is located. On those grounds, the Board should deem appellant's contention waived. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [57 Cal.Rptr.3d 363, 377] ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."].)

Nevertheless, the Department is expressly authorized under section 23800 to "place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges" in certain circumstances. None of those circumstances prohibit the Department from imposing conditions that are not also prohibited by the corresponding municipal entity. The Board sees no error.

III

ISSUE CONCERNING SUBSTANTIAL EVIDENCE

Appellant contends the Department's decision is not supported by substantial evidence. (AOB, at p. 5-9.) Namely, that Agent Rushing's testimony was not corroborated by any other witness. (*Id*. at pp. 5-6.)

However, appellant also contends that: 1) it did not commit noise violations because there is no evidence that it "impede[d] normal conversations, or negatively impact[ed] adjacent businesses" (AOB, at p. 6); 2) it did not commit cover charge violations because the evidence shows the money[8] was collected by third parties (security guards) (*id*. at pp. 7-9), and; 3) there is no evidence that it knew it needed a separate, duplicate license to serve alcohol on the patio (*id*. at p. 9).

The Department's findings regarding counts 1, 4, 7, and 10 (noise violations), counts 2, 5, 8, 11, and 12 (cover charge violations), and counts 3, 6, and 9 (duplicate license violations) will be upheld so long as those findings are supported by substantial evidence. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826, 837] (*Masani*); *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]".) Substantial evidence is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.' " (*County of*

[8] Appellant also argues that the "money" collected was a pre-paid meal ticket, not a cover charge. (AOB, at pp. 8-9.)

Los Angeles v. Commission on State Mandates (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

Section 23804 states that "[a] violation of a condition placed upon a license … shall be grounds for the suspension or revocation of such license." Therefore, in order to suspend appellant's license, the Department must prove both a condition placed upon the license and a violation thereof. (*Ibid*.)

The existence of the conditions prohibiting entertainment "beyond the area of [appellant's] control …" and "an admission charge or a cover charge" are supported by Exhibits 3-4. Exhibit 4 (Petition for Conditional License) establishes the license conditions while Exhibit 3 is a diagram establishing the area under appellant's control. Further, the Department found that the conditions referenced in Exhibit 4 were violated based on testimony by Agent Rushing.

First, Agent Rushing testified that he could hear music emanating from the licensed premises on March 3, 2017, April 28, 2017, and May 26, 2017 from across Alley Road, which according to Exhibit 3, is beyond the area of appellant's control. (Findings of Fact, ¶¶ 7, 11, and 16.) Agent Rushing further testified that, on October 20, 2017, while inside the licensed premises, he spoke to Agent Plotnik via cell phone while Agent Plotnik was across Alley Road. (*Id.* at ¶¶ 28-29.) While standing at that location, Agent Plotnik could hear music emanating from the licensed premises. (*Id*. at ¶ 29.)

Second, Agent Rushing testified that on each visit to the licensed premises, he was charged a fee to enter. (Findings of Fact, ¶¶ 8, 12, 17, 25, 32, and 34.) On three of his visits, October 20, 2017, October 27, 2017, and December 1, 2017, Agent

Rushing was given a ticket and told that he could exchange it inside for a food item. (*Id*. at ¶ 25, 33, and 34.) However, Agent Rushing did not see anyone with food inside the licensed premises, nor did he see any food being served. (*Id*. at ¶¶ 26, 33, and 35.) Similarly, Agent Rushing was not given the option to enter the licensed premises without paying a fee. (*Id*. at ¶ 25, 32, and 34.) In his testimony, appellant's CEO, Mr. Poozhikala, admitted that the prepaid appetizer/meal was, in fact, a cover charge. (Conclusions of Law, ¶ 25.)

Finally, section 24042 requires a duplicate license when a licensed premises "maintains upon or within the premises … more than one room in which there is regularly maintained a fixed counter or service bar at which distilled spirits are served … ." Agent Rushing testified that, on March 3, 2017, April 28, 2017, and, May 26, 2017, he ordered and was served a distilled spirit at appellant's external fixed bar, which was separate from the fixed bar inside the licensed premises, and that the external fixed bar did not have a duplicate license. (Findings of Fact, ¶¶ 10, 14, and 19.) CEO Poozhikala admitted that the external patio bar did not have a duplicate license until sometime after May 26, 2017. (*Id*. at ¶ 45.)

Based on the above, there is substantial evidence to support the Department's findings regarding the violations of condition #1 (noise violations), condition #6 (cover charge violations), and for failing to maintain a duplicate license at the external fixed bar. The evidence to support these findings is found in Agent Rushing's testimony, as well as Exhibits 3 and 4. Further, there is no requirement that a witness' testimony be corroborated in order to be found credible. However, we note that in many aspects, CEO Poozhikala himself actually corroborated Agent Rushing's testimony. For

example, when asked why he would implement policy which so closely resembles a cover charge, CEO Poozhikala responded, “[t]he entire city charges cover charges. I’m the only one who just got caught for having - - who got investigated on for all these things. The entire city does this.” (RT at p. 191:11-14.) As such, appellant’s contention that Agent Rushing’s testimony was not corroborated (or that it even needed to be) is rejected.

Further, we reject appellant’s argument that the Department failed to establish that appellant’s entertainment “impede[d] normal conversations, or negatively impact[ed] adjacent businesses” (AOB, at p. 6). Again, there is no such requirement as the license condition only says the entertainment cannot be heard “beyond the area of [appellant’s] control … .” (Exh. 4.) As discussed above, this was established with substantial evidence.

Likewise, there is no requirement that the Department tell appellant that it needed a separate, duplicate license to serve alcohol on the patio. That requirement can be found in section 24042. Under controlling legal authority, licensees have an affirmative duty to maintain and operate their premises in accordance with law. (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779] ["A licensee has a general, affirmative duty to maintain a lawful establishment [which includes] the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly."]; see also *CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1256 [122 Cal.Rptr.2d 914] ["[L]icensees bear an affirmative duty to ensure that minors are not permitted to enter and remain in their premises in violation of section 25665."].) “Ignorance of the law excuses no one.”

(*Shevlin-Carpenter Co. v. Minn*. (1910) 218 U.S. 57, 68 [30 S.Ct. 663] [rejecting loggers' argument that they were ignorant of law requiring permit for removal of lumber from state land]; *Central of Ga. Ry. Co. v. Wright* (1907) 207 U.S. 127, 136 [28 S.Ct. 47] [rejecting railway shareholders' argument that they were ignorant of shares' taxability].)

Finally, the Board rejects appellant's argument that it did not commit cover charge violations because the evidence shows the money was collected by third party security guards. First, there is substantial evidence to support the finding that appellant's security guards were collecting a fee on appellant's behalf, regardless if they pocketed the money or not. The evidence supports that it was appellant's desire that the guards collect money from patrons at the door. Second, the Board has heard and rejected the "no liability for the actions of an independent contractor argument" many times and has found again and again that the employment status of a third party is inconsequential where the purpose of the rule is to protect public welfare and morals. (*Funtastic, Inc.* (1998) AB-6920; *Clubary* (2011) AB-9098.) Third, both this Board and the courts have consistently found that a licensee may be held liable for the actions of its agents or employees.

> The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].)

The policy reasons for this general rule are evident. Without it, a licensee could escape discipline simply by maintaining a practiced state of ignorance. It would defy reason and the mandate of the State Constitution (which authorizes the Department to

suspend or revoke a license when continuation of the license would be contrary to public welfare or morals) to interpret the law in a manner that rewards licensees for distancing themselves from the operation of their premises or allows licensees to escape responsibility for reasonably foreseeable activity in their premises.

IV

ISSUE CONCERNING RELEVANT EVIDENCE

Appellant contends that there was relevant evidence which could not be produced at the hearing. (AOB, at p. 10.) Specifically, appellant claims it was "unable to secure testimony from this Security Company, despite its reasonably diligent efforts, due to [the security company's] evasiveness … ." (*Ibid*.)

The Board is authorized to review a decision of the Department to determine "[w]hether there is relevant evidence ... which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, § 23084; see also Cal. Const, art. XX, § 22 [providing remand as remedy in such cases].)

Generally, evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) However, relevance cannot be established by speculative inferences. (See, e.g., *People v. Babbitt* (1988) 45 Cal.3d 660, 681 [248 Cal. Rptr. 69]; *People v. Brady* (2006) 129 Cal.App.4th 1314, 1337-1338 [29 Cal.Rptr.3d 286].)

Finally, the California Constitution provides:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, *or of the improper admission or rejection of evidence*, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13, emphasis added.)

Thus "even where a trial court improperly excludes evidence, the error does not require reversal of the judgment unless such error resulted in a miscarriage of justice." (*Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 142 [104 Cal.Rptr.3d 291].) The burden falls on the complaining party "to demonstrate it is reasonably probable a more favorable result would have been reached absent the error." (*Ibid.*, citing *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432 [77 Cal.Rptr.2d 574]; see also *Estate of Thottham* (2008) 165 Cal.App.4th 1331, 1341-1342 [81 Cal.Rptr.3d 856] ["Error in excluding evidence is a ground for reversing a judgment only if the error resulted in a miscarriage of justice, and that a different result would have been probable if the error had not occurred."].)

Here, appellant's contention is not supported by the record. There is nothing in the record to show that testimony by the security personnel was excluded. Rather, appellant was simply unable to secure their testimony. Further, other than conclusory statements, appellant makes no showing that it made diligent efforts "to secure testimony from this Security Company" or that the security company was "evasive." (AOB, at p. 10.) In short, appellant has not demonstrated any error.

Finally, even if appellant had demonstrated an error, it has not shown that the error resulted in a "miscarriage of justice," i.e., that appellant would have discovered additional evidence that could have changed the outcome of the hearing. (Cal. Const., art. 6, § 13.) In fact, appellant has not given this Board any reason to believe the security personnel would have presented evidence other than what appellant already presented at the hearing.

V

ISSUE CONCERNING STACKING VIOLATIONS

Appellant contends violations "cannot be stacked absent giving prior notice of the violations and an opportunity to cure." (AOB, at p. 10.) Appellant further argues that the allegations were easily correctable, and in fact, once notified, appellant corrected each violation. (AOB, at pp. 11-12.)

Appellant's contentions implicate *Walsh v. Kirby* (1974) 13 Cal.3d 95, 106 [118 Cal.Rptr.1] ("*Walsh*"), where the California Supreme Court held that the Department had acted arbitrarily by accumulating enough violations to result in "the de facto revocation of the license … ."

In *Walsh*, the licensee, who had a previously unblemished record, was charged with selling below an established "fair trade" price on a total of 10 different occasions. (*Walsh*, *supra*, 13 Cal.3d at p. 98.) The statute involved did not provide for suspension or revocation, but a $250 fine for the first offense, and a $1,000 fine for each subsequent offense. (*Ibid*.) After the hearing, the Department sustained all 10 identical distilled spirit violations and assessed a penalty of $9,250. (*Id*. at pp. 98-99.) In annulling the penalty, the Court stated the Department's penalty order "is contrary to the provisions and purposes of the Alcoholic Beverage Control Act, is arbitrary and capricious in light of those purposes and constitutes a denial of due process of law." (*Id*. at p. 106.)

The instant appeal is not like *Walsh*. First, there is no monetary penalty at stake here that has the practical effect of a "de facto revocation of the license … ." (*Walsh*, *supra*, 13 Cal.3d at p. 106.) Second, appellant's penalty of a 30-day suspension is not

the result of aggregated violations, but rather two separate, concurrent 15-day suspensions. (Penalty Order, p. 28 [imposing a 15-day suspension for counts 1, 2, 4, 5, 7, 8, and 10-14, to be served concurrently, and an additional 15-day suspension for counts 3, 6, and 9, also to be served concurrently].) Further, appellant was not charged with 10 identical violations, but rather, 14 counts with at least four different types of violations (e.g., three different license condition violations – conditions #1, #6, and #8 – and a violation for serving alcohol on the patio without a duplicate license). Finally, the Department only went to the licensed premises on six occasions (instead of ten in *Walsh*) and the only violation that was charged for all six visits was the violation of license conditions #6 (cover charge). However, half of those visits (and cover charge violations) came *after* Department agents warned appellant that they were violating the conditions of their license. There was no such warning in *Walsh*.

The Board sees no error with the number of times the Department visited the licensed premises or how it chose to charge separate counts for each violation. The Department's conduct in this case was not akin to a "de facto revocation." Rather, the Department's actions are more in line with the "pruden[ce] to obtain evidence of more than one sale in technical violation of the statute before filing an accusation." (Walsh, *supra*, 13 Cal.3d at 105.) Of course, "[t]he gathering of such supportive evidence would not in itself, of course, constitute arbitrary or capricious conduct." (*Ibid*.)

VI

ISSUE CONCERNING PENALTY

Appellant contends the penalty is excessive.[9] (AOB, at pp. 12-15.)

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, 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].) An administrative agency abuses its discretion when it "exceeds the bounds of reason." (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, "[i]f 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 determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. The standard penalty for a violation of section 23804 is 15 days (with 5 days stayed for one year). (Cal. Code Regs., tit. 4, § 144.) The recommended penalty for violation of section 24042 is 15 days (sale of an alcoholic beverage not permitted by license). (*Ibid*.) Nevertheless, rule 144 allows the Department to deviate from the standard penalty when, "*in its sole discretion*[, it] determines that the facts of the particular case

[9] The Board does not consider the merit of appellant's request to pay a fine to the City in the amount of $10,000. That request is beyond the scope of this Board. This Board will only look to whether the Department abused its discretion in suspending appellant's license for 30 days.

warrant such deviation — such as where facts in aggravation or mitigation exist." (*Ibid*., emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at subject premises without prior discipline or problems, positive action by licensee to correct problem, documented training of licensee and employees, and cooperation by licensee in investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid*.)

Here, appellant received a 15-day suspension for its violations of section 23804 and second 15-day suspension for its violations of section 24042, a total of 30 days. (Order, at p. 28.) The only difference between the recommended penalty and the penalty appellant received, is that it did not get the benefit of the 5-day recommended stay for its section 23804 violations. However, this deviation does not necessarily mean the Department abused its discretion.

As stated above, the Department may deviate from the recommended penalties in rule 144 based on factors of aggravation in mitigation. (Cal. Code Regs., tit. 4, § 144.) The record indicates that the Department afforded appellant with some measure of mitigation, in that it cooperated with the investigation and positive action to correct some of the issues, such as the duplicate license. (Decision, at p. 27.) However, the Department balanced that mitigation evidence with evidence of

aggravation, in that appellant also disregarded the verbal warning by Agent Rushing and acted with some deceit in devising a "pre-paid meal plan" as an end-around to the prohibition against cover charges. (*Ibid*.) Ultimately, the Department decided that the evidence of aggravation outweighed appellant's mitigation evidence, and that it was not entitled to a 5-day stay. (*Ibid*.) We cannot say that the Department abused its discretion in weighing the evidence.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. The Department's decision that appellant's mitigation evidence was outweighed by evidence of aggravation was reasonable and cannot be second-guessed by this Board. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.[10]

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

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

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*.