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

AB-9846
File: 47-581208; Reg: 19088691

CHARCOAL HOUSE INVESTMENTS, INC.,
dba Charcoal House
9566 Murray Drive
Le Mesa, CA 91942,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: May 7, 2020
Telephonic

ISSUED MAY 12, 2020

Appearances: *Appellant:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as counsel for Charcoal House Investments, Inc.,

Respondent: Alanna K. Ormiston, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Charcoal House Investments, Inc., doing business as Charcoal House (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] (the Department) suspending its license for 15 days because it permitted smoking in an enclosed space, or at a place of employment, and made unauthorized physical changes to the licensed premises.

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[1] The decision of the Department, dated November 12, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on September 27, 2017. There is no record of prior departmental discipline against the license.

On April 5, 2019, the Department instituted a three-count accusation against appellant charging that, on two occasions — September 27, 2018 and February 1, 2019 — it permitted the smoking of tobacco products in an enclosed space, or at a place of employment, in violation of Business and Professions Code section Labor Code section 6404.5 (counts one and two); and because it made physical changes to the licensed premises — which resulted in a change of usage of the premises as detailed in the diagram on file — without obtaining the prior written consent of the Department, in violation of rule 64.2(b)(1)[2] (count three).

An administrative hearing was scheduled for July 16, 2019, with appellant being represented by Steven A. Elia, James Joseph, and Holly Attiq Semaan, of the Elia Law Firm, APC. On July 8, 2019, counsel for appellant submitted a motion for continuance on the basis of good cause — citing a scheduling conflict with a hearing in federal bankruptcy court and the unavailability of critical witnesses. (Exh. 1.) A declaration in support of the motion was submitted on July 10, 2019. (*Ibid*.) The Department submitted opposition to the motion on July 11, 2019. Administrative law judge (ALJ) Matthew G. Ainley granted the motion on July 12, 2019, and the matter was continued to September 10, 2019. (*Ibid*.)

On August 28, 2019, counsel for appellant submitted a second motion for continuance on the basis of good cause, supported by a declaration by counsel, citing

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[2] Cal. Code Regs., tit. 4., § 64.2(b)(1).

scheduling conflicts with two other trials. (*Ibid*.) The Department submitted opposition to the second motion on September 5, 2019, maintaining that the justification offered did not constitute good cause. (*Ibid*.) Chief ALJ John W. Lewis denied the second motion to continue on September 6, 2019. (*Ibid*.)

At the September 10, 2019 hearing before ALJ Doris Huebel, documentary evidence was received and testimony concerning the violations charged was presented by Department Agent Andrew De La Torre. Rodi Ramzee Mikha, president and sole shareholder of Charcoal House Investments, Inc., testified on behalf of appellant.

Prior to taking testimony, the Department asked that the accusation be amended: adding the word “or” to the last sentence of counts one and two, prior to the words “at a place of employment,” and correcting the date of the violation in count two from 2018 to 2019. The ALJ permitted correction of these typographical errors, over appellant’s objection.

Testimony established that in October of 2016, appellant submitted proposed plans to the City of La Mesa for structural changes to the premises. The changes were approved by the Building/Permit Department on August 3, 2017. The Department was not notified of, nor did it approve, any proposed changes. (Finding of Fact, ¶ 5.) The premises were inspected by the city and the permit was finalized on July 26, 2018. (*Ibid*.)

On August 22, 2018, Agent De La Torre went to the licensed premises in an undercover capacity to investigate a complaint that smoking was being permitted in the licensed premises. He observed three patrons smoking tobacco in a hookah device, while drinking what appeared to be beer, in the presence of appellant’s employees.

He also observed substantial structural changes to the patio, not reflected in the ABC-257 form on file with the Department. He then exited the premises.

Agent De La Torre returned to the licensed premises the following day with Agent Maier. Agent Maier contacted corporate president Rodi Ramzee Mikha and served him with a warning — a Notice of Violation (ABC-756) — containing the following verbiage, in red letters:

> PLEASE TAKE NOTICE. This notice is not a disciplinary action and does not give rise to any rights of hearing or appeal. It is intended to serve as a notice of violation(s) found to be occurring on or about an ABC licensed premises. Notwithstanding this warning notice, the Department may still choose to file an administrative accusation against the license based on the violation(s) indicated below. Continuance of these violation(s) may also result in the filing of an administrative action by the Department. This notice may be presented as an exhibit by the Department to establish aggravating circumstances, based on prior notice of these violation(s), in any administrative proceedings(s).

(Exh. 2.) Mr. Mikha signed and acknowledged the notice.

On September 27, 2018, Agent De La Torre returned to the licensed premises with three other Department agents to follow up on the warning. Agents De La Torre and Kuhn entered the establishment in plain clothes, and were seated in the patio area, while the other two waited outside. A server asked what they wanted and the agents ordered and were served beers. She asked if they wanted anything else and Agent De La Torre ordered a hookah. (Exh. 3.) Both agents shared in smoking the hookah and were observed doing so by appellant’s employees. Other patrons were observed smoking hookahs as well.

Numerous structural changes to the premises were observed by the agents which were not reflected in the ABC-257 on file with the Department. The changes included: a 10-foot high perimeter wall around the patio, a partial ceiling extending over

the patio (creating a cabana-style area), two roll-up garage style doors between the patio and main building, and a new mail entrance door and lobby — open to smoke from both the patio and mail building room through the garage style doors. (Exhs. 5-13.)

The agents waiting outside were informed that the premises remained in violation of Labor Code section 6404.5. Agents Maier and Rios entered the premises and conducted an inspection. Agent De La Torre paid his bill and exited the premises.

On February 1, 2019, Agents De La Torre and Kuhn returned to the premises in plain clothes and were guided by an employee through the patio and one of the garage-style doors to a seating area in the interior of the main building. A server took their order, with Agent Kuhn ordering a vodka and soda and Agent De La Torre ordering a water. They also ordered a hookah. The items were served, and the agents both smoked the hookah while observing other patrons doing the same. Appellant's employees were also in the area observing this activity. (Exh. 4.) Agent De La Torre observed two signs posted in the premises stating: "Private Smoker's Lounge" — one in the patio and one in the main building. (Exh. 5.) Patrons smoking hookahs were observed in both areas. Agent De La Torre again compared the structural changes to the premises with the ABC-257 form on file. He noted the changes on a copy of the ABC-257. (Exh. 10.)

Appellant testified that the structural changes made to the premises were made in an attempt to remediate building code violations by a previous owner. The violations resulted in litigation between the City of La Mesa and the previous owner. Appellant further testified that the interior dividing wall between the hookah and alcohol bars was put in place to prevent smoke from entering the dining area of the premises. He

presented signatures from patrons on a petition attesting that the premises is a private smoking lounge and tobacco retailer.

The ALJ issued her proposed decision on September 23, 2019, sustaining all three counts of the accusation and recommending suspension of the license for 15 days for each count, with the penalties to be served concurrently. The Department adopted the proposed decision in its entirety on November 8, 2019, and issued a certificate of decision on November 12, 2019.

Appellant then filed a timely appeal raising the following issues: (1) the ALJ erred by not continuing the hearing after the Department amended the accusation; (2) the Department incorrectly interpreted Labor Code section 6404.5, and the Department's enforcement of that interpretation constitutes an underground regulation, and; (3) the ALJ erred as a matter of law by failing to make substantive findings regarding the penalty.

DISCUSSION

I

ISSUE CONCERNING CONTINUANCE

Appellant contends the ALJ erred as a matter of law by not continuing the administrative hearing — to permit appellant to prepare a defense — after the Department amended the accusation. (AOB at pp. 6-8.)

Government Code section 11524, subdivision (a), vests an administrative law judge with authority to grant a continuance upon a showing of "good cause."

> In exercising the power to grant continuances in an administrative proceeding, an administrative law judge must be guided by the same principles applicable to continuances generally in adjudicative settings: continuances should be granted sparingly, nay grudgingly, and then only on a proper and adequate showing of good cause. In general, a

> continuance for a short and certain time is less objectionable than a continuance for a long and uncertain time, and there must be a substantial showing of necessity to support a continuance into the indefinite future. But the factors that influence the granting or denying of a continuance in any particular case are so varied that the judge must necessarily exercise a broad discretion. Since it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding, the determination of a request for a continuance must be based upon the facts and circumstances of the case as they exist at the time of the determination.

(*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 343 [56 Cal.Rptr.2d 774].)

The “broad discretion” of the ALJ has been noted to be very broad indeed: Witkin, the leading text writer on California law, has succinctly assessed the discretion as follows:

> The factors which influence the granting or denying of a continuance in any particular case are so varied that the trial judge must necessarily exercise a broad discretion. On an appeal from the judgment . . . **it is practically impossible to show reversible error in the granting of a continuance**.

(*Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1007 [98 Cal.Rptr. 855], citing 4 Witkin, *Cal. Procedure* (2d ed. 1971) Trial, § 7, p. 2865, emphasis added.)

Appellant maintains the changes made to the accusation constitute a material change to the charges which, under the Administrative Procedures Act (APA) in Government Code section 11507, mandate a continuance in order for it to prepare its defense. That section states, in pertinent part:

> At any time before the matter is submitted for decision, the agency may file, or permit the filing of, an amended or supplemental accusation . . . . All parties shall be notified of the filing. If the amended or supplemental accusation . . . presents new charges, the agency shall afford the respondent a reasonable opportunity to prepare his or her defense to the new charges, but he or she shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or

> supplemental accusation . . . may be made orally and shall be noted in the record.

(Gov. Code, § 11507.) The statute does not define "new charges," nor does it explain what constitutes a "reasonable opportunity" to prepare a defense. (*Ibid.*)

Case law provides little additional guidance. An early case rejected a defense premised on section 11507 where the amended accusation was filed on the first day of the hearing and the trial court refused to grant a continuance. (*Buckley v. Savage* (1960) 184 Cal.App.2d 18, 32 [7 Cal.Rptr. 328] [accusation by the Real Estate Commissioner seeking revocation of a real estate agent's license].) After noting that the contention was not raised before the trial court, the court found that denial of the continuance was not improper because the amended accusation "in no way added new facts to the existing ones," but simply set forth that the respondent's conduct violated the law. (*Id*. at pp. 32-33.) The same is true in this case.

The holding in *Buckley* is consistent with the plain language of section 11507, which provides that "the agency shall afford the respondent a reasonable opportunity to prepare his or her defense to the *new charges*." (Gov. Code, § 11507, emphasis added.) The statute does not necessarily entitle a party to a continuance or "additional time," as appellant insists. It provides only that "the agency shall afford the respondent a *reasonable opportunity to prepare his or her defense*" — and then only if the amended accusation includes new charges. (*Ibid*., emphasis added.) Depending on the facts of the individual case — including the complexity of the charges and the amount of time remaining for the respondent to prepare — a continuance may or may not be appropriate. If a continuance is indeed appropriate to ensure the respondent

has a reasonable opportunity to prepare, the ALJ may find good cause to grant it pursuant to section 11524. (See Gov. Code, § 11524(a).)

The question, then, is whether the amended accusation introduced "new charges" as contemplated by section 11507, and, if it did, did the Department "afford the respondent a reasonable opportunity to prepare his or her defense"? (Gov. Code, § 11507.) On these questions, this Board defers to the ALJ as finder of fact, and will not reverse absent an abuse of discretion. (*Givens v. Dept. of Alcoholic Bev. Control* (1959) 176 Cal.App.2d 529, 532, 533 [1 Cal.Rptr. 446]; *Ring v. Smith* (1970) 5 Cal.App.3d 197, 201 [85 Cal.Rptr. 227] [refusal of request for continuance is not a denial of due process absent an abuse of discretion].)

At the administrative hearing, appellant maintained the addition of the word "or" changed its legal strategy and defense, but did not explain how its defense was rendered ineffective or how the defense would change if the continuance were granted. (RT at pp. 11-12.) Prior to the amendment, the accusation alleged, in counts 1 and 2, that appellant "permitted the smoking of tobacco products in an enclosed space at a place of employment, in violation of Labor Code section 6404.5." After the amendment, these counts alleged that appellant "permitted the smoking of tobacco products in an enclosed space, *or* at a place of employment, in violation of Labor Code section 6404.5." (Emphasis added.)

Appellant contends the addition of the word "or" "radically widens the range of conduct under scrutiny." (AOB at p. 6.) We disagree. As the ALJ pointed out at the administrative hearing, with or without the amendment appellant was charged with violating Labor Code section 6404.5. (RT at pp. 13-14.) The addition of the word "or" simply does not constitute the introduction of "new charges" such that section 11507

would compel a continuance to formulate an entirely new and different defense. The accusation put appellant on notice of the statute alleged to have been violated, and the precise acts supporting those allegations. The amendment did not change those facts. Appellant was charged with violating the exact same statute before and after the amendment.

As noted above, appellant was not entitled to a continuance simply because an amended accusation was filed. Appellant has not established that the amendment introduced new charges or that good cause was shown to continue the hearing. We see no error.

II

ISSUE CONCERNING LABOR CODE § 6404.5

Appellant contends the Department's interpretation of Labor Code section 6404.5 violates the plain meaning of the statute, and that the Department's enforcement of that interpretation constitutes an underground regulation. Appellant maintains its premises should fall under the exception for a private smokers' lounge under section 6404.5(e)(2)(A). (AOB at pp. 8-14.)

Labor Code section 6404.5 provides, in pertinent part:

> (a) The Legislature finds and declares that regulation of smoking in the workplace is a matter of statewide interest and concern. It is the intent of the Legislature in enacting this section to prohibit the smoking of tobacco products in all (100 percent of) enclosed places of employment in this state, as covered by this section, thereby eliminating the need of local governments to enact workplace smoking restrictions within their respective jurisdictions. It is further the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment, as specified in this section, in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees, and also to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local

> workplace smoking restrictions. Notwithstanding any other provision of this section, it is the intent of the Legislature that an area not defined as a "place of employment" pursuant to subdivision (e) is subject to local regulation of smoking of tobacco products.
>
> [¶ . . . ¶]
>
> (c) An employer or owner-operator of an owner-operated business shall not knowingly or intentionally permit, and a person shall not engage in, the smoking of tobacco products at a place of employment or in an enclosed space.
>
> [¶ . . . ¶]
>
> (e) For purposes of this section, "place of employment" does not include any of the following:
>
> [¶ . . . ¶]
>
>> (2) Retail or wholesale tobacco shops and private smokers' lounges. For purposes of this paragraph:
>>
>>> (A) "Private smokers' lounge" means any enclosed area in or attached to a retail or wholesale tobacco shop that is dedicated to the use of tobacco products, including, but not limited to, cigars and pipes.
>>>
>>> (B) "Retail or wholesale tobacco shop" means any business establishment, the main purpose of which is the sale of tobacco products, including, but not limited to, cigars, pipe tobacco, and smoking accessories.

(Labor Code, § 6404.5(a)-(e).)[3]

In 2011, the Attorney General of California was asked to determine whether a private smokers' lounge is exempt from the requirement of Labor Code section 6404.5 to maintain a smoke-free workplace, and reached the following conclusion:

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[3] The full text of section 6404.5 is included in Conclusions of Law, paragraph 3 of the Department's decision. (See Decision at pp. 10-14.)

> Accordingly, we conclude that a private smokers' lounge located in or attached to a retail or wholesale tobacco shop, which serves alcoholic beverages to patrons, is not exempt from the requirements of Labor Code section 6404.5 to maintain a smoke-free workplace.

(94 Ops.Cal.Atty.Gen. 46, at p. 7.) The opinion reasoned that in order to qualify for the private smokers' lounge exception to the smoke-free workplace requirement, an establishment's purpose had to be the sale and use of tobacco products *only*. (*Id*. at p. 5.)

More recently, the Department issued a Precedential Decision in which it followed the 2011 Attorney General's decision and determined: "Labor Code section 6404.5(c) prohibits the issuance of an ABC license to a 'private smokers' lounge' because it would no longer be 'dedicated' to the use of tobacco products." (*In the Matter of the Application of: LADH, LLC, dba La Aroma de Havana* (2019) 19-05-L, at p. 4.)

In the decision, the ALJ found:

> . . . In the matter at hand, the Respondent's type-47 on-sale general eating place Licensed Premises includes two separate fixed bars, a dining room and patio with enclosed cabanas, throughout all of which the sales, service and consumption of alcoholic beverages are made. Calling the Charcoal House a "private smoker's lounge" or "retail tobacco shop" which also sells alcoholic beverages in an attempt to exempt it from the requirements of Labor Code section 6404.5, runs counter to the Legislature's clear intent and goals, including, protecting the public and employees by reducing "exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees," and bring uniformity to workplace smoking restrictions.

(Conclusions of Law, ¶ 7.) We agree with this analysis and its application to the present matter.

"When . . . a civil statute is enacted for the protection of the public, it must be 'broadly construed in favor of that protective purpose.' [Citation.]" (*People ex rel.*

Lockyer v. R.J. Reynolds Tobacco Co. (2005) 37 Cal.4th 707, 717 [124 36 Cal.Rptr.3d 814].) In addition, with regard to statutory law, the Supreme Court has stated, "Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive; 'no resort to extrinsic aids is necessary or proper.'" (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 61 [124 Cal.Rptr.2d 507].

> If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. [Citation.] Moreover, remedial or protective statutes and regulations must be liberally construed to effect their object and quell the mischief at which they are directed. [Citation.]

(*Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1710-1711 [42 Cal.Rptr.2d 172], internal quotation marks omitted.)

The plain language of section 6404.5 specifically states its reasons for enactment, and the goals to be achieved, namely: the protection of the public and the protection of employees, by the prohibition of smoking in 100 percent of enclosed spaces of employment, and by creating a uniform statewide standard to restrict and prohibit the smoking of tobacco products in those spaces; and the elimination of confusion and hardship resulting from the enactment or enforcement of disparate local workplace smoking restrictions, as a result of those uniform standards. Appellant has given us no reason to look beyond the plain language of section 6404.5 and question the enforcement of the statute in this case. As noted in the *Schmidt* case, protective statutes such as this must be liberally construed (*Schmidt, supra*, 35 Cal.App.4th at 1711).

Appellant argues that the enforcement of section 6404.5 by the Department, and the Department's "recent promulgation"[4] and utilization of form ABC-203 to do so, constitute an underground regulation. (AOB at p. 9.)

Form ABC-203 is entitled "Acknowledgment of ABC's Laws, Rules, and Regulations" and includes the following statement: "I, [the licensee], have received a copy of Labor Code Section 6404.5 and understand that I am not allowed to permit smoking of tobacco products inside the building portion of the licensed premises." (Exh. T.) Appellant maintains that the policy instituting the use of this form should have been subjected to the rulemaking requirements of the Administrative Procedures Act (APA), and that the failure to do so constitutes an underground regulation.

The APA defines the term "regulation" broadly: "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) "[I]f it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it." (*State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 702 [16 Cal.Rptr.2d 25].)

The APA requires that all regulations be adopted through the formal rulemaking process.

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general

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[4] There is no evidence in the record that Form ABC-203 was "recently promulgated." The form itself contains a notation indicating it was created in 2011. (Exh. T.)

> application, or other rule, which is a regulation, as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(Gov. Code, § 11340.5(a).) All regulations are subject to the APA rulemaking process unless expressly exempted by statute. (Gov. Code, § 11346; *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59 [3 Cal.Rptr.2d 264].) Compliance with the rulemaking process is mandatory; where a regulation was not properly adopted, it has no legal effect. (*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1].)

In *Tidewater*, cited by both parties, the California Supreme Court outlined a two-part test to determine if something is a regulation subject to the rulemaking requirements of the APA:

> A regulation subject to the APA thus has two principal identifying characteristics. [Citation.] First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure." (Gov. Code, §11342, subd. (g).)

(*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186].)

The analysis does not stop there, however. Even if the Board were to rule that the use of ABC-203 is an underground regulation, this conclusion alone would not necessarily merit reversal. (See *id.*, at pp. 576-577.) As the Court observed,

> If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA [rulemaking procedures], then we would undermine the legal force of the controlling law. Under such a rule, an agency could

> effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations.

(*Id.*, at p. 577.) The court then went on to say that in order to prevail it is necessary to show that voiding the underground regulation would have changed the specific outcome of the case. (*Ibid*.)

Under the initial two-part *Tidewater* test, it would appear that the new procedure for enforcing Labor Code section 6404.5 does apply generally, rather than in just this specific case. However we fail to see how using form ABC-203 interprets the plain meaning of section 6404.5. Licensees are simply being asked to acknowledge that they have been informed of the existence of section 6404.5 and to acknowledge what it prohibits. This is not something that requires formal rulemaking. Accordingly, we do not believe the use of the ABC-203 form is an underground regulation which was adopted in violation of the formal rulemaking requirements of the APA.

Even if we did find that the form's use constituted an underground regulation, appellant has not demonstrated that voiding the complained-of procedure would have changed the outcome in this case. In order for this Board to grant relief, an appellant must show prejudice:

> 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.) "Under this standard, the appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial

had the error not occurred." (*Citizens for Open Gov. v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [250 Cal.Rptr.3d 459]; see also *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) Such a showing has not been made in this case.

We find no error in the Department's decision regarding the violation of Labor Code section 6404.5 and appellant's failure to qualify for the private smokers' lounge exception to the smoke-free workplace requirement. These counts are supported by substantial evidence. Furthermore, we are unpersuaded that the use of form ABC-203 constitutes an underground regulation.

III

ISSUE CONCERNING PENALTY

Appellant contends the ALJ erred as a matter of law by failing to make findings regarding the penalty determination. (AOB at pp. 15-17.)

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].)

If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

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*.)

In the decision, the ALJ addresses the issue of penalty — noting both the factors in aggravation highlighted by the Department, and the factors in mitigation argued by appellant. Having found that substantial evidence supported each of the three counts, she recommended, and the Department ultimately imposed, a 15-day suspension for each count, with the suspensions to be served concurrently.

As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion.

Appellant complains, "the ALJ made no findings whatsoever on the issue of the severity of the imposed penalty." (AOB at p. 16.) In other words, appellant would have us require the ALJ to explain her reasons for ordering the 15-day suspension for each count — served concurrently. However, such a requirement has been rejected by this Board numerous times. For example, in 7-*Eleven, Inc.*/*Cheema* (2004) AB-8181, the Board said: "Appellants misapprehend *Topanga*.[5] It does not hold that findings must be explained, only that findings must be made." (Also see: *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. Co. of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].)

Indeed, unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd.*

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[5]*Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].

(1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellant has not pointed out a statute with such requirements.

Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].) The decision here meets that standard. As we have said again and again: "No 'analytical bridge' of any sort is required in imposing a penalty. Provided the penalty is reasonable, this Board will have no cause to retrace the ALJ's reasoning." (*Hawara* (2015) AB-9512, at p. 9.) We see no reason to deviate from this precedent and require that the ALJ explain her reasoning process — particularly where, as here, ample reason for the penalty imposed has been provided in the decision itself.

Appellant has not established that the Department abused its discretion by imposing three 15-day suspensions, served concurrently, in this matter.

ORDER

The decision of the Department is affirmed.[6]

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

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

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

APPENDIX

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

IN THE MATTER OF THE APPEAL BY:

CHARCOAL HOUSE INVESTMENTS, INC.
DBA: CHARCOAL HOUSE
9566 MURRAY DR
LA MESA, CA 91942

ON-SALE GENERAL EATING PLACE - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 47-581208

Reg: 19088691

AB: 9846

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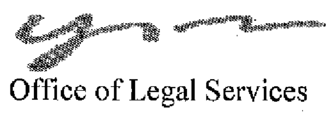
RECEIVED
ABC APPEALS BOARD

CERTIFICATION

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

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

IN WITNESS WHEREOF, I hereunto affix my signature on January 15, 2020, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

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

IN THE MATTER OF THE ACCUSATION AGAINST:

CHARCOAL HOUSE INVESTMENTS, INC.
CHARCOAL HOUSE
9566 MURRAY DRIVE
LE MESA, CA 91942

ON-SALE GENERAL EATING PLACE - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 47-581208

Reg: 19088691

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 November 8, 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.

On or after December 23, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 12, 2019

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Charcoal House Investments, Inc. Dba: Charcoal House 9566 Murray Drive La Mesa, California 91942 Respondent On-Sale General Eating Place License	} } } } } } } } } } } } }	File: 47-581208 Reg.: 19088691 License Type: 47 Word Count: 30,673 Reporter: Shelia McQueen Kennedy Court Reporters **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California, on September 10, 2019.

Alanna Ormiston, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Steve Elia, and James Joseph, Attorneys, represented the Respondent, Charcoal House Investments, Inc. Rodi Ramzee Mikha, corporate president for the Respondent, was present.

The Department seeks to discipline the Respondent's license on the grounds that:

1) On September 27, 2018, and February 1, 2019, the Respondent-Licensee's agents or employees permitted the smoking of tobacco products in an enclosed space or at a place of employment, in violation of Labor Code section 6404.5 (counts 1 and 2);
2) On February 1, 2019, and for a period of time prior to that date, the Respondent-Licensee made physical changes to the premises which resulted in a change of usage of the premises from the plan contained in the diagram on file with the Department of Alcoholic Beverage Control without obtaining the prior written assent of the Department, in violation of California Code of Regulations, Title 4, Chapter 1, Rule 64.2(b)(1)[1]. (Exhibit 1.)

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

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on September 10, 2019.

FINDINGS OF FACT

1. The Department filed the Accusation on April 5, 2019. At the hearing, the Department requested to amend the accusation, which was granted over objection, and the accusation was amended by interlineation, inserting in counts 1 and 2 the word, "or" between the words, "space" and "at," and replacing in count 2, the year "2018" with "2019."

2. The Department issued a type-47, on-sale general eating place license to the Respondent at the above-described location on September 27, 2017 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondent's license.

4. As part of the Respondent's application for its type-47 license it submitted an ABC-257 Licensed Premises Diagram. (Exhibit 9.) The form included a diagram of the Licensed Premises, its perimeter, rooms, entrances, exits, interior walls, and other features. The ABC-257 indicates, "The diagram below is a true and correct description of the entrances, exits, interior walls and exterior boundaries of the premises to be licensed, *including dimensions and identification of each room (i.e., "storeroom", "office", etc.).*" Below the diagramed area, at the bottom of the form, it states, "It is hereby declared that the above-described boundaries, entrances and planned operated as indicated on the reverse side, will not be changed without first notifying and securing prior written assent of the Department of Alcoholic Beverage Control. I declare under penalty of perjury that the foregoing is true and correct." The form was signed by Rodi Ramzee Mikha on behalf of the Respondent on August 11, 2017. The form also reflected the Department inspector's signature certifying the diagram as correct. At that time, the ABC-257 depicted an open-air patio, with a rock fountain water feature in the center of the patio, cement encircling the fountain, grass at the edges of the patio, thirteen tables with chairs, one main entrance from the patio to the main building[2], which contained one large room with two fixed bars, which large room connected to the dining room, at which point was

[2] At the hearing, Agent De La Torre marked on Exhibit 10, an "X" to indicate the location of the original main entrance to the main building prior to the structural changes which the Respondent made to the Licensed Premises. During Mr. Mikha's testimony he also drew on Exhibit 10 an "X" with a circle around it and added his initials to mark the location of the original main entrance. This original door was the only way to access the patio from the interior of the main building, as well as to access the main building from the patio.

an exit door out of the building,[3] in addition to a kitchen and two restrooms. (Exhibits 9, 12, 13 and M3.)

5. In October of 2016, the Respondent submitted to the City of La Mesa's Building/Permit Department proposed plans for the structural changes it planned to make to its Licensed Premises. Those changes included the Respondent planning to structurally reconfigure its open-air patio by including an approximate 10-foot high wall serving as a perimeter wall with a ceiling extending approximately 10 feet wide, inward into the patio, partially covering the patio, attached with pillars, to create cabana-style lounge seating areas where the grass was originally located, and creating additional seating in the center of the patio where the Respondent planned to remove the water feature. The proposed plans also included creating one doorway, two large entrances/exits with garage-style roll-up doors constructed into the main building to open the interior of the building to the patio with its cabana-style lounge and seating areas. Additionally, a new walled-in entrance door with lobby was planned to be attached to the proposed patio walls, to replace the sliding three-foot high gate[4] on the east side of the patio. The Respondent also planned on building a dividing wall in the main building to create two separate rooms, a hookah smoking room and a dining room, each with their individual fixed bars.[5] On August 3, 2017, the City of La Mesa approved the Respondent's remodeling plans, and the Respondent began construction thereof. The structural changes to the Licensed Premises was inspected by the City of La Mesa and the permit was finalized with the city on July 26, 2018. The Respondent, at no point, notified the Department of the proposed physical changes it planned or made to its Licensed Premises, nor did the Department provide any approval, written or otherwise, for the physical changes and alterations the Respondent made to the Licensed Premises. (Exhibits 5, 6, 7, 8, 10[6], 11[7], B, D, G[8], H1, H2.)

[3] This exit door exits out onto the asphalt parking lot and is depicted on Exhibit B, to the far right, and which has a light fixture over the entry way and what appears to be a vertical standing rot-iron railing. Also see Exhibit E.
[4] In Exhibit M3, the said three-foot high gate is shown and located at the palm tree depicted to the far right of the photograph.
[5] See Exhibit 10.
[6] Exhibit 10 is a copy of the ABC-257 with a red-shaded area drawn in by Agent De La Torre indicating the structural changes to the said patio. This ABC-257 diagram was not submitted by the Respondent to the Department. Exhibit 9 is a copy of the ABC-257 the Respondent submitted to the Department.
[7] Exhibits 12C and 13 more resemble the base file ABC-257, as compared to Exhibit 11, which depicts the structural changes with red mesh or material tarp stretched across the patio between the squared-off ceiling. Exhibits F, G and I do not accurately depict the red, mesh or material tarp as it appears to have been removed in these photos and there was no indication in the record when the Respondent's photograph exhibits were taken.
[8] Exhibit G is used for the purpose of depicting the location of the new doorway to the left as well as the two garage-style roll-up door entrances/exits in comparison to the "Charcoal House" lettering on the exterior of the main building as depicted both in Exhibits G and M3/13A.

(August 22, 2018)

6. On August 22, 2018, Department Agent De La Torre went to the Licensed Premises, in a plain clothes capacity, to investigate a citizen complaint that the Respondent was permitting smoking in the Licensed Premises. Prior to going to the premises Agent De La Torre reviewed the Respondent's base file, which included the ABC-257 form. Upon entering the Licensed Premises[9] Agent De La Torre walked into the interior of the main building and observed three patrons seated at a table openly using a hookah device to smoke tobacco, with a couple of glasses of what appeared to be beer upon the table, in the presence of Respondent's employees. Agent De La Torre walked out to the patio and observed substantial structural changes to the patio, which were not delineated on the ABC-257 form. The agent soon thereafter left the premises.

(August 23, 2018)

7. On August 23, 2018, Agent De La Torre returned to the Licensed Premises with Agent Maier. Agent De La Torre remained outside while Agent Maier entered the Licensed Premises and made contact with Respondent's corporate president, Rodi Ramzee Mikha. Agent Maier served Mr. Mikha with a Notice of Violation (ABC-756), which provided notice to the Respondent that Agent De La Torre had observed a violation of Labor Code section 6404.5 in the Licensed Premises. The ABC-756 form stated in red lettering, "PLEASE TAKE NOTICE This notice is not a disciplinary action and does not give rise to any rights of hearing or appeal. It is intended to serve as a notice of violation(s) found to be occurring on or about an ABC licensed premises. Notwithstanding this warning notice, the Department may still choose to file an administrative accusation against the license based on the violation(s) indicated below. Continuance of these violation(s) may also result in the filing of an administrative action by the Department. This notice may be presented as an exhibit by the Department to establish aggravating circumstances, based on prior notice of these violation(s), in any administrative proceeding(s)." Mr. Mikha signed the Notice of Violation and was aware of said listed violation on August 23, 2018. (Exhibit 2.)

(September 27, 2018)

8. On September 27, 2018, Agent De La Torre returned to the Licensed Premises with Agents Kuhn, Maier and Rios, to follow-up on the Notice of Violation served upon the Respondent, to ensure Respondent's Licensed Premises was in-compliance thereafter

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[9] Agent De La Torre entered the new main entrance as constructed and depicted in Exhibits B and D. In Exhibit B the entrance is located to the right of the palm tree, where the second man is standing to the right of the American flag in photograph. This entrance takes you immediately into the lobby, which is depicted in Exhibit D, which lobby opens into the patio area.

such service. Agents Maier and Rios remained outside while Agents De La Torre and Kuhn entered the Licensed Premises[10] in a plain clothes capacity.

9. Agents De La Torre and Kuhn were seated by one of Respondent's employees in the patio area of the Licensed Premises. Respondent's server, Nicole, approached the agents at their table and asked for their order. The agents placed an order for beer with Nicole, who served the agents their beers. Nicole asked the agents if there was anything else they wanted to order, to which Agent De La Torre ordered a hookah. Nicole brought a hookah to the agents, who both shared in smoking the hookah by placing the hookah hose into their mouth and inhaling the tobacco. Respondent's employees, who were wearing all black attire, including Nicole, approached the agents while they smoked the hookah to ask if they needed anything else. Agent De La Torre took a photograph of the said hookah, from which the agents smoked tobacco. (Exhibit 3.) Agent De La Torre observed patrons sitting in the covered cabana section of the patio smoking hookah as well.

10. Agent De La Torre looked around the patio and observed structural changes that were not delineated in the Respondent's base file ABC-257. The changes he noticed were that the Licensed Premises' patio had an approximate 10-foot high wall as a perimeter which surrounded the patio area and attached to that wall was a partial ceiling that extended approximately 10 feet wide, inward into the patio, that was held up by pillars, which created the cabana-style seating/lounge area along the perimeter of the patio. (Exhibits 5, 6, 7, 8, 10, 11.) Agent De La Torre also noticed the two large entrances/exits consisting of the two, roll-up garage-style doors which had been added to the premises for ingress and egress between the patio area and interior of the main building. (Exhibits 6C, 6D, 8A, 10, G[11] and H1.) He also noticed the new main entrance door and lobby that were created with the 10-foot walls from the patio and constructed on the patio where before a three-foot high, sliding gate had been located in what used to be the prior open-area patio. The lobby was fully open to smoke from both the patio and main building room (through the open wide garage doors), where tobacco was smoked. (Exhibits B, D, M3[12], 10, 12C, and 13A.)

11. Agent De La Torre informed Agents Maier and Rios that the Licensed Premises remained in violation of Labor Code section 6404.5. Agents Maier and Rios entered the Licensed Premises and conducted an inspection thereof. Thereafter, Agent De La Torre paid for the hookah and beer.

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[10] Agents De La Torre and Kuhn entered the same new main entrance as Agent De La Torre entered on August 22, 2018, and depicted in Exhibits B and D.
[11] With a comparison of Exhibits M3 and G, by looking at the "Charcoal House" lettering on the outer wall of the exterior of the building, one can see to the left of that sign where the two, roll-up garage-style doors were constructed and installed, along with a portion of the 10-foot wide ceiling partially covering the patio.
[12] In Exhibit M3, the said three-foot high gate is shown and located at the palm tree depicted to the far right of the photograph.

(February 1, 2019)

12. On February 1, 2019, Agents De La Torre and Kuhn, dressed in a plain clothes capacity, entered the Licensed Premises.[13] The agents were greeted by one of Respondent's employees at the new main entrance/lobby and were guided through the patio area, through one of the garage-style doors, to a seating area with couches, chairs, tables and a fixed bar inside the interior of the main building of the Licensed Premises. (Exhibits 6A, 6B, H1, H2, and H3.) Thereafter, a server named Noor, approached the agents and asked for their order. Agent De La Torre ordered water and Agent Kuhn ordered Tito's Vodka mixed with soda. Noor served the agents their drinks and asked if they wanted anything else. The agents ordered a hookah, which Noor provided to the agents. Agents De La Torre and Kuhn smoked the hookah by placing the hose of the hookah in their mouth and inhaling the tobacco smoke. While the agents smoked the hookah inside the interior main building of the premises the Respondent's employees were around the agents. Seated directly to the right of Agent De La Torre were other patrons, who were smoking tobacco from a hookah. Agent De La Torre took a photograph of the beverages and hookah the agents were served. (Exhibit 4.)

13. Agent De La Torre observed two signs hanging in the Licensed Premises which stated, "Private Smoker's Lounge," one in the patio area and the other where he was seated inside the main building, along with two Proposition 65 warning signs[14]. (Exhibits 5 and H4.) He also saw in the center of the room in which the agents were seated a disc jockey (DJ) who wore headphones, was manipulating a computer playing music and smoking a hookah. From Agent De La Torre's seat on the couch inside the main building he also had a clear view out onto the patio, where he saw other patrons smoking hookah in the cabana-style lounge seating areas. (Exhibit 6.) Agents De La Torre and Kuhn paid for the hookah and drinks and soon thereafter left.

14. During Agent De La Torre's investigation of the Licensed Premises he compared the structural changes that he observed in the Licensed Premises to the only ABC-257 form in the Respondent's base file. (Exhibit 9.) Agent De La Torre determined that the structural changes he observed did not match the said ABC-257 form. Agent De La Torre copied the base file ABC-257, upon which he added descriptors, shaded areas and arrows. (Exhibit 10.) He indicated the structural changes to the Licensed Premises he observed, which were not depicted on the original ABC-257 form. On this second, altered version Agent De La Torre created a red, shaded area to depict the 10-foot perimeter wall with its attached 10 foot wide ceiling (creating the cabana-style seating

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[13] Agents De La Torre and Kuhn entered the same new main entrance as Agent De La Torre entered on August 22, 2018, and depicted in Exhibits B and D.

[14] The "Warning" signs state, "Breathing The Air In This Smoking Area (Including Hookah Smoke) Can Expose You To Chemicals Including Tobacco Smoke, Nicotine, Which Are Known To The State Of California To Cause Cancer And Birth Defects Or Other Reproductive Harm. Do Not Stay In This Area Longer Than Necessary. For More Info Go To: wwwP65Warnings.ca.gov/smokers-areas."

lounge areas), with blue arrows pointing thereto, as well as to additional seating in the center of the patio where the water feature had been, the two roll-up garage-style doors, a dividing wall (which created two separate rooms, each with their own fixed bars[15]), and the new walled-in/doored entrance and lobby where the three-foot high gate had originally been in the open patio area. (Exhibit 10.) At the hearing, Agent De La Torre marked on Exhibit 10, an "X" to indicate the location of the original main entrance to the main building prior to the structural changes which the Respondent made to the Licensed Premises.[16]

15. Agent De La Torre requested from the San Diego County Sheriff's Department current aerial photographs of the Licensed Premises, which depict the structural changes to the patio with the red mesh tarps stretched out across the center of the patio area between the squared off 10-foot wide ceiling. (Exhibit 11.) Agent De La Torre printed Google images of the Licensed Premises; two which depict the current view of the Respondent's patio with structural changes (Exhibits 12A and 12B), and one satellite image which depicts the premises prior to the said structural changes (Exhibit 12C). The agent also downloaded Yelp images of the Licensed Premises' patio (Exhibit 13.) Exhibits 12C, 13 and M3 more resemble the Licensed Premises diagram as depicted in the ABC-257 in the Respondent's base file.

(Respondent's Witness)

16. Rodi Ramzee Mikha appeared and testified at the hearing. Mr. Mikha described himself as the licensee and corporate president of the Respondent, Charcoal House Investments, Inc. Mr. Mikha said he purchased the Charcoal House in 2017, from the prior owner, Dallo Restaurant Group, Inc. At the time of said purchase and escrow Mr. Mikha was aware a lawsuit had been filed by the City of La Mesa against Dallo Restaurant Group, Inc., for a cause of action for abatement of a public nuisance relating to Dallo Restaurant Group, Inc.'s unpermitted construction on the Licensed Premises patio, including, but not limited to, unpermitted construction of the exterior, wrap-around retaining wall, seven gazebo-like structures, as well as gas/propane and electrical hookups, which did not comply with city building standards and/or the fire code requirements.[17] Mr. Mikha had a general contractor design plans to make structural changes to remodel the Licensed Premises. (Exhibit P.) Mr. Mikha submitted to the City

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[15] The two garage-style roll-up doors are located in the room described as "Bar Two (Used for Hookah)."
[16] During Mr. Mikha's testimony he also drew on Exhibit 10 an "X" with a circle around it and added his initials to mark the location of the original main entrance prior to the structural changes the Respondent made to the Licensed Premises. This entrance is currently used to enter, from the patio, into the dining room only, since the dividing wall which was also constructed now separates the dining area with its Bar One from the Bar Two with its interior seating area (see Exhibits Q1, Q2, and Q3).
[17] Exhibit N First Amended Complaint to Abate A Public Nuisance with Injunctie Relief & Civil Penalties; Exhibits M1 and M2 depicting unpermitted retaining wall, gazebo's, etc. on the patio which prior owner Dallo Restaurant Group, Inc. built without permits and not to code.

of La Mesa's Building/Permit Department Respondent's proposed plans for the structural changes it planned to make to its Licensed Premises,[18] which the city eventually approved and permitted. On August 11, 2017, Mr. Mikha signed and submitted, through his attorney, the said ABC-257 form (Exhibit 9) to the Department, which he said was the same ABC-257 diagram the prior owner, Dallo Restaurant Group, Inc. had submitted to the Department. On July 26, 2018, the building permit for the structural changes to the Licensed Premises was finalized with the City of La Mesa. Mr. Mikha paid an invoice dated August 17, 2018, in the amount of $624,270 to the general contractor who made the said structural changes to the Licensed Premises. (Exhibit P.) Mr. Mikha never submitted to the Department any proposed plans to remodel and structurally change the Licensed Premises and never requested approval thereof from the Department.

17. Mr. Mikha said there are currently two entrances into the Licensed Premises from the parking lot as depicted in Exhibit B; (1) the new main entrance/door to the right of the man standing under the American flag which leads into the lobby/waiting area and directly into the patio area,[19] (prior to the reconstruction of the Licensed Premises there was a three-foot high sliding gate[20] which patrons had to pass through to enter into the open patio area) and (2) the door to the far right of the picture (in Exhibit B) and main building with a lamp over the threshold, which entrance leads directly into the dining room which contains Bar One.[21]

18. Mr. Mikha claimed that the photographs in Exhibits H1 through H12 depict the retail location of the premises where the Respondent has on display for sale tobacco products, including, but not limited to cigars, tobacco accessories and smoking devices. Mr. Mikha further testified that prior to the Respondent installing the two garage-style roll-up doors between the claimed retail area and the outdoor patio, the only direct route into the main building, which housed one large room with two fixed bars and the dining room, was to walk through the original main entrance and exit door located near Bar One (as marked by Mr. Mikha with a circled "X" and his initials on Exhibit 10).[22]

19. Mr. Mikha said he has a passion for hookah. Mr. Mikha generally oversees operations of the Licensed Premises. He is at the premises' restaurant a minimum of 50 hours, five days a week. Mr. Mikha said that the Respondent does not permit smoking in the dining room with attached Bar One as depicted in Exhibit 10[23], but does permit and welcome smoking in its patio area and the room in the main building denoted with Bar

[18] See planned changes as described above in paragraphs 5, 10 and 14.
[19] See also Exhibits 10 and D.
[20] In Exhibit M3, the said three-foot high gate is shown and located at the palm tree depicted to the far right of the photograph.
[21] See also Exhibits 10 and E.
[22] This is currently the only entrance *from the patio* into the dining room and its fixed Bar One. (see Exhibit Q1, Q2, and Q3).
[23] See also Exhibits Q1, Q2, and Q3.

Two on Exhibit 10 and as depicted in Exhibit G[24]. In Mr. Mikha's experience he finds approximately 60 percent of the persons seated in the patio area smoke hookah. Mr. Mikha also acknowledged that sales, service and consumption of alcoholic beverages occurs in the patio (which the Respondent referred to as a private smoker's lounge) and the room in the main building (the latter of which the Respondent claimed to be a retail tobacco shop and private smoker's lounge). The Respondent permits the sales, service and consumption of alcoholic beverages throughout the Licensed Premises, including but not limited to the patio area, and the interior of the main building, which can be entered through the garage roll-up doors and as depicted with Bar Two in Exhibit 10.[25] The Respondent's servers help its patrons with whatever they want to order, "inside and outside." The Respondent's servers ring up all sales orders at one of either two computers, located at Bar One and Bar Two (as depicted in Exhibit 10).

20. The Respondent produced Exhibit S entitled, "Petition From Charcoal House Customers," which has two, typed statements, "I visit the Charcoal House because it has a dedicated private smoker's lounge where customers can enjoy a range of tobacco products" and "Even though I may purchase alcoholic beverages or food while in the private smoker's lounge, the main reason I come here is to enjoy tobacco products." Mr. Mikha said approximately 100 customers signed this petition acknowledging the aforementioned statements after he informed the customers "they tried to prevent us from having hookah and alcohol at the same time."

21. Mr. Mikha said that he never received from the Department a copy of the ABC-203 form, entitled, "Acknowledgment of ABC Laws, Rules and/or Regulations," which contains a statement "I have received a copy of Labor Code Section 6404.5 and understand that I am not allowed to permit smoking of tobacco products inside the building portion of the licensed premises." (Exhibit T)

22. Except as set forth in this decision, all other allegations in the Accusation and all other contentions of the parties' lack merit.

CONCLUSIONS OF LAW

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

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[24] See also Exhibits 5, 6, 7, 8, F, G, H1, H2, and H3.
[25] Also see Exhibits 5, 6, 7, 8, F, G, H1, H2, and H3. The Bar Two is claimed by Respondent to be a retail tobacco shop.

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

3. Labor Code section 6404.5 provides:

(a) The Legislature finds and declares that regulation of smoking in the workplace is a matter of statewide interest and concern. It is the intent of the Legislature in enacting this section to prohibit the smoking of tobacco products in all (100 percent of) enclosed places of employment in this state, as covered by this section, thereby eliminating the need of local governments to enact workplace smoking restrictions within their respective jurisdictions. It is further the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment, as specified in this section, in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees, and also to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions. Notwithstanding any other provision of this section, it is the intent of the Legislature that an area not defined as a "place of employment" pursuant to subdivision (e) is subject to local regulation of smoking of tobacco products.

(b) For purposes of this section, an "owner-operated business" shall mean a business having no employees, independent contractors, or volunteers, in which the owner-operator of the business is the only worker. "Enclosed space" includes covered parking lots, lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building and not specifically defined in subdivision (e).

(c) An employer or owner-operator of an owner-operated business shall not knowingly or intentionally permit, and a person shall not engage in, the smoking of tobacco products at a place of employment or in an enclosed space.

(d) For purposes of this section, an employer or owner-operator of an owner-operated business who permits any nonemployee access to his or her place of employment or owner-operated business on a regular basis has not acted knowingly or intentionally in violation of this section if he or she has taken the following reasonable steps to prevent smoking by a nonemployee:

(1) Posted clear and prominent signs, as follows:

(A) Where smoking is prohibited throughout the building or structure, a sign stating "No smoking" shall be posted at each entrance to the building or structure.

(B) Where smoking is permitted in designated areas of the building or structure, a sign stating "Smoking is prohibited except in designated areas" shall be posted at each entrance to the building or structure.

(2) Has requested, when appropriate, that a nonemployee who is smoking refrain from smoking in the enclosed workplace or owner-operated business. For purposes of this subdivision, "reasonable steps" does not include:

(A) the physical ejection of a nonemployee from the place of employment or owner-operated business or

(B) any requirement for making a request to a nonemployee to refrain from smoking, under circumstances involving a risk of physical harm to the employer or any employee or owner-operator.

(e) For purposes of this section, "place of employment" does not include any of the following:

(1) Twenty percent of the guestroom accommodations in a hotel, motel, or similar transient lodging establishment.

(2) Retail or wholesale tobacco shops and private smokers' lounges. For purposes of this paragraph:

(A) "Private smokers' lounge" means any enclosed area in or attached to a retail or wholesale tobacco shop that is dedicated to the use of tobacco products, including, but not limited to, cigars and pipes.

(B) "Retail or wholesale tobacco shop" means any business establishment, the main purpose of which is the sale of tobacco products, including, but not limited to, cigars, pipe tobacco, and smoking accessories.

(3) Cabs of motortrucks, as defined in Section 410 of the Vehicle Code, or truck tractors, as defined in Section 655 of the Vehicle Code, if nonsmoking employees are not present.

(4) Theatrical production sites, if smoking is an integral part of the story in the theatrical production.

(5) Medical research or treatment sites, if smoking is integral to the research and treatment being conducted.

(6) Private residences, except for private residences licensed as family day care homes where smoking is prohibited pursuant to Section 1596.795 of the Health and Safety Code.

(7) Patient smoking areas in long-term health care facilities, as defined in Section 1418 of the Health and Safety Code.

(f) The smoking prohibition set forth in this section constitutes a uniform statewide standard for regulating the smoking of tobacco products in enclosed places of employment and owner-operated businesses and supersedes and renders unnecessary the local enactment or enforcement of local ordinances regulating the smoking of tobacco

products in enclosed places of employment and owner-operated businesses. Insofar as the smoking prohibition set forth in this section is applicable to all (100 percent) places of employment and owner-operated businesses within this state and, therefore, provides the maximum degree of coverage, the practical effect of this section is to eliminate the need of local governments to enact enclosed workplace smoking restrictions within their respective jurisdictions.

(g) This section does not prohibit an employer or owner-operator of an owner-operated business from prohibiting smoking of tobacco products in an enclosed place of employment or owner-operated business for any reason.

(h) The enactment of local regulation of smoking of tobacco products in enclosed places of employment or owner-operated businesses by local governments shall be suspended only for as long as, and to the extent that, the (100 percent) smoking prohibition provided for in this section remains in effect. In the event this section is repealed or modified by subsequent legislative or judicial action so that the (100 percent) smoking prohibition is no longer applicable to all enclosed places of employment and owner-operated businesses in California, local governments shall have the full right and authority to enforce previously enacted, and to enact and enforce new, restrictions on the smoking of tobacco products in enclosed places of employment and owner-operated businesses within their jurisdictions, including a complete prohibition of smoking. Notwithstanding any other provision of this section, an area not defined as a "place of employment" or in which smoking is not regulated pursuant to subdivision (e), is subject to local regulation of smoking of tobacco products.

(i) A violation of the prohibition set forth in subdivision (c) is an infraction, punishable by a fine not to exceed one hundred dollars ($100) for a first violation, two hundred dollars ($200) for a second violation within one year, and five hundred dollars ($500) for a third and for each subsequent violation within one year. This subdivision shall be enforced by local law enforcement agencies, including, but not limited to, local health departments, as determined by the local governing body.

(j) Notwithstanding Section 6309, the division is not required to respond to any complaint regarding the smoking of tobacco products in an enclosed space at a place of employment, unless the employer has been found guilty pursuant to subdivision (i) of a third violation of subdivision (c) within the previous year.

(k) If a provision of this section or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the section that can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(l) For purposes of this section, "smoking" has the same meaning as in subdivision (c) of Section 22950.5 of the Business and Professions Code.

(m) For purposes of this section, "tobacco product" means a product or device as defined in subdivision (d) of Section 22950.5 of the Business and Professions Code.[26]

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violation of Labor Code section 6404.5 as alleged in counts 1 and 2. Specifically, on September 27, 2018, and February 1, 2019, the Respondent-Licensee's agents or employees permitted the smoking of tobacco products in an enclosed space or at a place of employment, in violation of Labor Code section 6404.5. (Findings of Fact ¶¶ 1-15, 19, and 20.)

5. The Respondent argued that the Licensed Premises falls within the "places of employment" exceptions of a "retail tobacco shop" and "private smokers' lounge." The Respondent further argued that the word "dedicated" in Labor Code section 6404.5(e)(2)(A) is vague and that the Attorney General Opinion of Kamala Harris[27], while entitled to respect, is not binding or controlling in the matter at hand as fortified by the fact that some tobacco shops and smoking lounges in the city of San Diego are also licensed to sell alcoholic beverages. In making this argument the Respondent relied upon a decision by the Office of Administrative Hearings OAH No. 2017040053. (Exhibit U.) A decision by the OAH is not binding precedent and in fact has no jurisdiction to consider the issue at hand. That OAH decision acknowledged as much stating, "Although the department raised a bona fide question as to whether a hookah lounge might lose its exemption if it became licensed to sell alcohol, this PCN [public convenience or necessity] appeal is *not* the forum in which to litigate the ultimate resolution of that issue....For those reasons, this decision does *not* reach the issue of whether a hookah lounge would lose its exemption under Labor Code section 6404.5 subdivision (e)(2), if it became licensed to sell beer and wine." (Emphasis added.)

6. The Respondent further argued that while the Attorney General may want to change the law if a change in the law is desired the appropriate elected officials are the ones who should make amendments to the Labor Code section and clearly state that premises cannot have alcohol licenses concurrently where there is smoke. The Department attorney addressed this argument by pointing out that Attorney General Kamala Harris' Opinion referred to case law that provides that "an exception to a statute is to be narrowly

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[26] Amended by Stats. 2016, 2nd Ex. Sess., Ch. 7, Sec. 23.5. (SB 5 2x) Effective June 9, 2016.

[27] 94 Ops. Cal. Atty. Gen 46 (dated December 21, 2011).

construed,"[28] and concluded that both a private smoker's lounge, located in or attached to a retail or wholesale tobacco shop, and a tobacco shop which serves alcoholic beverages to patrons, is not exempt from the requirements of Labor Code section 6404.5 to maintain a smoke-free workplace. The Department further pointed out that after Attorney General Kamala Harris' Opinion, the Legislature amended, among other smoking statutes, Labor Code section 6404.5 by "limiting [the exceptions] further from 14 to seven exceptions," indicating that "the Legislature has weighed in on these exceptions and this evidences the Legislature's intent that the exceptions should be narrowly tailored and strictly enforced."

7. The Respondent is correct, that the Opinion of the Attorney General deserves respect. But also, as pointed out in that same OAH decision as cited by Respondent, "cases have stated that an AG Opinion can be entitled to 'great weight.' (*Napa Valley Unified School District* (1987) 194 Cal.App.3rd 243,251.)"[29] The Respondent's arguments are rejected. The undersigned disagrees with the cited OAH decision, in that the undersigned finds the word "dedicated" is not vague. The Opinion of Attorney General Kamala Harris was well-reasoned and thoroughly examined the Legislature's intent. The undersigned will not recite said decision herein but will note the undersigned's agreement therewith as well as make an additional point relating to its footnote 17, which states, "Bars and taverns are now smoke-free workplaces." In the matter at hand, the Respondent's type-47 on-sale general eating place Licensed Premises includes two separate fixed bars, a dining room and patio with enclosed cabanas, throughout all of which the sales, service and consumption of alcoholic beverages are made. Calling the Charcoal House "a private smoker's lounge" or "retail tobacco shop" which also sells alcoholic beverages in an attempt to exempt it from the requirements of Labor Code section 6404.5, runs counter to the Legislature's clear intent and goals, including, protecting the public and employees by reducing "exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees," and bringing uniformity to workplace smoking restrictions.

8. The Respondent further cited the Attorney General Opinion of Daniel E. Lungren No. 97-1201 dated March 17, 1998 (Exhibit V), which determined the meaning of the phrase "enclosed space" for purpose of section 6404.5 and whether the owner of a bar, restaurant, or tavern could avoid violation thereof by opening all doors and windows during the hours of employment. The Respondent cites Attorney General Daniel E. Lungren's Opinion despite the fact that in the Attorney General Opinion of Kamala Harris (Exhibit K) it is pointed out in footnote 17 that since the January 1, 1998 deadline had passed the temporary exemption for bars and taverns expired and bars and taverns

[28] *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 201 Cal.App.2d 567, at 571.
[29] Another case the Department cited which holds that Attorney General Opinions are entitled to great weight is *Department of Alcoholic Beverage Control vs. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4th 1066, at page 1075.

were thereafter smoke-free workplaces, not entitled to the temporary exemption given them. Nevertheless, the Respondent focused on Attorney General Daniel E. Lungren's definition of enclosed space in the first full paragraph of the final page of the Opinion to acknowledge that both the Respondent's fixed Bar Two area (Bar Two is described in Exhibits H1, H2, H3 and 10) and patio meet the definition of "enclosed spaces." In that same Attorney General Opinion, the next paragraph points out that "The walls and roof make it an 'enclosed space' as that term is normally understood" and concludes with finding that "the owner of a bar, restaurant or tavern may not allow smoking in his or her establishment merely by opening all doors and windows during the hours of employment." The Respondent's patio cabana-style lounge areas fit this definition because the Licensed Premises' patio walls and roof make the cabanas an enclosed space. The Respondent's waiting area or lobby also fits within the definition of "enclosed spaces…that are a structural part of the building" as defined in Labor Code section 6404.5(b). The lobby/waiting area was fully open to smoke from both the patio and main building room (through the open wide garage doors), where Respondent welcomed tobacco to be smoked. The evidence established that patrons were permitted to smoke tobacco at both the Respondent's place of employment and in enclosed spaces, including inside the main building in the Bar Two area as well as the enclosed patio cabanas, in the presence of Respondent's employees.

9. The preponderance of the evidence established, including, but not limited, through the testimony of both Agent De La Torre and Rodi Ramzee Mikha, that alcoholic beverages are sold, served and consumed in the Bar Two area, which the Respondent refers to both as a private smoker's lounge and claims is a retail tobacco shop as defined in Labor Code section 6404.5(e)(2), as well as the attached patio with its enclosed cabanas, which the Respondent also refers to as a private smoker's lounge. These private smoker's lounges of the Licensed Premises are not dedicated to the use of tobacco products and the alleged tobacco shop does _not_ have the main purpose of which is the sale of tobacco products, regardless of artwork on the wall and products on the shelves. The Respondent's servers help its patrons with whatever they want to order, "inside and outside." The Respondent's employees take orders of all kinds, including alcoholic beverage sales in all areas of the Licensed Premises. As the Department attorney correctly pointed out, "Here too it is no longer the main purpose of Charcoal House or any of its interior portions to sell tobacco products where there is also sales of alcohol." The introduction of alcohol sales, service and consumption removes those portions of the Licensed Premises from the exceptions listed in Labor Code section 6404.5(e)(2).

10. Based on the preponderance of the evidence it is found the Respondent "knowingly or intentionally permit[ted]… the smoking of tobacco products at a place of employment or in an enclosed space" in violation of Labor Code section 6404.5, with no exemptions from the requirements thereof to maintain a smoke-free workplace.

11. California Code of Regulations, Title 4, Division 1, Article 11, section 64.2 (referred to hereafter as Rule 64.2, provides:

(a) Premises and Activity Diagram.
(1) Prior to the issuance or transfer of a license, the applicant shall file with the department, on forms furnished by the department, a complete detailed diagram of the proposed premises wherein the license privileges will be exercised.
(2) The diagram will show all boundaries, dimensions, entrances and exits, interior partitions, walls, rooms, and common or shared entryways. Each room and/or partitioned area within the premises area shown will include a brief statement or description of the principal activity to be conducted therein, e.g., office, storeroom, toilets, bar, cardroom, billiards, etc. If any described activity shown thereon is not, or will not be, conducted under the direct control, supervision and ownership of the alcoholic beverage licensee, the name and full identification of any person or persons who own, direct, control and/or supervise the activity will be furnished to the department together with a full disclosure of any agreement, written or oral, between the licensee and said person.
(3) If the area proposed to be licensed uses, either as a principal or secondary means of public ingress and/or egress, any common door or common passage with any other occupant of the same or adjacent buildings or rooms, a statement of the general entities conducted and the identification of the persons or entities conducting said activities will be made on the diagram.

(b) Substantial Physical Changes of Premises or Character of Premises.
(1) After issuance or transfer of a license, the licensees shall make no changes or alterations of the interior physical arrangements which materially or substantially alter the premises or the usage of the premises from the plan contained in the diagram on file with his application, unless and until prior written assent of the department has been obtained.

For purposes of this rule, material or substantial physical changes of the premises, or in the usage of the premises, shall include, but are not limited to, the following:

(A) Substantial increase or decrease in the total area of the licensed premises previously diagrammed.
(B) Creation of a common entryway, doorway, passage or other such means of public ingress and/or egress, when such common entryway, doorway, passage or other such means of public ingress and/or egress, when such common entryway, doorway or passage permits access to the licensed premises area from or between adjacent or abutting buildings, rooms, or premises.

(C) Where the proposed change will create in the licensed premises an area, or room, or rooms, whether or not partitioned, or in some other manner delimited and defined wherein activities of any nature not directly related to the sale of alcoholic beverages will be conducted by a person, persons, or entity not under the direct control, supervision and direction of the licensee.

12. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violation of California Code of Regulations, Title 4, Chapter 1, Rule 64.2(b)(1) as alleged in count 3. Specifically, on February 1, 2019, and for a period of time prior to that date, the Respondent-Licensee made physical changes to the Licensed Premises which resulted in a change of usage of the premises and materially or substantially altered the premises from the plan contained in the diagram on file with the Department of Alcoholic Beverage Control without obtaining the prior written assent of the Department, in violation of California Code of Regulations, Title 4, Chapter 1, Rule 64.2(b)(1). (Findings of Fact ¶¶ 2, 4-6, 8-10, 12-20.)

13. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the extent of the opportunity of the witness to perceive any matter about which the witness testifies, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

14. The Respondent's contentions that (1) there are no alcoholic beverages sold, served or consumed in the interior of the premises indicated by Bar Two (in Exhibits G, H1, H2, and H3) or in the patio area, including its cabanas, and (2) the Bar Two area is a retail tobacco shop with the main purpose of the sale of tobacco products, and the seating in the Bar Two area as well as the enclosed patio are private smoker's lounges dedicated to the use of tobacco products, are disbelieved for the following reasons. The Respondent presented conflicting evidence and biased testimony by Respondent's corporate president whose Licensed Premises is subject to discipline. The preponderance of the evidence, including the testimony from both Agent De La Torre and Rodi Ramizee Mikah established that alcoholic beverages are sold, served and consumed in all areas of the Licensed Premises, including, but not limited to the interior portion of the Bar Two area as well as the patio and its cabanas. Even the Respondent's customers state in the signed petition (Exhibit S) that they purchase alcoholic beverages in the private smokers' lounge along with hookah. Furthermore, the preponderance of the evidence established that the alleged private smoker's lounges of the Licensed Premises are not dedicated to the use of tobacco products and the alleged tobacco shop's main purpose is not the sale of tobacco products as discussed above.

PENALTY

The Department requested the Respondent's license be suspended for 15 days, based on aggravating factors, including (1) a Notice of Violation was served on the Respondent's corporate president, Rodi Ramzee Mikha, despite that service ongoing violations were confirmed with no apparent effort to cease the illegal activity, (2) which indicates Licensee involvement and endorsement thereof, since the Respondent welcomes smoking of tobacco products in violation of the said labor code, (3) the Respondent had plans to make the substantial changes to the Licensed Premises since October of 2016, and completed aforesaid changes by July of 2018, with the City of La Mesa approving the said remodeling plans on August 3, 2017, and just eight days later the Respondent signed an ABC-257 form, which it submitted to the Department regardless of knowing that substantial changes were eminent and that the said ABC-257 form did not notify the Department of any of the said proposed changes; let alone, at no point did the Licensee request prior written consent to such changes. The Department did not provide a recommended breakdown of the penalty.

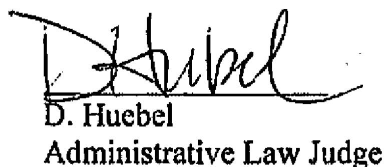
The Respondent did not recommend a penalty should the accusation be sustained. The Respondent argued that a mitigated penalty is justified based upon the Respondent's efforts at remodeling the Licensed Premises to comply with the City of La Mesa's building and safety standards and codes. In addition, the Respondent argued mitigation for its having posted signs designating smoking only areas and Proposition 65 "Warning" signs of exposure to chemicals known to cause cancer and birth defects or reproductive harm for remaining in smoke-filled areas.

With respect to Respondent's changes to the Licensed Premises contrary to rule 64.2, and violation of Labor Code section 6404.5 there are no recommended penalties noted in rule 144. Rule 144 offers guidance on adjusting a penalty up or down depending on aggravating and mitigating factors. In assessing the standard recommended penalties for first time violations and weighing the argued-for aggravating and mitigating factors the penalty recommended herein complies with rule 144.

ORDER

Counts 1, 2 and 3 of the Accusation are sustained. In light of these violations, the Respondent's on-sale general eating place license is hereby suspended for 15 days as to each count, with all penalties as to those counts to be served concurrently with one another.

Dated: September 23, 2019



D. Huebel
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: ____________________

By: [signature]

Date: 11/8/19

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CHARCOAL HOUSE INVESTMENTS, INC., dba Charcoal House 9566 Murray Drive La Mesa, CA 91942, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-9846 File: 47-581208 Reg: 19088691 **DECLARATION OF SERVICE BY MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 1325 J Street, Suite 1560, Sacramento, CA; that on the 12th day of May, 2020, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below:

Ralph Barat Saltsman
Solomon, Saltsman & Jamieson
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I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California, on the 12th day of May, 2020.

Maria Sevilla

MARIA SEVILLA