

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

AB-9847

File: 21-476650; Reg: 18088284

BM PETRO, INC.
8240 Fair Oaks Boulevard
Carmichael, CA 95608-2414,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: May 7, 2020
Telephonic

ISSUED MAY 12, 2020

Appearances: *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for BM
PETRO, INC.

Respondent: Joseph J. Scoleri, III, as counsel for the Department
of Alcoholic Beverage Control.

OPINION

BM PETRO, INC. (appellant) appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 20 days because its clerk sold an alcoholic beverage to an obviously intoxicated person and a habitual or common drunkard, in violation of Business and Professions Code² section 25602(a).

¹The decision of the Department under Government Code section 11517(c), dated November 12, 2019, is set forth in the appendix, as well as the administrative law judge's proposed decision, dated April 29, 2019.

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 9, 2009. There is no record of prior departmental discipline against the license.

On November 30, 2018, the Department filed an accusation against appellant charging that, on June 13, 2018, appellant's clerk, Harmit Singh (the clerk), sold an alcoholic beverage to Kara Mulrooney, an obviously intoxicated person and a habitual or common drunkard.

At the administrative hearing held on March 28, 2019, evidence established that California Highway Patrol (CHP) Officer S. Rice responded to a traffic collision on June 13, 2018 between a gold-colored Honda Accord and a motorcycle at the intersection of Fair Oaks Boulevard and Hillsgrove Avenue. Officer Rice determined that the collision had occurred at approximately 9:30 a.m. based on the time of the call, witness reports, and the physical evidence. Officer Rice also determined that the Honda was traveling eastbound on Fair Oaks Boulevard when it turned left in front of the motorcycle traveling westbound on Fair Oaks Boulevard, causing the collision. The operator of the Honda left the scene prior to Officer Rice's arrival.

Officer Rice ran the registration records of the Honda and determined that the vehicle was associated with Kara Mulrooney, who lived in the apartment complex at 8601 Fair Oaks Boulevard; the same apartment complex the Honda had been turning into at the time of the collision. Officer Rice knocked on the door of Mulrooney's apartment and announced himself as law enforcement. Officer Rice heard movement inside the apartment, but no one responded to the door.

After getting no response, Officer Rice entered Mulrooney's apartment and contacted her to determine if she was injured and to continue his investigation. Officer

Rice immediately determined that Mulrooney was exhibiting obvious signs of intoxication, and initially had to do a sternum rub to wake Mulrooney so he could speak with her. Officer Rice testified that Mulrooney smelled strongly of alcohol, had red, water eyes, and her speech was slurred. He observed that her clothing was unkempt and dirty, and at one point when she stood, she staggered, and her shorts fell down.

Mulrooney told Officer Rice that she had purchased vodka at the licensed premises. She described herself as “fucked up,” but denied drinking alcohol before purchasing the vodka at the licensed premises. She also told Officer Rice that she had taken OxyContin earlier and while drinking vodka. Officer Rice accompanied Mulrooney to the hospital where a blood sample indicated she had a blood alcohol level of .345 percent and showed the presence of Oxycodone. (Exh. D-2.)

On June 13, 2018, CHP Officer C. Hertzell spoke with the clerk who sold vodka to Mulrooney just prior to the collision. The clerk told Officer Hertzell that Mulrooney had obviously been drinking prior to the purchase. The clerk reported that Mulrooney was a regular customer over the course of several years and that she bought alcohol and other items multiple times a week.

The clerk also allowed Officer Hertzell to watch the surveillance video. Officer Hertzell observed Mulrooney on the video moving in a slow, deliberate manner in the video while purchasing vodka from the clerk. Officer Hertzell noted that Mulrooney was having trouble using an ATM card and handling her purse, as evidenced by her need to grasp both the card and her purse with both hands, and her need to have the clerk complete the transaction for her. Mulrooney was also barefoot when she entered the licensed premises.

Department Agent B. Pender also spoke with Mulrooney on June 13, 2018 after she returned to her apartment from the hospital. She told Agent Pender that she perceived herself as intoxicated when she purchased vodka from the clerk, given that she was shaky, had been on a multi-day drinking binge, and had trouble entering her PIN number to pay. Mulrooney told Agent Pender that she was a regular customer at the licensed premises and knew the clerk well. Agent Pender was able to obtain the receipt for the vodka purchase, which showed the transaction occurring approximately three minutes before the collision. (Exh. D-3.)

Agent Pender returned on June 14, 2018 and re-interviewed Mulrooney. During this interview, Mulrooney stated that she drank half a pint of vodka after waking at approximately 8:00 a.m. on June 13, 2018. Mulrooney stated that she bought all of her alcoholic beverages from the licensed premises because it was close to her home. She also recalled several instances where she made alcohol purchases at the licensed premises while intoxicated. She described one prior incident where the clerk drove her home because she was too intoxicated. Mulrooney did not mention ever being denied alcohol sales at the licensed premises during the times she was intoxicated.

Agent Pender also went to the licensed premises on June 14, 2018 and spoke to the clerk. The clerk admitted to knowing Mulrooney and that she was a regular customer for about 10 years. The clerk also admitted to knowing that Mulrooney drank regularly and that he had seen her intoxicated on multiple occasions prior to June 13, 2018. The clerk told Agent Pender that he had prevented Mulrooney from purchasing alcohol on many occasions because she was "very drunk" and "really messed up." The clerk admitted that he had driven her home on at least one occasion because she was too intoxicated to get home on her own.

The clerk also appeared at the administrative hearing and testified to knowing Mulrooney for multiple years and that she made purchases multiple times a week. He testified that her voice sounded “fine” when she greeted him and asked to buy vodka on June 13, 2018. The clerk stated he did not notice any abnormal behavior in Mulrooney that morning, that he did not smell alcohol, and noted that her eyes were not bloodshot or watery when they interacted on June 13, 2018. The clerk also testified that Mulrooney was having trouble with entering her PIN number because she told him she was using her boyfriend’s ATM card and could not remember his PIN number.

The administrative law judge (ALJ) issued a proposed decision on April 29, 2019, sustaining count one of the accusation (sale to an obviously intoxicated individual) and recommended a 20-day suspension. The ALJ dismissed count two for sale of alcohol to a habitual or common drunk, determining that this portion of the statute did not pass “constitutional scrutiny.” (Proposed Decision, at pp. 5-6 fn. 3.) The Department declined to adopt the proposed decision on June 25, 2019 and issued a Certificate of Decision stating it would decide the case pursuant to Government Code section 11517(c)(2)(E) on July 16, 2019. On August 14, 2019, the Department sent a notice to the parties that it would receive additional written argument regarding the “common” or “habitual” drunkard language in section 25602.

After considering the written briefs of the parties, the Department issued its decision on November 12, 2019, sustaining both counts of the accusation, and suspending appellant’s license for 20 days for each count, to be served concurrently. Appellant filed a timely appeal contending that Department’s findings are not supported by substantial evidence and the penalty is unreasonable.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends that the Department's finding that Mulrooney was obviously intoxicated at the time of the sale is not supported by substantial evidence. (AOB at pp. 3-5.) Specifically, appellant argues that the video is not a reliable source of evidence since there was conflicting testimony that Mulrooney's actions on the video were "due to [an] extensive spinal surgery." (*Id.* at p. 4.) Appellant further contends that the terms "habitual drunkard" and "common drunkard" are unconstitutionally vague. (AOB at pp. 5-6.) These issues will be discussed together.

The Board's scope of review is limited; it may only review a Department's decision based upon "insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion." (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 95, [84 Cal.Rptr. 113].) Here, the Department found that Mulrooney was obviously intoxicated and a habitual or common drunkard at the time the clerk sold her alcohol on June 13, 2018. (Findings of Fact ¶¶ 3-13; Conclusions of Law ¶ 8-16.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"]; see also *Kirby v. Alcoholic*

Bev. etc. Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] [“When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department.”].) “Substantial evidence” is “evidence of ponderable legal significance, which is ‘reasonable in nature, credible and of solid value.’” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

To support its findings, the Department relied on the surveillance video from the licensed premises, as well as statements made by Mulrooney that she drank prior to going to the licensed premises and Officer Rice’s observations of Mulrooney shortly after the collision. (Findings of Fact, ¶¶ 6-12.) The Department further relied on testimony offered at the hearing, including the clerk’s, that Mulrooney was a regular customer at the licensed premises, frequently purchased alcohol, and appeared intoxicated on many occasions, including one specific occasion where the clerk had to drive her home. (*Ibid.*) In fact, Mulrooney could not recall ever being denied the purchase of alcohol at the licensed premises or by the clerk. (*Id.* at ¶ 10.)

The video evidence, as well as the testimony and statements in the record are “reasonable in nature, credible and of solid value,” and thus, constitute “substantial evidence” to support the Department’s findings. (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.) The fact that appellant cites the clerk’s testimony that Mulrooney did not appear intoxicated—and explains his assistance with the transaction as Mulrooney forgetting her boyfriend’s PIN—is insufficient to overturn the Department’s decision. Likewise, the possible explanation of Mulrooney’s physical behavior on the video as attributed to a spinal injury and not to intoxication is equally immaterial. First,

such evidence is merely contradictory, and binding legal authority compels us to resolve this conflict in the Department's favor. (*Kirby, supra*, 261 Cal.App.2d at p. 122.)

Second, as the trier of fact, the Department is entitled to make credibility determinations of witness testimony. (*People v. Burton* (1958) 162 Cal.App.2d 790, 792 [328 P.2d 492, 493] ["It was for the trier of the facts to pass upon the credibility of the witnesses and the weight to be accorded the evidence."]) Here, the Department found the clerk's testimony not credible, which it is entitled to do. (Conclusion of Law ¶ 9.) The Board sees no error.

Based on the above, the Board affirms the Department's findings regarding Mulrooney's appearance as obviously intoxicated, or that she was a habitual or common drunkard, which are supported by the surveillance video as well as testimony and other statements in the record. Ultimately, appellant is asking this Board to reconsider the same evidence as the Department and reach a different conclusion. The Board has no legal authority to overturn the Department's decision based on a difference of opinion as to what conclusions the evidence in the record supports.

Finally, appellant contends that the terms "habitual" or "common" drunkard are unconstitutionally vague, which is the same contention it made at the administrative hearing. There, the Department rejected appellant's argument, citing Article III, section 3.5 of the California Constitution which states that an administrative agency does not have the power to declare a statute unenforceable or refuse to enforce a statute on unconstitutional grounds, unless an appellate court has done so first. Appellant has not cited any authority, and the Board knows of none, which would allow the Board, an administrative agency, to declare the terms of section 25602(a) as unconstitutional or unenforceable. Again, without express authority to act, the Board is prohibited from

overturning the Department's decision. Therefore, the Department's findings regarding counts one and two must stand.

II

EXCESSIVE PENALTY

Appellant argues that the penalty is unreasonable. (AOB at pp. 6-7.) Specifically, appellant cites its nearly nine³ years of discipline-free history and contends that it should be able to pay a fine in this case instead of a suspension. (*Ibid.*)

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, the Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) An administrative agency abuses its discretion when it "exceeds the bounds of reason." (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, "[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. The standard penalty for a first-time violation of section 25602 is 15 days. (Cal. Code

³ Appellant claims it has 11 years of discipline-free history in its brief. However, this assertion does not take into account the sale to Mulrooney on June 13, 2018, which took place roughly eight years and nine months after the license was issued.

Regs., tit. 4, § 144.) Nevertheless, rule 144 allows the Department to deviate from the standard penalty when, “*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist.” (*Ibid.*, emphasis added.)

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

Here, the Department determined that aggravation was warranted because there was a “pattern of conduct where [appellant’s] agents allowed repeated sales to Mulrooney in circumstances where they knew or should have known that she was intoxicated and a habitual or common drunkard.” (Penalty at p. 8.) The Department cited appellant’s lack of prior discipline, but nevertheless added five days to the standard penalty, resulting in a 20-day total suspension. (*Id.* at p. 9.) Appellant takes issue with the length of the suspension and the fact that it was not offered a petition for offer in compromise or “POIC,” which is essentially is a fine in lieu of a suspension. (AOB at pp. 6-7.)

The Board cannot say that the Department abused its discretion. As we have said many times over the years, the extent to which the Department considers

mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 15-day suspension for a section 25602 violation. However, rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The Department's rejection of appellant's discipline-free history in favor of aggravating circumstances was reasonable and not an abuse of discretion. Further, appellant is not entitled to a POIC; rather, section 23098 allows the Department to authorize a POIC in its discretion. However, the Department may not authorize a POIC when the penalty is more than 15 days, as it is here. Therefore, the penalty assessed is reasonable and must stand.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

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

APPENDIX

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

IN THE MATTER OF THE APPEAL BY:

BM PETRO, INC.
8240 FAIR OAKS BLVD.
CARMICHAEL, CA 95608-2414

OFF-SALE GENERAL - LICENSE

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

SACRAMENTO DISTRICT OFFICE

File: 21-476650

Reg: 18088284


AB: 9847

CERTIFICATION

I, Yuri Jafarnejad, 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 29, 2020, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

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ABC APPEALS BOARD

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

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

BM Petro, Inc.
8240 Fair Oaks Blvd.
Carmichael, CA 95608-2414

Respondent

Off-Sale General License

File No.: 21-476650

Reg. No.: 18086948

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Alcoholic Beverage Control
Office of Legal Services

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department November 12, 2019, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on March 28, 2019, before Administrative Law Judge Alberto Roldan, and the written arguments of the parties, adopts the following decision.

In a two-count accusation, the Department seeks to discipline Respondent's license on the grounds that,

- On or about June 13, 2018, respondent-licensee's agent or employee, Harmit Singh Dhillon, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: distilled spirits, to Kara Mulrooney, an obviously intoxicated person, in violation of California Business and Professions Code¹ section 25602(a).
- On or about June 13, 2018, respondent-licensee's agent or employee, Harmit Singh Dhillon, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: distilled spirits, to Kara Mulrooney, a habitual or common drunkard, in violation of California Business and Professions Code section 25602(a). (Exhibit D-1)

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

In each of the above two counts alleged in the accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b) of the Business and Professions Code. The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b). (Exhibit D-1)

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 March 28, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on November 30, 2018.
2. The Department issued a type 21, off-sale general license to the Respondent at the above-described location on September 9, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. On June 13, 2018, Officer S. Rice (Rice) of the California Highway Patrol (CHP) responded to a traffic collision between a car and a motorcycle at Fair Oaks Boulevard and Hillsgrove Avenue. Rice had 24 years of training and experience with CHP and had investigated thousands of collisions during his career. Rice also had extensive training and experience in the investigation of driving under the influence cases. When Rice arrived, he observed that a motorcycle was damaged from a collision with a car. Based on the time of the call, witness statements and physical evidence, Rice determined that the collision had occurred at approximately 9:30 a.m. Witnesses pointed out to Rice a gold colored Honda Accord as the vehicle that had cut off the motorcyclist by turning into its path. Rice observed significant damage to the right side of the Accord that was consistent with it having been involved in a collision with the motorcycle as described by the witnesses. Based on the witness reports and the physical evidence Rice observed, Rice determined that the Honda Accord was proceeding eastbound on Fair Oaks Boulevard, just prior to turning left into an apartment complex. While making this turn, the driver of the Honda Accord failed to yield to the motorcyclist who was proceeding westbound on Fair Oaks Boulevard.
5. The operator of the Honda Accord left the scene prior to Rice's arrival. Rice ran the registration records of the Honda Accord and determined that the vehicle was associated with Kara Mulrooney (Mulrooney). Rice determined that Mulrooney lived in apartment #10 at 8601 Fair Oaks Boulevard, which was the complex the Honda Accord had been turning into at the time of the collision. Rice went to Mulrooney's apartment, knocked on the door and announced

himself as law enforcement. Rice heard movement in the apartment, but no one responded to the door.

6. After getting no response, Rice entered Mulrooney's apartment and contacted her at approximately 10:54 a.m. to determine if she was injured and to continue the investigation of the collision. Rice immediately determined that Mulrooney was exhibiting obvious signs of intoxication. Rice initially had to do a sternum rub with his knuckles to revive Mulrooney so he could speak with her. Mulrooney smelled strongly of alcohol. She had red, watery eyes. Her speech was slurred. Her clothing was unkempt and dirty. At one point when she stood, she staggered, and her shorts fell down. Rice observed her movements to be slow and deliberate.

7. Mulrooney told Rice that she had purchased vodka at the nearby Valero gas station on Fair Oaks Boulevard, which was the Licensed Premises. Mulrooney described herself to Rice as "fucked up" but denied having drank any alcohol since before the vodka purchase at the Licensed Premises that day. Mulrooney told Rice that she had also taken OxyContin earlier. While she did not clarify when she had taken the OxyContin, she stated that she had taken the OxyContin while drinking vodka. Rice accompanied Mulrooney to the hospital where he observed a phlebotomist draw a blood sample from Mulrooney at 11:32 a.m. on June 13, 2018. Rice booked the sample into evidence and it was later tested by the Sacramento County District Attorney's Office Laboratory of Forensic Services. The sample taken from Mulrooney had a blood alcohol level of .345 percent and showed the presence of Oxycodone². (Exhibit D-2)

8. On June 13, 2018, CHP Officer C. Hertzell (Hertzell) spoke with Harmit Singh Dhillon (Dhillon), the clerk who sold vodka to Mulrooney just prior to the collision. Dhillon told Hertzell that it was obvious that Mulrooney had been drinking prior to the purchase. Dhillon reported that Mulrooney was a regular customer over the course of several years and that she bought alcohol and other items multiple times a week. Dhillon also allowed Hertzell to watch the surveillance monitors. Hertzell, like Rice, was an experienced traffic officer familiar with under the influence investigations. He observed that Mulrooney was moving in a slow, deliberate manner while purchasing the vodka from Dhillon. She was also having trouble using an ATM card and handling her purse as evidenced by her need to grasp both with both hands and her need to have Dhillon complete the transaction for her. Mulrooney was barefoot when she entered the Licensed Premises.

9. Department Agent B. Pender (Pender) spoke with Mulrooney on June 13, 2018, after she returned to her apartment from the hospital. She stated that she bought Smirnoff vodka at the Licensed Premises earlier that day. Mulrooney perceived herself as being intoxicated during the purchase given that she was shaky and had been on a multi-day drinking binge prior to the purchase. She had trouble entering her PIN number to pay for the purchase, so she ultimately had Dhillon complete the purchase transaction as a credit purchase. Mulrooney stated that she was a

² OxyContin is an extended release formulation of Oxycodone.

regular customer at the Licensed Premises and that she knew Dhillon well. Pender obtained the receipt for the purchase which showed the transaction occurring at 9:27 a.m. on June 13, 2018. (Exhibit D-3) Mulrooney left the Licensed Premises by vehicle and the collision with the motorcycle occurred approximately 3 minutes after the purchase.

10. Pender re-interviewed Mulrooney on June 14, 2018. During this interview, Mulrooney stated that she drank half a pint of vodka after waking on June 13, 2018, at approximately 8 a.m. and before going to the Licensed Premises. Mulrooney testified that she bought all her alcoholic beverages from the Licensed Premises because it was close by her home. Mulrooney recalled prior instances where she had made alcohol purchases at the Licensed Premises while she felt intoxicated and she described an incident prior to June 13, 2018, when Dhillon drove her home because she was too intoxicated to get home from the Licensed Premises. Mulrooney did not mention being denied alcohol sales at the Licensed Premises during periods when she was making purchases when intoxicated.

11. Pender went to the Licensed Premises on June 14, 2018, to try to speak with Dhillon. When Pender initially asked for Dhillon, Dhillon told Pender that Dhillon was not there. Once Pender identified himself as a law enforcement officer, Dhillon immediately admitted that he was Dhillon. Dhillon admitted to knowing Mulrooney and that she was a regular customer for about 10 years. Dhillon admitted to knowing that Mulrooney drank regularly and that he had seen her on multiple occasions intoxicated prior to June 13, 2018. Dhillon stated to Pender that he had prevented Mulrooney from making purchases on prior occasions because she was "very drunk" and "really messed up". On at least one occasion, Dhillon stated that he had driven her home from the Licensed Premises because she was too intoxicated to get home on her own.

12. Pender obtained and preserved video recordings of the surveillance system from the Licensed Premises monitors that showed Mulrooney's movement through the Licensed Premises and interaction with Dhillon during the transaction on June 13, 2018. Pender did this by using the video function on his smart phone to record the surveillance system while it was run at regular speed. (Exhibits D-4 and L-1) The exhibits show Mulrooney from two separate angles. They show Mulrooney moving in a shuffling fashion. Her movements are markedly slower than the movements of other persons in the Licensed Premises. Mulrooney is unsteady in the handling of her purse and Dhillon ultimately assists Mulrooney in retrieving her ATM card. After Mulrooney is unable to enter her PIN number, Dhillon ultimately takes possession of Mulrooney's ATM card and rings up the transaction as a credit purchase. During their interviews, both Mulrooney and Dhillon talked about this occurring. In the videos, Mulrooney then slowly reaches forward and uses both hands to take back the card from Dhillon. Mulrooney appears unsteady in the receipt of the card, the handling of her purse and in walking out of the Licensed Premises to her vehicle.

13. Dhillon testified in this matter. He testified to knowing Mulrooney for multiple years and that she made purchases multiple times a week at the Licensed Premises. He testified to her voice sounding "fine" when she said "morning" to Dhillon and asked to buy vodka upon entering on June 13, 2018. He testified to not noticing any abnormal behavior in Mulrooney that morning. Dhillon testified to not smelling alcohol when he interacted with Mulrooney. Dhillon testified that her eyes were not bloodshot and watery on June 13, 2018. Dhillon testified to knowing what Mulrooney was like when she was intoxicated because he had declined to sell to her on occasions where she appeared to be intoxicated. Both she and her boyfriend have entered the Licensed Premises intoxicated on multiple occasions prior to June 13, 2018, according to Dhillon. Dhillon testified to Mulrooney having trouble with entering the PIN on June 13, 2018, as the result of her not being able to remember her boyfriend's PIN number. This is what led Dhillon to take Mulrooney's card and complete the transaction for her as a credit card purchase. Dhillon testified to telling the CHP officer that "I don't think so" in response to the officer's question of whether Mulrooney was intoxicated when she made the purchase on June 13, 2018. Dhillon testified to looking at Mulrooney during the transaction and that he would not have sold to her if he thought she was intoxicated. Dhillon saw Mulrooney walk to her car and drive away after the vodka purchase on June 13, 2018.

14. 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.
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. Section 25602(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.
4. As noted in *Rice v. Alcoholic Bev. etc. Appeals Bd.* 118 Cal.App.3d 30, 35-36 (1981):

"Courts have long recognized that the outward manifestations of intoxication are well known and easily recognized. In *Coulter v. Superior Court* (1978) 21 Cal.3d 144, 155, the court said: "Defendants have argued that the term 'obviously intoxicated' is too broad and subjective to serve as a satisfactory measure for imposition of civil liability. However, the

phrase is contained in section 25602, a criminal statute, and the courts have experienced no discernible difficulty in applying it. (See *Samaras v. Dept. Alcoholic Bev. Control* (1960) 180 Cal.App.2d 842, 844; *People v. Smith* (1949) 94 Cal.App.2d Supp. 975; *People v. Johnson* (1947) 81 Cal.App.2d Supp. 973, 975-976). As described in *Johnson*, "The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are plain and easily seen or discovered. If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent."

5. In regard to opinion testimony of intoxication, the *Rice* court further noted: "Because the manifestations of intoxication are so well known, nonexpert witnesses may offer opinion testimony based upon their observations as to a person's intoxication. (*People v. Conley* (1966) 64 Cal.2d 310, 325)" *Rice v. Alcoholic Bev. etc. Appeals Bd.* (1981) 118 Cal.App.3d 30, 35-36

6. As noted above, "[t]he use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are 'plain' and 'easily seen or discovered.' If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent."³

7. The factors courts have relied upon in establishing whether or not a person is obviously intoxicated include incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, and argumentative behavior.⁴ It is not necessary for all of the signs described to be present in order to find that a person is obviously intoxicated, but there must be sufficient indications "to cause a reasonable person to believe that the one with whom he or she is dealing is intoxicated."⁵

8. 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) on the basis that, on June 13, 2018, respondent-licensee's agent or employee, Harmit Singh Dhillon, at the Licensed Premises, sold an alcoholic beverage, to wit: vodka, a distilled spirit, to Kara Mulrooney, an obviously intoxicated person, in violation of California Business and Professions Code section 25602(a) as alleged in count one of the accusation. (Findings of Fact ¶¶ 2-13)

³ *People v. Johnson*, 81 Cal. App. 2d Supp. 973, 975-76 (1947) (emphasis in original). See also *Schaffield v. Abboud*, 15 Cal. App. 4th 1133, 1141 (1993).

⁴ *Jones v. Toyota Motor Company, Ltd.*, 198 Cal. App. 3d 364, 370 (1988).

⁵ *Schaffield*, 15 Cal. App. 4th at 1140-41.

9. Despite Dhillon's claims to the contrary, there was substantial evidence that Mulrooney was obviously intoxicated and that this was, or should have been, apparent to Dhillon when he sold her a container of vodka. The video evidence revealed that Mulrooney had difficulty walking and performing the simple task of making an ATM transaction to the point that Dhillon had to intercede to complete the transaction for her. Mulrooney, in the video evidence, appears to be in slow motion compared to the movement of the people around her, including Dhillon. Mulrooney reported that she drank prior to going to the Licensed Premises on June 13, 2018. The credible physical evidence received in this matter was contrary to Dhillon's testimony. Dhillon's testimony in this matter was at odds with a statement he made to Hertzell where he said it was obvious that Mulrooney had been drinking. Given the inconsistencies in Dhillon's statements versus his testimony and the fact that his testimony is at odds with the physical evidence received in this matter, his testimony is given little weight. (Findings of Fact ¶¶ 2-13)

10. The physical symptoms and outward appearance of Mulrooney that Rice saw later were manifest for Dhillon to observe when she came in to make the purchase on June 13, 2018. Rice testified credibly that Mulrooney smelled strongly of alcohol, had red, watery eyes and her speech was slurred when he first contacted her about two hours after the purchase from Dhillon. He noted that Mulrooney's clothing was unkempt and dirty. The video evidence showed that Mulrooney entered the Licensed Premises barefoot. Her blood alcohol level when tested a few hours later was, astonishingly, nearly four times the legal limit. She crashed mere moments after leaving the Licensed Premises despite being on a road with which she was very familiar. Notably, Mulrooney herself perceived that she was intoxicated when she went to the Licensed Premises according to her statement to Pender on June 13, 2018. (Findings of Fact ¶¶ 2-13)

11. The evidence presented at the hearing established that Respondent's agent or employee, Dhillon, knew or should have known that Mulrooney was obviously intoxicated and should not be sold any alcoholic beverages at the time Mulrooney was sold the vodka on June 13, 2018 at the Licensed Premises, as alleged in count one. This count of the accusation is sustained.

12. Respondent argues that the term "habitual or common drunkard" was found to be unconstitutionally vague, uncertain, and incapable of being uniformly enforced under a prior version of Penal Code section 647 in *Ex parte Newbern* 53 Cal.2d 786 (1960).

13. However, the prior version of Penal Code section 647 only used the term "common drunkard," which is different than the language in Section 25602(a) of a "habitual or common drunkard." Even if the language is substantially similar enough to have the same result, this

hearing does not grant the authority to the Department to determine the constitutionality of any statute and refuse to enforce it on that basis.⁶

14. The evidence shows that Dhillon was aware that Mulrooney was a “habitual or common drunkard.” Dhillon stated that he knew Mulrooney well, she was a regular customer at the Licensed Premises for the past ten years, and he knew she drank habitually. Dhillon stated that Mulrooney repeatedly came to the Licensed Premises to purchase alcohol when obviously intoxicated. Mulrooney testified that she purchased all her alcohol at the Licensed premises and developed a friendly relationship with Dhillon due to her frequent patronage of the Licensed Premises. Dhillon claims he previously denied sales on multiple occasions to Mulrooney because she was obviously intoxicated. Dhillon stated that on at least one prior occasion Mulrooney was so intoxicated when entering the Licensed Premises that Dhillon drove her home because she could not get home on her own.

15. Due to Dhillon’s own admissions and testimony, Dhillon was aware that Mulrooney was a “habitual or common drunkard” based on their shared history. Dhillon chose to make a sale to Mulrooney on June 13, 2018, even with this knowledge in violation of Section 25602(a).

16. 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) on the basis that, on June 13, 2018, respondent-licensee’s agent or employee, Harmit Singh Dhillon, at the Licensed Premises, sold an alcoholic beverage, to wit: vodka, a distilled spirit, to Kara Mulrooney, a habitual or common drunkard, in violation of California Business and Professions Code section 25602(a) as alleged in count two of the accusation. (Findings of Fact ¶¶ 2-13)

PENALTY

The Department sought an aggravated penalty of 25 days for both counts. The multiple counts were alternative statements of the same transactional violation.

Under rule 144⁷, the standard recommended penalty for a violation of section 25602(a) is a 15-day suspension. The Department argued for a significant upward departure given the serious outcome that flowed, in part, from the Respondent’s sale of alcohol to Mulrooney, regardless of her condition of sobriety, as evidenced by this incident and the prior described history that was developed in this case. There appears to be a pattern of conduct where the Respondent’s agents allowed repeated sales to Mulrooney in circumstances where they knew or should have known that she was intoxicated and a habitual or common drunkard. Because of the Licensed Premises’

⁶ See Article III, section 3.5 of the California Constitution which states that an administrative agency has no power to declare a statute unenforceable or refuse to enforce a statute based on it being unconstitutional unless an appellate court has decided that such statute is unconstitutional.

⁷ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

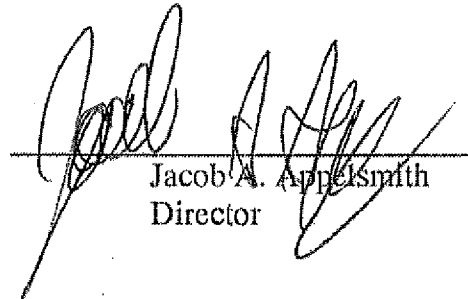
tolerance of her alcohol purchases, regardless of her condition of sobriety, Mulrooney came to rely on the Licensed Premises as a place to get alcohol without having to worry about getting turned away. The Respondent failed in its duty to turn away obviously intoxicated persons and habitual or common drunkards trying to purchase alcohol. The evidence established that this appeared to be a pattern. Aggravation is warranted.

The only factor in mitigation applicable to this violation is the Respondent's lack of prior discipline over approximately nine years of licensure. The penalty recommended herein complies with rule 144.

ORDER

Counts one and two are sustained. The Respondent's off-sale general license is suspended for 20 days for each count. Respondent's suspensions are to be served concurrently.

Dated: November 12, 2019



Jacob A. Appelsmith
Director

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

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

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

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

BM PETRO, INC.
8240 FAIR OAKS BLVD.
CARMICHAEL, CA 95608-2414

OFF-SALE GENERAL - LICENSE

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

SACRAMENTO DISTRICT OFFICE

File: 21-476650

Reg: 18088284

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION

To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: July 16, 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:

BM Petro, Inc.
8240 Fair Oaks Blvd.
Carmichael, CA 95608-2414

Respondent

Off-Sale General License

} File: 21-476650
}
} Registration: 18088284
}
} License Type: 21
}
} Page Count: 155
}
} REPORTER:
} Brittany Ann Flores-CSR # 13460
} California Reporting
}

PROPOSED DECISION

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Sacramento, California, on March 28, 2019.

Joe Scoleri, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Dean Leuders, Attorney, represented the respondent, BM Petro, Inc. (Respondent) in this matter.

In a two count accusation, the Department seeks to discipline Respondent's license on the grounds that,

- On or about June 13, 2018, respondent-licensee's agent or employee, Harmit Singh Dhillon, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: distilled spirits, to Kara Mulrooney, an obviously intoxicated person, in violation of California Business and Professions Code¹ section 25602(a).
- On or about June 13, 2018, respondent-licensee's agent or employee, Harmit Singh Dhillon, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: distilled spirits, to Kara

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

Mulrooney, a habitual or common drunkard, in violation of California Business and Professions Code section 25602(a). (Exhibit D-1)

In each of the above two counts alleged in the accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b) of the Business and Professions Code. The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b). (Exhibit D-1)

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 March 28, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on November 30, 2018.
2. The Department issued a type 21, off-sale general license to the Respondent at the above-described location on September 9, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. On June 13, 2018, Officer S. Rice (Rice) of the California Highway Patrol (CHP) responded to a traffic collision between a car and a motorcycle at Fair Oaks Boulevard and Hillsgrove Avenue. Rice had 24 years of training and experience with CHP and had investigated thousands of collisions during his career. Rice also had extensive training and experience in the investigation of driving under the influence cases. When Rice arrived, he observed that a motorcycle was damaged from a collision with a car. Based on the time of the call, witness statements and physical evidence, Rice determined that the collision had occurred at approximately 9:30 a.m. Witnesses pointed out to Rice a gold colored Honda Accord as the vehicle that had cut off the motorcyclist by turning into its path. Rice observed significant damage to the right side of the Accord that was consistent with it having been involved in a collision with the motorcycle as described by the witnesses. Based on the witness reports and the physical evidence Rice observed, Rice determined that the Honda Accord was proceeding eastbound on Fair Oaks Boulevard just prior to turning left into an apartment complex. While making this turn, the driver of the Honda Accord failed to yield to the motorcyclist who was proceeding westbound on Fair Oaks Boulevard.
5. The operator of the Honda Accord left the scene prior to Rice's arrival. Rice ran the registration records of the Honda Accord and determined that the vehicle was associated

with Kara Mulrooney (Mulrooney). Rice determined that Mulrooney lived in apartment #10 at 8601 Fair Oaks Boulevard which was the complex the Honda Accord had been turning into at the time of the collision. Rice went to Mulrooney's apartment, knocked on the door and announced himself as law enforcement. Rice heard movement in the apartment but no one responded to the door.

6. After getting no response, Rice entered Mulrooney's apartment and contacted her at approximately 10:54 a.m. to determine if she was injured and to continue the investigation of the collision. Rice immediately determined that Mulrooney was exhibiting obvious signs of intoxication. Rice initially had to do a sternum rub with his knuckles to revive Mulrooney so he could speak with her. Mulrooney smelled strongly of alcohol. She had red, watery eyes. Her speech was slurred. Her clothing was unkempt and dirty. At one point when she stood, she staggered and her shorts fell down. Rice observed her movements to be slow and deliberate.

7. Mulrooney told Rice that she had purchased vodka at the nearby Valero gas station on Fair Oaks Boulevard which was the Licensed Premises. Mulrooney described herself to Rice as "fucked up" but denied having drank any alcohol since before the vodka purchase at the Licensed Premises that day. Mulrooney told Rice that she had also taken OxyContin earlier. While she did not clarify when she had taken the OxyContin, she stated that she had taken the OxyContin while drinking vodka. Rice accompanied Mulrooney to the hospital where he observed a phlebotomist draw a blood sample from Mulrooney at 11:32 a.m. on June 13, 2018. Rice booked the sample into evidence and it was later tested by the Sacramento County District Attorney's Office Laboratory of Forensic Services. The sample taken from Mulrooney had a blood alcohol level of .345 percent and also showed the presence of Oxycodone². (Exhibit D-2)

8. On June 13, 2018 CHP Officer C. Hertzell (Hertzell) spoke with Harmit Singh Dhillon (Dhillon), the clerk who sold vodka to Mulrooney just prior to the collision. Dhillon told Hertzell that it was obvious that Mulrooney had been drinking prior to the purchase. Dhillon reported that Mulrooney was a regular customer over the course of several years and that she bought alcohol and other items multiple times a week. Dhillon also allowed Hertzell to watch the surveillance monitors. Hertzell, like Rice, was an experienced traffic officer familiar with under the influence investigations. He observed that Mulrooney was moving in a slow, deliberate manner while purchasing the vodka from Dhillon. She was also having trouble using an ATM card and handling her purse as evidenced by her need to grasp both of them with both hands and her need to have Dhillon complete the transaction for her. Mulrooney was barefoot when she entered the Licensed Premises.

9. Department Agent B. Pender (Pender) spoke with Mulrooney on June 13, 2018 after she returned to her apartment from the hospital. She stated that she bought Smirnoff

² OxyContin is an extended release formulation of Oxycodone.

vodka at the Licensed Premises earlier that day. Mulrooney perceived herself as being intoxicated during the purchase given that she was shaky and had been on a multi-day drinking binge prior to the purchase. She had trouble entering her PIN number to pay for the purchase so she ultimately had Dhillon complete the purchase transaction as a credit purchase. Mulrooney stated that she was a regular customer at the Licensed Premises and that she knew Dhillon well. Pender obtained the receipt for the purchase which showed the transaction occurring at 9:27 a.m. on June 13, 2018. (Exhibit D-3) Mulrooney left the Licensed Premises by vehicle and the collision with the motorcycle occurred approximately 3 minutes after the purchase.

10. Pender re-interviewed Mulrooney on June 14, 2018. During this interview, Mulrooney stated that she drank half a pint of vodka after waking on June 13, 2018 at approximately 8 a.m. and before going to the Licensed Premises. Mulrooney recalled prior instances where she had made alcohol purchases at the Licensed Premises while she felt intoxicated and she described an incident prior to June 13, 2018 where Dhillon drove her home because she was too intoxicated to get home from the Licensed Premises. Mulrooney did not mention being denied alcohol sales at the Licensed Premises during periods when she was making purchases when intoxicated.

11. Pender went to the Licensed Premises on June 14, 2018 to try to speak with Dhillon. When Pender initially asked for Dhillon, Dhillon told Pender that Dhillon was not there. Once Pender identified himself as a law enforcement officer, Dhillon immediately admitted that he was Dhillon. Dhillon admitted to knowing Mulrooney and that she was a regular customer for about 10 years. Dhillon admitted to knowing that Mulrooney drank regularly and that he had seen her on multiple occasions intoxicated prior to June 13, 2018. Dhillon stated to Pender that he had prevented Mulrooney from making purchases on prior occasions because she was "very drunk" and "really messed up". On at least one occasion, Dhillon stated that he had actually driven her home from the Licensed Premises because she was too intoxicated to get home on her own.

12. Pender obtained and preserved video recordings of the surveillance system from the Licensed Premises monitors that showed Mulrooney's movement through the Licensed Premises and interaction with Dhillon during the transaction on June 13, 2018. Pender did this by using the video function on his smart phone to record the surveillance system while it was run at regular speed. (Exhibits D-4 and L-1) The exhibits show Mulrooney from two separate angles. They show Mulrooney moving in a shuffling fashion. Her movements are markedly slower than the movements of other persons in the Licensed Premises. Mulrooney is unsteady in the handling of her purse and Dhillon ultimately assists Mulrooney in retrieving her ATM card. After Mulrooney is unable to enter her PIN number, Dhillon ultimately takes possession of Mulrooney's ATM card and rings up the transaction as a credit purchase. During their interviews, both Mulrooney and Dhillon talked about this occurring. In the videos, Mulrooney then slowly reaches forward and uses both hands to take back the card from Dhillon. Mulrooney appears unsteady in the

receipt of the card, the handling of her purse and in walking out of the Licensed Premises to her vehicle.

13. Dhillon testified in this matter. He testified to knowing Mulrooney for multiple years and that she made purchases multiple times a week at the Licensed Premises. He testified to her voice sounding "fine" when she said "morning" to Dhillon and asked to buy vodka upon entering on June 13, 2018. He testified to not noticing any abnormal behavior in Mulrooney that morning. Dhillon testified to not smelling alcohol when he interacted with Mulrooney. Dhillon testified that her eyes were not bloodshot and watery on June 13, 2018. Dhillon testified to knowing what Mulrooney was like when she was intoxicated because he had declined to sell to her on occasions where she appeared to be intoxicated. Both she and her boyfriend have entered the Licensed Premises intoxicated on multiple occasions prior to June 13, 2018, according to Dhillon. Dhillon testified to Mulrooney having trouble with entering the PIN on June 13, 2018 as the result of her not being able to remember her boyfriend's PIN number. This is what led Dhillon to take Mulrooney's card and complete the transaction for her as a credit card purchase. Dhillon testified to telling the CHP officer that "I don't think so" in response to the officer's question of whether Mulrooney was intoxicated when she made the purchase on June 13, 2018. Dhillon testified to looking at Mulrooney during the transaction and that he would not have sold to her if he thought she was intoxicated. Dhillon saw Mulrooney walk to her car and drive away after the vodka purchase on June 13, 2018.

14. 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.

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. Section 25602(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor³.

³ In this matter, the Department pled two counts in the Accusation as alternative statements of the same conduct. Count one references the "obviously intoxicated person" language of the section and count two references the "habitual or common drunkard" language in 25602(a). Respondent correctly noted in argument that substantively similar "habitual or common drunkard" language was also contained in a prior version of Penal Code section 647. This language was found to be unconstitutionally vague, uncertain and incapable of being uniformly enforced in *Ex parte Newbern* 53 Cal.2d 786 (1960). While this case was abrogated by subsequent legislation, the analysis of the

4. As noted in *Rice v. Alcoholic Bev. etc. Appeals Bd.* 118 Cal.App.3d 30, 35-36 (1981):

“Courts have long recognized that the outward manifestations of intoxication are well known and easily recognized. In *Coulter v. Superior Court* (1978) 21 Cal.3d 144, 155, the court said: “Defendants have argued that the term ‘obviously intoxicated’ is too broad and subjective to serve as a satisfactory measure for imposition of civil liability. However, the phrase is contained in section 25602, a criminal statute, and the courts have experienced no discernible difficulty in applying it. (See *Samaras v. Dept. Alcoholic Bev. Control* (1960) 180 Cal.App.2d 842, 844; *People v. Smith* (1949) 94 Cal.App.2d Supp. 975; *People v. Johnson* (1947) 81 Cal.App.2d Supp. 973, 975-976). As described in *Johnson*, “The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are plain and easily seen or discovered. If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.”

5. In regards to opinion testimony of intoxication, the *Rice* court further noted: “Because the manifestations of intoxication are so well known, nonexpert witnesses may offer opinion testimony based upon their observations as to a person's intoxication. (*People v. Conley* (1966) 64 Cal.2d 310, 325)” *Rice v. Alcoholic Bev. etc. Appeals Bd.* (1981) 118 Cal.App.3d 30, 35-36

6. As noted above, “[t]he use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are ‘plain’ and ‘easily seen or discovered.’ If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.”⁴

7. The factors which the courts have relied upon in establishing whether or not a person is obviously intoxicated include incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired

archaic “habitual or common drunkard” language removed from Penal Code section 647 but still contained in 25602(a) remains applicable. This portion of 25602(a) fails constitutional scrutiny. This constitutional defect does not extend to the disjunctive portion of the statute that establishes an alternative basis for liability for selling, furnishing or giving away any alcoholic beverage “to any obviously intoxicated person” as alleged in count one.

⁴ *People v. Johnson*, 81 Cal. App. 2d Supp. 973, 975-76 (1947) (emphasis in original). See also *Schaffield v. Abboud*, 15 Cal. App. 4th 1133, 1141 (1993).

judgment, or argumentative behavior.⁵ It is not necessary for all of the signs described to be present in order to find that a person is obviously intoxicated, but there must be sufficient indications "to cause a reasonable person to believe that the one with whom he or she is dealing is intoxicated."⁶

8. 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) on the basis that, on June 13, 2018, respondent-licensee's agent or employee, Harmit Singh Dhillon, at the Licensed Premises, sold an alcoholic beverage, to wit: vodka, a distilled spirit, to Kara Mulrooney, an obviously intoxicated person, in violation of California Business and Professions Code section 25602(a) as alleged in count one of the accusation. (Findings of Fact ¶¶ 2-13)

9. Despite Dhillon's claims to the contrary, there was substantial evidence that Mulrooney was obviously intoxicated and that this was, or should have been, apparent to Dhillon when he sold her a container of vodka. The video evidence revealed that Mulrooney had difficulty walking and performing the simple task of making an ATM transaction to the point that Dhillon had to intercede to complete the transaction for her. Mulrooney, in the video evidence, appears to be in slow motion compared to the movement of the people around her, including Dhillon. Mulrooney reported that she only drank prior to going to the Licensed Premises on June 13, 2018. The credible physical evidence received in this matter was contrary to Dhillon's testimony. Dhillon's testimony in this matter was at odds with a statement he made to Hertzell where he said it was obvious that Mulrooney had been drinking. Given the inconsistencies in Dhillon's statements versus his testimony and the fact that his testimony is at odds with the physical evidence received in this matter, his testimony is given little weight. (Findings of Fact ¶¶ 2-13)

10. The physical symptoms and outward appearance of Mulrooney that Rice saw later were manifest for Dhillon to observe when she came in to make the purchase on June 13, 2018. Rice testified credibly that Mulrooney smelled strongly of alcohol, had red, watery eyes and her speech was slurred when he first contacted her about two hours after the purchase from Dhillon. He noted that Mulrooney's clothing was unkempt and dirty. The video evidence showed that Mulrooney entered the Licensed Premises barefoot. Her blood alcohol level when tested a few hours later was, astonishingly, nearly four times the legal limit. She crashed mere moments after leaving the Licensed Premises despite being on a road that she was very familiar with. Notably, Mulrooney herself perceived that she was intoxicated when she went to the Licensed Premises according to her statement to Pender on June 13, 2018. (Findings of Fact ¶¶ 2-13)

⁵ *Jones v. Toyota Motor Company, Ltd.*, 198 Cal. App. 3d 364, 370 (1988).

⁶ *Schaffield*, 15 Cal. App. 4th at 1140-41.

11. The evidence presented at the hearing established that Respondent's agent or employee, Dhillon knew or should have known that Mulrooney was obviously intoxicated and should not be sold any alcoholic beverages at the time Mulrooney was sold the vodka on June 13, 2018 at the Licensed Premises, as alleged in count one. This count of the accusation is sustained.

PENALTY

The Department sought an aggravated penalty of 25 days for both counts. The multiple counts were alternative statements of the same transactional violation. As previously addressed, count two was not considered in this matter because of the constitutional infirmity of its enforcement language.

Under rule 144⁷, the standard recommended penalty for a violation of section 25602(a) is a 15 day suspension. The Department argued for a significant upward departure given the serious outcome that flowed, in part, from the Respondent's sale of alcohol to Mulrooney, regardless of her condition of sobriety, as evidenced by this incident and the prior described history that was developed in this case. There appeared to be a pattern of conduct where the Respondent's agents allowed repeated sales to Mulrooney in circumstances where they knew or should have known that she was intoxicated. Because of the Licensed Premises' tolerance of her alcohol purchases, regardless of her condition of sobriety, Mulrooney came to rely on the Licensed Premises as a place to get alcohol without having to worry about getting turned away. The Respondent failed in its duty to turn away obviously intoxicated persons trying to purchase alcohol. The evidence established that this appeared to be a pattern. Aggravation is warranted.

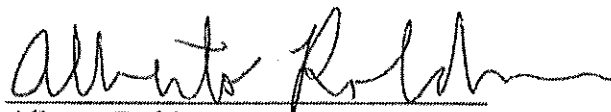
The only factor in mitigation applicable to this violation is the Respondent's lack of prior discipline over approximately nine years of licensure. The penalty recommended herein complies with rule 144.

⁷ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

As to count one, the Respondent's off-sale general license is suspended for 20 days.

Dated: April 29, 2019


Alberto Roldan
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt: _____
By: <u>Jacob A. Appo, District</u>
Date: <u>6/25/19</u>

