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

AB-9916
File: 21-271258; Reg: 19089070

SAFEWAY, INC.,
dba Safeway, Inc. #1125
1366 East Avenue
Chico, CA 95926,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: September 3, 2021
Telephonic

ISSUED SEPTEMBER 13, 2021

Appearances: *Appellant:* John Hinman, of Hinman & Carmichael, LLP, as counsel for Safeway, Inc.,

Respondent: John Newton, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Safeway, Inc., doing business as Safeway, Inc. #1125 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for a period of 30 days, with 15 days stayed upon the condition that no cause for disciplinary action occurs within one year, because appellant refused to permit the Department to

[1]The decision of the Department, dated April 20, 2021, is set forth in the appendix.

make an examination of its books and records, in violation of Business and Professions Code[2] sections 25616 and 25753.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale license was issued on August 5, 1992. There is one instance of prior departmental discipline against the license in 2014 for selling alcoholic beverages to a person under 21 years of age in 2014.

On July 16, 2019, the Department filed an accusation against appellant charging that between August 22, 2018 and July 9, 2019, appellant refused to permit the Department and the Department's representatives to make an examination of its books and records. The Department filed an amended accusation on January 25, 2021.

At the administrative hearing held on February 11, 2021, documentary evidence was received, and testimony concerning the alleged violations was presented by Department Agent Bryant Pender and Supervising Agent in Charge Lee Riegler.

Testimony established that on July 15, 2018, Agent Pender entered the licensed premises and saw a display sign in the wine section that directed customers to "watch the labels come to life." (Findings of Fact, ¶ 4.) The sign was above multiple cases of various wines from Treasury Wine Estates. The focal point of the display was an LCD tablet that appeared to have an interactive feature with the wine bottles, that could be accessed via a smartphone application. A poster below the tablet provided instructions for accessing the feature, and some of the individual wine bottles had neck-ring advertisements highlighting the advertisement campaign.

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

Based on Agent Pender's experience, he was concerned that there was a possibility that a wine manufacturer may have unlawfully provided a free good to a retailer. Agent Pender returned to the licensed premises on August 22, 2018 and spoke with Spencer Bourassa ("Bourassa"), the assistant store director of the licensed premises. Bourassa told Pender that the display was set up in June 2018 and taken down in July 2018. Bourassa was aware that Treasury Wine Estates was involved in the promotion, but he did not know the details of who had set it up. Even though the display had been taken down, the licensed premises was still in possession of the LCD tablet installed in the display. Bourassa retrieved the tablet, a flash drive, batteries, and accessories associated with the tablet from the licensed premises' storage area.

Agent Pender asked Bourassa for all documents at the licensed premises related to the promotion. Bourassa produced a two-page document from appellant's corporate office explaining the promotion. (Exh. D-6.) Bourassa told Agent Pender that the licensed premises did not have any other records related to the promotion, but other records would be at the corporate office.

On September 13, 2018, the Department sent a notice to produce records to appellant's corporate headquarters via certified mail. The certified letter was acknowledged as received on September 17, 2018. The notice to produce sought four categories of records: 1) records related to the Treasury Wine Estates promotion; 2) names and contact information of the individuals involved in the promotion; 3) employee expense records, receipts, and reimbursements at the licensed premises from March 1, 2018 to September 7, 2018, and; 4) confirmation that appellant had performed a diligent search and that any records provided were responsive to the Department's request.

Pursuant to the notice (exh. D-7), appellant was also instructed to list responsive documents that were not currently in its possession, but that they anticipated obtaining, and to list responsive documents appellant was aware of that had been destroyed. The notice specified that the records should be produced within 20 days of the date of the certified letter, and provided the direct phone number and email for Agent Pender in order for appellant to coordinate with him. As of December 6, 2018, the Department had not been contacted, and did not receive any records in response to the September 13, 2018 order.

On December 6, 2018, the Department sent a "Notice to Produce Records-2nd Notice" via certified mail. (Exh. D-8.) The second notice referenced the prior notice and requested the same four categories of information as the first notice. The second notice specified that the records should be produced within ten days of the date of the certified letter. It again provided Agent Pender's contact information. Appellant acknowledged receiving the certified letter on December 10, 2018.

As of April 5, 2019, appellant had not responded with any documents or communications. The Department sent a "Notice to Produce Records-3rd Notice" that specifically referenced the dates of the two prior notices and the failure of appellant to respond. In the third notice, the Department removed its request for employee expense records, receipts, and reimbursements at the licensed premises from March 1, 2018 to September 7, 2018. The third notice was identical in all other aspects to the two prior notices to produce, and specified that the records should be produced within 10 days of the date of the certified letter. (Exh. D-8.) Appellant acknowledged receiving the certified letter on April 8, 2019.

On June 26, 2019, Agent Pender was contacted by Christina Meza ("Meza"), who identified herself as appellant's liquor license coordinator. Meza told Agent Pender that she did not become aware of the 3rd Notice until June 20, 2019. Meza advised Agent Pender that she would act on the order right away, and confirmed that she had Agent Pender's contact information that was listed in all three orders to produce. Meza did not object to the notice or communicate an alternative method of compliance, such as arranging for an in-person examination.

Despite Meza's representations, the Department did not receive any documents or communications that complied with the orders as of July 9, 2019, one week before the Department filed the accusation. Subsequent to the filing of the accusation, appellant produced two rounds of documents responsive to the Department's orders: on August 12, 2019, appellant sent a PDF file via email that contained 32 pages of responsive documents, and on August 13, 2019, appellant sent a second email with an attached PDF file that contained an additional 15 pages.

On March 5, 2021, the administrative law judge (ALJ) issued a proposed decision sustaining the accusation and recommending a 30-day suspension, with 15 days suspended for a period of one year, provided that no further cause of disciplinary action occur within that time. The Department adopted the proposed decision in its entirety on April 12, 2021, and issued a certificate of decision eight days later. Appellant filed a timely appeal contending that the Department's decision is not supported by substantial evidence and that the penalty is excessive.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant argues that the Department's decision to suspend its license for failing to respond to its request for documents is not supported by substantial evidence. (AOB at pp. 8-11.) Specifically, appellant argues its failure to respond was due to an "inadvertent clerical error that caused the Safeway mailing center failure to forward the Requests for Documents to the corporate legal department." (*Id*. at p. 10.)

Section 25616 states, in pertinent part,

> [A]ny person who refuses to permit the department or any of its representatives to make any inspection or examination for which provision is made in this division, or who fails to keep books of account as prescribed by the department, or who fails to preserve such books for the inspection of the department for such time as the department deems necessary, or who alters, cancels, or obliterates entries in such books of account for the purpose of falsifying the records of sales of alcoholic beverages made under this division is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment.

Section 25753 states:

> The department may make any examination of the books and records of any licensee or other person and may visit and inspect the premises of any licensee it may deem necessary to perform its duties under this division.

Here, the Department found that appellant refused to permit the Department and its representatives to make an examination of appellant's books and records. (Conclusions of Law ¶ 5.) 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.)

The evidence in the record establishes that the Department sent three separate requests for records to appellant on August 22, 2018, December 6, 2018, and April 5, 2019 respectively. (Findings of Fact, ¶¶ 2-13.) Each request was acknowledged by appellant, and each notice contained contact information for Agent Pender. (*Ibid*.) Appellant did not contact Agent Pender, or any representative of the Department, nor did it produce any records to either of the first two Department requests. (*Ibid*.) Appellant produced documents responsive to the Department's third request, however, those documents were produced well after the date for compliance. (*Ibid*.) This constitutes substantial evidence to affirm the Department's decision.

On appeal, appellant argues that its failure to produce documents was the result of a clerical error at its corporate office, and that that the Board should vacate the judgment based on a "failure to receive notice, mistake, inadvertence, surprise or

excusable neglect." (AOB, at pp. 9-10.) However, as the Department points out, this issue was not raised at the administrative hearing. It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) Further, while the Board is sympathetic to the overall size of appellant's corporate structure, and understands that mail can be easily lost or misrouted, the Department sent all three requests to the address appellant listed on its license application. If appellant wanted the Department to send mail to a different address, it should update its information accordingly. The Board cannot find against the Department when it mailed its requests to the very address appellant gave them.

For the reasons stated above, the Department's decision must stand.

II

EXCESSIVE PENALTY

Appellant argues that its penalty was excessive, and that it "should be relieved of the exceptionally serious penalty" since its failure to comply was an "honest mistake." (AOB. at p. 12.) Appellant further argues in support of a lesser suspension that "[t]here is no evidence in this record of intentional or willful violation of the requirement to permit the Department the right to examine Safeway's books and records … ." (*Id*. at p. 13.)

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 refusing to allow the Department to inspect records is a 30-day suspension, and indefinite thereafter until records are produced. (Cal. Code 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 the licensee in investigation, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at the subject premises without prior discipline or problems, positive action by the licensee to correct

the problem, documented training of the licensee and the employees, and cooperation by the licensee in the investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid*.)

Here, appellant received a 30-day suspension, with 15 days stayed for a period of one year, provided that no additional grounds for discipline arises during that timeframe. This is a lesser penalty than the standard penalty provided under rule 144. Based on the mitigated penalty, and the evidence in the record, the Board cannot say that the Department abused its discretion. As noted in numerous Board opinions, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. The Board cannot say that a 30-day suspension, with 15 days stayed, is unreasonable or excessive. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.[3]

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

[3] 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 ACCUSATION AGAINST:

SAFEWAY, INC.
SAFEWAY, INC. #1125
1366 EAST AVE
CHICO, CA 95926

OFF-SALE GENERAL - LICENSE

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

TRADE ENFORCEMENT UNIT

File: 21-271258

Reg: 19089070

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on April 12, 2021. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: https://abcab.ca.gov or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after May 31, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 20, 2021

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Safeway, Inc. DBA: Safeway, Inc. #1125 1366 East Ave. Chico, California 95926 Respondent	}	File: 21-271258 Registration: 19089070 License Type: 21 Page Count: 107 Reporter: Paige Hutchinson, CSR #13459 iDepo Reporters
Off-Sale General License	}	**PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on February 11, 2021.

John Newton, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Gillian Garrett, Attorney, represented Licensee-Respondent Safeway, Inc. (Respondent).

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 February 11, 2021.

The Department's accusation alleged cause for suspension or revocation of Respondent's license exists under California Constitution, article XX, section 22, and Business and Professions Code, section 24200, subdivision (a) and (b), based on the following grounds:[1]

Between on or about August 22, 2018 and on or about July 9, 2019, the Respondent-Licensee refused to permit the Department and the Department's representatives to make an examination of the books and records of Respondent-Licensee, to wit: records pertaining to the Living Wine Labels Display, in violation of sections 25616 and 25753. (Exhibit D-1)

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

FINDINGS OF FACT

1. The Department filed its initial accusation on July 16, 2019. On January 25, 2021 the Department filed a first amended accusation.

2. The Department issued a type 21, off-sale license to the Respondent for the above-described location on August 5, 1992 (the Licensed Premises).

3. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department (Exhibit D-2):

Violation Date	Violation	Registration Date	Registration Number	Penalty
10/01/2014	25658(a)	11/17/2014	14081586	10 day suspension, stayed

4. On July 15, 2018 Department Agent B. Pender (Pender) entered the Licensed Premises at approximately 5:33 p.m. Pender was engaged in a general enforcement assignment. In the wine section of the Licensed Premises, Pender saw a display sign that directed customers to "watch the labels come to life." The sign was above multiple cases of various wines from Treasury Wine Estates, a type 2 wine manufacturer. The focal point of the display was an LCD tablet that appeared to have an interactive feature with the wine bottles, that could be accessed via a smartphone application. A poster below the tablet provided instructions for accessing the feature. Pender documented the display during this visit by photographing it. (Exhibit D-3) In addition to the larger display, Pender observed that some of the individual wine bottles in the display had neck ring advertisements highlighting the above advertisement campaign. (Exhibit D-4) Pender left the Licensed Premises after photographing the display.

5. Based on Pender's 5 years of experience as a Department agent, he was concerned that there was the possibility that a wine manufacturer may have unlawfully provided a free good to a retailer. To further this investigation, Pender returned to the Licensed Premises on August 22, 2018. Pender spoke with Spencer Bourassa (Bourassa), the assistant store director of the Licensed Premises, to determine the circumstances surrounding the display. Bourassa told Pender that the display was set up in June 2018 and taken down in July. Bourassa was aware that Treasury Wine Estates was involved in the promotion, but he did not know the details of who had set it up. Even though the display had been taken down in July 2018, the Licensed Premises was still in possession of the LCD tablet installed in the display. Bourassa retrieved the tablet, a flash drive, batteries, and accessories associated with the tablet from the storage area of the Licensed Premises. Pender photographed the LCD tablet on August 22, 2018 during this visit. (Exhibit D-5)

6. Pender asked Bourassa for all documents at the Licensed Premises related to the promotion. Bourassa turned over to Pender a two page document that had come from the Respondent's corporate office explaining the promotion. The document described the promotion as the "Living Wine Label Display." The second page of the document showed that the promotion was to be

run at 24 different Safeway locations, including the Licensed Premises. (Exhibit D-6) Pender asked if the Licensed Premises was in possession of any other documents related to the promotion. Bourassa responded that they did not have any other documents at the Licensed Premises and that any other records related to the promotion would be at the corporate office. Pender then told Bourassa that he would be seeking additional documents from the corporate office regarding the promotion.

7. On September 13, 2018, the Department sent a notice to produce records to the Respondent's corporate headquarters in Phoenix, Arizona via certified mail. A number was accidentally omitted from the P.O. Box designation, but the certified letter was acknowledged as received by the Respondent on September 17, 2018. The notice to produce sought four categories of records. (Exhibit D-7)

8. The first category sought records related to the promotion observed by Pender in the Licensed Premises. The second category sought the names and contact information of the individuals involved in the promotion. The third category sought employee expense records, receipts and reimbursements at the Licensed Premises from March 1, 2018-September 7, 2018 which was a period that overlapped the start and end of the promotion at issue. The fourth category instructed the Respondent to confirm that they had performed a diligent search and that the records provided were responsive. The Respondent was also instructed to list responsive documents that were not currently in their possession but that they anticipated obtaining and to list responsive documents the Respondent was aware of that had been destroyed. The notice specified that the records should be produced within 20 days of the date of the certified letter. The notice also provided the direct phone number and email for Pender in order for the Respondent to coordinate with him. (Exhibit D-7)

9. As of December 6, 2018, the Department had not received any records in response to the September 13, 2018 order. The Department also had not been contacted about the order. The Department sent a "Notice to Produce Records-2nd Notice" on December 6, 2018 via certified mail. This notice to produce records referenced the prior notice that was sent on September 13, 2018. The 2nd notice then requested the same four categories of information as the prior letter. The 2nd notice specified that the records should be produced within 10 days of the date of the certified letter. It again provided Pender's contact information so that the Respondent could coordinate its response. The Respondent acknowledged receiving the certified letter on December 10, 2018. (Exhibit D-8)

10. Despite being placed on notice, twice, of the Department's order to produce records, as of April 5, 2019 the Respondent had not responded with any documents or communications. On April 5, 2019 the Department sent a "Notice to Produce Records-3rd Notice" that specifically referenced the dates of the two prior notices and the failure of the Respondent to respond to those notices[2]. The Department narrowed the scope of this order by removing the request for employee

[2] The Department inadvertently dated the 3rd notice to produce records "April 5, 2018" rather than April 5, 2019. The letter's body references two dates subsequent to April 5, 2018 and the

expense records, receipts and reimbursements at the Licensed Premises from March 1, 2018-September 7, 2018. The requested information was identical in all other regards to the two prior notices to produce. The 3rd notice also specified that the records should be produced within 10 days of the date of the certified letter. It again provided Pender's contact information so that the Respondent could coordinate its response. The Respondent acknowledged receiving the certified letter on April 8, 2019. (Exhibit D-8)

11. Prior to June 26, 2019 the Department did not receive any responsive documents or communications from the Respondent (other than the acknowledgements of receipt of the orders) despite the three orders to produce that had been sent. On June 26, 2019 Pender was contacted by Christina Meza (Meza). Meza identified herself as the Respondent's liquor license coordinator. Meza told Pender that she did not become aware of the 3rd notice to produce records until June 20, 2019. Meza represented to Pender that she would act on the order "right away" and she confirmed that she had Pender's contact information that had been listed in all three orders to produce. Meza did not object to the notice or communicate an alternative method of compliance such as arranging for an in-person examination. (Exhibit L-5)

12. Despite the representation from Meza, the Department did not receive any documents or communications that complied with the orders as of July 9, 2019. After this date, the Department initiated an accusation against the Respondent, and it was filed on July 16, 2019. The Respondent's notice of defense to the accusation was dated August 9, 2019. (Exhibit D-1)

13. Subsequent to the filing of the accusation against the Respondent, the Respondent produced two rounds of documents to the Department that the Respondent identified as responsive to the orders that had previously been issued by the Department. On August 12, 2019 the Respondent sent an email to the Department with an attached PDF file that contained 32 pages of responsive documents. (Exhibits L-1 and L-2) On August 13, 2019 the Respondent sent a second email to the Department with an attached PDF file that contained an additional 15 pages of responsive documents. (Exhibits L-3 and L-4)

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 25616 provides that, "[a]ny person who knowingly or willfully files a false license fee report with the department, and any person who refuses to permit the department or any of its

---

Respondent acknowledged receipt on April 8, 2019 so there is ample evidence from the context of the letter that the year was in error.

representatives to make any inspection or examination for which provision is made in this division, or who fails to keep books of account as prescribed by the department, or who fails to preserve such books for the inspection of the department for such time as the department deems necessary, or who alters, cancels, or obliterates entries in such books of account for the purpose of falsifying the records of sales of alcoholic beverages made under this division is guilty of a misdemeanor."

4. Section 25753 provides that, "[t]he department may make any examination of the books and records of any licensee or other person and may visit and inspect the premises of any licensee it may deem necessary to perform its duties under this division."

5. 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, from October 3, 2018 through July 9, 2019, the Respondent-Licensee refused to permit the Department and the Department's representatives to make an examination of the books and records of Respondent-Licensee, to wit: records pertaining to the Living Wine Labels Display, in violation of sections 25616 and 25753. (Findings of Fact ¶¶ 2-13)

6. On August 22, 2018 Pender notified a representative of the Respondent that the Department would be seeking additional documents pertaining to the Living Wine Label Display he was investigating, but he did not specify what he was seeking at that time. On September 13, 2018, the Department sent a notice to produce records to the Respondent that did identify the sought records with specificity. The Respondent acknowledged receipt of the notice. The Department requested compliance within 20 days of the date of the letter and it provided contact information for a Department representative so that the Respondent could coordinate its response to the notice to produce records. The notice indicated that the records should be produced within 20 days, i.e., on or before October 3, 2018.[3] The Respondent did not produce any records in response to this notice and the Respondent did not contact the Department with an alternative approach that would allow an examination consistent with the requirements of section 25753. (Findings of Fact ¶¶ 3-9)

7. This pattern repeated itself with the December 6, 2018 2nd notice to produce records and the April 5, 2019 3rd notice to produce records. The two subsequent notices sent by the Department referenced 10 day windows for the Respondent to comply. They also gave specific contact information for the Respondent to communicate with the Department about an alternative approach to the notices if the Respondent deemed them to be unduly burdensome or overbroad. The Respondent did not produce any records in response to these two subsequent notices and the

---

[3] It is unclear why the accusation uses the date August 22, 2018 as the beginning date of the alleged violation, which is prior to the compliance date of the notice sent from the Department. The Respondent did not fail to comply with the Department's request until the 20 day period elapsed in the initial notice, without a response, on October 3, 2018. Since the accusation indicates that the violation took place "[b]etween on or about August 22, 2018 and on or about July 9, 2019" and the evidence established that the records were not produced until August 2019, the dates have been sufficiently pled to support the finding of a violation.

Respondent did not contact the Department prior to the compliance dates with alternative approaches that would allow a Department examination consistent with the requirements of section 25753. (Findings of Fact ¶¶ 8-13)

8. On June 26, 2019, well after the compliance date of the 3rd notice to produce, a representative of the Respondent spoke with Pender and indicated that the Respondent would comply with the 3rd order to produce. Meza, the representative, did not express any concerns with the breadth or manner in which the Department sought compliance with section 25753 in the 3rd order to produce records. Meza indicated the compliance would occur "right away" and she blamed the prior non-compliance to not seeing the notice before June 20, 2019. (Findings of Fact ¶¶ 8-13)

9. Counsel for the Respondent has argued that the Respondent was under no obligation to "produce" records pursuant to either of the sections in the accusation. The record in this matter establishes that the notices to produce records allowed for a mechanism to comply with the obligation to allow an "examination," as required by section 25753, in a manner that was less burdensome to the Respondent. The evidence also supports that the Respondent never resisted this mechanism and then ultimately accepted this mechanism for compliance through its representative, Meza. (Findings of Fact ¶¶ 3-13)

10. The Respondent initially complied with its duty to allow examination when Bourassa answered questions and turned over documents on August 22, 2018. The possible existence of additional documents subject to examination was identified during the conversation between Pender and the Respondent's representative, Bourassa. Pender explicitly communicated a desire to conduct a further examination of the corporate records to Bourassa. The three notices to produce records were in furtherance of the Department seeking to examine records of the Respondent, as allowed by section 25753. The Respondent was under an obligation to allow further examination of its records on or before October 3, 2018. (Findings of Fact ¶¶ 3-13)

11. The Department offered compliance with the obligation to facilitate the statutorily required examinations by allowing the Respondent to send the requested information. Were the request unduly burdensome and/or overbroad, the Respondent could have easily communicated its concern. Respondent never did so during the period it was required to respond. The Department even narrowed its request in its third letter. The Respondent did not comply, and the Respondent did not even communicate with the Department about its request for records until well after the date for compliance identified in the third certified letter. The Respondent's failure to comply with its duty to facilitate the sought examination by the Department, until after the filing of the accusation in this matter, violated sections 25616 and 25753, as alleged in the accusation. (Findings of Fact ¶¶ 2-13)

12. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

PENALTY

The Department argued that there is no substantial mitigation or aggravation in this matter, and it asked for a 30 day suspension. The Respondent argued that the Department failed to prove the violation alleged in the accusation. As a result, the Respondent did not address penalty.

Rule 144[4] calls for a presumptive suspension of 30 days (to continue indefinitely until compliance) for violations of section 25616. In this matter, the Respondent complied with its duty to allow examination of the records at issue by sending them to the Department in August 2019. The Department did not offer any evidence that there are further records being sought in this matter, beyond the documents that were ultimately produced. As such, there is no basis for an indefinite suspension. This is also evidence of positive action by the Respondent to correct the problem. This is a factor in mitigation.

The repeated non-compliance with the reasonable requests of the Department appear to have resulted from negligence on the part of the Respondent rather than an intent to not comply. Meza admitted to not having seen the request of the Department until June 20, 2019 which suggests that the communications sent by the Department weren't being considered and acted on in a professional manner by the Respondent.

It is concerning that the Respondent wasn't spurred to action until the Department initiated an accusation against the Respondent. The Respondent does have one prior incident of discipline, but it was from over 4 years before the events in this matter and involved an unrelated violation of section 25658(a) in 2014. Other than this incident, the Respondent has been discipline-free since 1992, which is a significant period of licensure without discipline which is a factor in mitigation.

The penalty recommended herein complies with rule 144.

---

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

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 30 days, with execution of 15 days of the suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: March 5, 2021

Alberto Roldan
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

_____

By: _____

Date: 04/12/21