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

AB-9855
File: 21-461952; Reg: 19088655

C&C LIQUOR, LLC,
dba C&C Liquor
18089 Ventura Boulevard
Encino, CA 91316-3515,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: June 11, 2020
Telephonic

ISSUED JUNE 19, 2020

Appearances: *Appellant:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as counsel for C&C Liquor, LLC,

Respondent: Patricia G. Huber, as counsel for the Department of Alcoholic Beverage Control.

OPINION

C&C Liquor, LLC, doing business as C&C Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days (with five days conditionally stayed provided that no further cause for disciplinary action occurs within one year) because its clerk sold an alcoholic beverage to a person

[1]The decision of the Department under Government Code section 11517(c), dated December 27, 2019, as well as the administrative law judge's proposed decision, dated July 1, 2019, are set forth in the appendix.

under the age of 21 years old, in violation of Business and Professions Code[2] section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 16, 2008. There is one prior record of departmental discipline against the license for violation of section 25658(a) that occurred in 2013.

On March 26, 2019, the Department filed a single-count accusation against appellant charging that, on August 18, 2018, appellant's clerk, Ibraam Fayez Waheeb (the clerk), sold an alcoholic beverage to 20-year-old Evan Somoza (Somoza). On June 17, 2019, three days before the scheduled hearing, appellant filed a Motion to Continue Administrative Hearing (Motion) on the basis that its witness, Joseph Helou,[3] was unavailable to testify due to physical limitations as the result of a recent back surgery. (Exh. 1B.) Mr. Helou had prepared his daughter, Lina Helou, to appear and testify on his behalf; however, his daughter became unavailable at the last minute due to a work emergency. (*Ibid*.) In its Motion, appellant stated that the Helous were expected to testify "regarding mitigation … ." (*Ibid*.)

The Department opposed appellant's Motion on the basis that appellant did not make a showing of good cause to justify a continuance. (Exh. 1B.) Specifically, the Department argued that the Motion should be denied because appellant never disclosed Mr. Helou (or his daughter) as a potential witness, and that the Motion failed

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

[3] Mr. Helou's relationship with appellant is unclear from the record. Although appellant describes Mr. Helou as the "licensee," the licensee is, in fact, appellant (a corporation).

to include an affidavit or any other evidence supporting appellant's claims. (*Ibid*.) The Department further argued that appellant failed to establish that appellant's mitigation evidence could only be offered by Mr. Helou or his daughter. (*Ibid*.) On June 18, 2019, Administrative Law Judge (ALJ) John W. Lewis denied appellant's Motion on the grounds that "good cause to continue the hearing does not exist." (*Ibid*.)

The administrative hearing was held on June 20, 2019. Documentary evidence was received and testimony concerning the sale was presented by Department Agent Charlotte Clark and the minor, Somoza. Appellant presented no witnesses.

Testimony established that on August 18, 2018, Agent Clark and another agent arrived at the licensed premises in a plain-clothes capacity to investigate a citizen complaint of alcoholic beverage sales to minors. As the agents sat in their vehicle, they observed two youthful looking females enter the licensed premises. Both agents exited their vehicles. Agent Clark walked to the front of the store while the other agent followed the females into the licensed premises. Agent Clark observed the two females select alcoholic beverages, which they took to the sales counter.

Agent Clark saw the clerk standing behind the sales counter and observed him having a conversation with the two females for approximately 10 minutes. Agent Clark found this behavior strange, since, in her experience, clerk interactions with customers are usually very short. As she was observing the clerk's conversation with the females, she noticed that the clerk would look at her standing outside. At some point, the clerk left the sales counter, exited the store, and approached Agent Clark. The clerk scolded Agent Clark for loitering and asked her to leave. Agent Clark explained that she was waiting for a friend (the other agent) who was inside the store. The clerk went back inside the store and Agent Clark remained outside.

After her interaction with the clerk, Agent Clark was approached by Somoza, who she described as a youthful looking male. Somoza asked Agent Clark if she wanted to buy Xanax. Agent Clark declined his offer but continued to ask him questions. A short time later, Agent Clark observed the youthful-looking females exit the licensed premises without purchasing any alcoholic beverages. The other agent also exited the store and joined Agent Clark on the sidewalk. Somoza then left Agent Clark and entered the licensed premises.

After Somoza entered the store, the clerk exited a second time and scolded the agents for loitering and asked them to leave. The clerk re-entered the licensed premises and the agents moved a short distance away where they could still observe inside the licensed premises. Agent Clark saw Somoza select a six-pack of alcoholic beverages and take it to the sales counter. At the counter, Somoza showed the clerk his identification. The clerk looked at Somoza's identification, handed it back to him, and completed the sale. Somoza then took the alcoholic beverages and exited the store.

The agents stopped Somoza outside the licensed premises and identified themselves as police officers. They escorted Somoza to a nearby gas station, where they seized a six-pack of Mickeys Fine Malt Liquor. Agent Clark patted Somoza down for weapons as the other agent searched for identification. The agents did not find a fake identification, only Somoza's valid California identification card (exh. A). Somoza's ID had his correct date of birth, showing him to be 20 years old at the time. Agents confirmed with California Highway Patrol dispatch that Somoza was only 20 years old. The agents issued Somoza a citation and took a photograph of him (exh. 4).

Agent Clark went back to the licensed premises, entered, and approached the clerk. She identified herself as a police officer and informed the clerk that he had just sold an alcoholic beverage to a minor. The clerk told Agent Clark that he checked Somoza's ID. Agent Clark showed the clerk Somoza's ID and Somoza's date of birth. The clerk claimed that Somoza showed him a different ID, but admitted he was very distracted during the transaction.

The ALJ issued a proposed decision on July 1, 2019, sustaining the accusation and recommending a 10-day penalty, with all 10 days conditionally stayed provided that no further cause of disciplinary action occurs within one year. The Department declined to adopt the proposed decision on August 27, 2019, and issued a notice to the parties that it would decide the case under Government Code section 11517(c). On October 2, 2019, the Department asked the parties for additional written argument regarding mitigating or aggravating factors and whether the ALJ's proposed penalty was appropriate.

After considering the parties' briefs, the Department issued a decision on December 27, 2019, sustaining the accusation and suspending appellant's license for 15 days, with five days stayed upon the condition that no cause for disciplinary action occur within one year. Appellant filed a timely appeal contending that the ALJ: 1) committed legal error by failing to continue the hearing due to the unavailability of its witnesses; 2) erred by ruling that appellant's evidence of the Department's double standards and bias was irrelevant, and; 3) wrongfully prohibited the minor's invocation of the Fifth Amendment right against self-incrimination.

DISCUSSION

I

DENIAL OF A CONTINUANCE

Appellant contends the ALJ erred when they did not grant appellant's motion. Specifically, appellant argues that it established good cause and the denial of its motion prevented appellant from presenting additional mitigating evidence. (Appellant's Opening Brief, pp. 7-10 (AOB).)

Continuances are granted or denied in the discretion of the ALJ for good cause shown. (Gov. Code, § 11524; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446]; *Dresser v. Board of Medical Quality Assurance* (1982) 130 Cal.App.3d 506, 518 [181 Cal.Rptr. 797].) The factors which influence the granting or denying of a continuance in any particular case are so varied that the trial judge must "necessarily exercise a broad discretion." (*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 343 [56 Cal.Rptr.2d 774] (*Arnett*).) The "power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law." (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [272 Cal.Rptr. 602].) The decision to grant or deny a continuance may implicate a broad range of potential considerations, but it necessarily requires "an affirmative showing of good cause" by the moving party. (Ca. St. Civil Rules, rule 3.1332(c).)

What constitutes "good cause" is the same for administrative hearings as it is for judicial proceedings. (see *Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858, 864 [79 Cal.Rptr.3d 414] ("[i]n exercising the power to grant or deny a continuance, an administrative law judge is guided by the same principles applicable to

continuances generally in adjudicative settings”).) The California Rules of Court, while not binding on administrative hearings, offer guidance regarding the “good cause” requirement:

> **(c) Grounds for continuance**
>
> Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance. Circumstances that may indicate good cause include:
>
> (1) The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances;
>
> (2) The unavailability of a party because of death, illness, or other excusable circumstances;
>
> (3) The unavailability of trial counsel because of death, illness, or other excusable circumstances;
>
> (4) The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice;
>
> (5) The addition of a new party if:
>
> (A) The new party has not had a reasonable opportunity to conduct discovery and prepare for trial; or
>
> (B) The other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement in the case;
>
> (6) A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; or
>
> (7) A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial.
>
> **(d) Other factors to be considered**
>
> In ruling on a motion or application for continuance, the court must consider all the facts and circumstances that are relevant to the determination. These may include:
>
> (1) The proximity of the trial date;

(2) Whether there was any previous continuance, extension of time, or delay of trial due to any party;

(3) The length of the continuance requested;

(4) The availability of alternative means to address the problem that gave rise to the motion or application for a continuance;

(5) The prejudice that parties or witnesses will suffer as a result of the continuance;

(6) If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay;

(7) The court's calendar and the impact of granting a continuance on other pending trials;

(8) Whether trial counsel is engaged in another trial;

(9) Whether all parties have stipulated to a continuance;

(10) Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and

(11) Any other fact or circumstance relevant to the fair determination of the motion or application.

(Ca. St. Civil Rules, rule 3.1332(c) and (d).)

A belief that favorable evidence might be found does not automatically justify granting a continuance; the decision remains up to the ALJ's discretion. (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 628 [157 Cal.Rptr. 248]; *Johnston v. Johnston* (1941) 48 Cal.App.2d 23, 26 [119 P.2d 158].) An appellant has no absolute right to a continuance, and an ALJ's refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198].) The ALJ's decision "will be upheld unless a clear abuse is shown, amounting to a

miscarriage of justice." (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [272 Cal.Rptr. 602].)

Appellant's Written Motion to Continue

The weekend before the administrative hearing, appellant filed its written motion for a continuance. However, there were several problems with appellant's motion. First, it lacked supporting documentation. Appellant stated it learned, a week prior to the administrative hearing, that Joseph Helou would be unavailable due to back surgery. (Exh. 1B.) However, the motion had no attached declaration in support of this claim. Appellant next claimed that Helou's daughter, Lina Helou, could have testified in his place even though she was not a percipient witness. (*Ibid*.) In fact, appellant's motion "did not include the relationship or duties, if any, Ms. Helou had to the license." (Respondent's Reply Brief, p. 8 (RRB).) There was "neither a declaration as to these claims nor a subpoena ordering Ms. Helou to testify." (*Id*. at p. 9; Exh. 1B.)

Second, appellant failed to act with reasonable diligence in identifying Joseph and Lina Helou as witnesses. At no point during the discovery process did it appear that appellant listed Joseph or Lina Helou as potential witnesses. (RRB, p. 9.) In response to the Department's March 26, 2019 written request for names and addresses of witnesses, appellant named only clerk Waheeb while "vaguely refer[ring] to other persons present at the time of the incident." (Exh. 1B.) Under penalty of perjury, the Department's counsel stated that the clerk was the only employee present at the time of the incident; neither Joseph nor Lina Helou were present at the incident; and that "neither Mr. Helou nor Ms. Helou had been disclosed as potential witnesses" until the June 17, 2019 phone call from appellant's counsel. (*Ibid*.) Despite having several

months to procure and name witnesses, appellant did not identify Mr. Helou or his daughter until the weekend immediately prior to the hearing. It cannot be said appellant acted with reasonable diligence in living up to its responsibility of disclosing witnesses as required by Government Code section 11507.6. The fact that it took appellant as long as it did to name Joseph and Lina Helou cuts against the notion that they were essential witnesses to its case.

Third, it cannot be said appellant acted with reasonable diligence in ascertaining the availability of other witnesses. It was put on notice, months prior to the hearing, to identify and name witnesses. Other than conclusory statements, appellant makes no case for finding good cause. Appellant named Lina Helou, whose responsibilities with the licensed premise is unclear, as a witness. Yet, the motion makes no mention of Raymonde Helou, the only other stockholder in C&C Liquor, LLC.

The above factors underline the fact that the appellant's motion was properly denied. The crux of appellant's case boils down to an "assertion that it is entitled to show up at the last minute with unannounced witnesses." (Exh. 1B.) The ALJ's determination that appellant's written motion failed to establish good cause was proper and we see no reason to disturb this decision.

Appellant's Renewed Motion to Continue

Following the denial of its written motion, appellant renewed its request for a continuance at the administrative hearing. After conferring with both parties, the ALJ found good cause lacking and denied appellant's renewed motion. For one, the appellant failed to offer new or significant information regarding how the circumstances surrounding Joseph Helou's medical condition constituted good cause. Furthermore, appellant failed to explain how Lina Helou's schedule conflict, with respect to an

unrelated third-party employer, constituted good cause justifying a continuance. (RT 83:25; 84:1-4; 92:20-25; 93:1-16, 93:20-25; 94:1-10.)

The ALJ was provided with a copy of the subpoena served on Ms. Helou, as well a copy of her acknowledgment of the subpoena. (Exh. B.) However, appellant could not explain why the subpoena was not attached to the original written motion or why the subpoena was served on Ms. Helou on the same date as when the written motion was submitted. (RT 92:1-10.) Appellant's counsel did not ask the managing member, Joseph Helou, whether another employee could testify. (RT 95.) Instead, counsel stated they asked Ms. Helou, whose own connection to the license is vague, whether there was another employee who could testify. (*Ibid*.) After further questioning by the ALJ, appellant's counsel admitted it did not prepare either Raymonde Helou or clerk Waheeb to provide testimony. (RT 96:8-25; 97:1-25; 98:1, 98:16-19; 101:6-7, 101:16-25; 102:1-3, 102:10-20; 103:2-20.)

In sum, there was no meaningful difference between appellant's written motion and its renewed motion. At the hearing, appellant re-asserted Mr. Helou's medical condition without showing it acted diligently between the time it learned of his condition and the hearing; re-emphasized Ms. Helou's work schedule conflict without providing any new insight or evidence into her role, if any, with the licensed premise; and admitted it did not prepare either Raymonde Helou or the clerk, a percipient witness to the violation, to testify at the hearing. Through questioning of both parties, the ALJ obtained responses relating to appellant's desired witnesses (Joseph and Lina Helou), the availability of alternate witnesses (Raymonde Helou and clerk Waheeb), and whether appellant (and appellant's counsel) acted with reasonable diligence. The determination that appellant failed to establish good cause was well-reasoned and a

proper exercise of discretion.

Even if it was legal error to deny a continuance, this Board concludes it does not warrant reversal. To justify reversal, an error must be prejudicial, and it must appear that a different result would have been probable if such error did not exist. (Code Civ. Proc., § 475; see *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104 [87 Cal.Rptr.2d 754] (*Paterno*).) There is no presumption of injury from an error, and the burden is on the appellant to show that the error was sufficiently prejudicial to justify reversal. (*Kyne v. Eustice* (1963) 215 Cal.App.2d 627, 635-636 [30 Cal.Rptr 391]; see *Paterno*, at p. 106 (Appellant has the burden "of spelling out in his brief exactly how the error caused a miscarriage of justice").)

Here, appellant has failed to show that a different outcome would have been probable had the continuance been granted. It has not alleged that the decision of the Department, concluding appellant violated section 25658(a), resulted from the denial of a continuance. In fact, appellant concedes that appellant's clerk "was observed to sell alcohol to [minor] Somoza, who on [the date of the incident] was two weeks shy of his 21st birthday." (AOB, pp. 2-3.)

Nowhere in its briefs does appellant allege that granting the continuance would have altered the ALJ's conclusion that it violated section 25658(a). What appellant *does* allege is that denial of a continuance prevented it from introducing additional mitigating evidence. (AOB, p. 9.) However, the problem is that testimony from Joseph Helou or Lina Helou would factor into the penalty determination, not the ultimate decision. With respect to the penalty determination, Rule 144 provides guidance for Department discipline and states, in relevant part:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act [citation] and the Administrative Procedures Act [citation], the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such a deviation—such as where facts in aggravation or mitigation exist.

(Code Regs., tit. 4, § 144, emphasis added.) The penalty guidelines further state:

> POLICY STATEMENT
>
> It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.
>
> PENALTY POLICY GUIDELINES
>
> The California Constitution authorizes the Department, in its *discretion*, to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department *may* use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.
>
> Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

(Code Regs., tit. 4, § 144, Penalty Guidelines, emphasis added.)

The plain language of these guidelines is permissive and leaves penalty determinations up to the Department's discretion. The guidelines list factors that *may* be considered in aggravation or mitigation. However, presenting mitigating evidence does not *entitle* an appellant to a mitigated penalty. Here, the Department weighed

both aggravating and mitigating factors and issued a mitigated penalty. (Decision, pp. 6-8.) Even if Joseph or Lina Helou provided additional testimony, it would not have entitled appellant to a further mitigated penalty, much less altered the ultimate outcome.

In closing, there is no absolute right to a continuance. The ALJ has significant discretion in weighing the present facts and circumstances in deciding whether to grant a continuance. Here, appellant failed to establish good cause in both its written and renewed motion for a continuance. Appellant also failed to show that, but for the ALJ's denial of a continuance, a different outcome would have been probable. Under all the circumstances, we conclude that no reversible error took place and must affirm the ALJ's denial of a continuance.

II

EXCLUSION OF EVIDENCE

The appellant next argues it was legal error when the ALJ "repeatedly . . . refused to permit" anecdotal evidence of other cases where the Department was granted a continuance. (AOB, p. 10.) Appellant contends such evidence would show there is a double standard in that requests for continuances are more readily granted to the Department as compared to licensees. (*Ibid*.) The ALJ rejected appellant's proposed evidence on relevance grounds. (*Ibid*.)

The Board has authority to review a decision of the Department to determine whether "there is relevant evidence . . . which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, § 23084; see also Cal. Const., art. XX, § 22.) Evidence is relevant where it has "any tendency in reason to prove or disprove any *disputed fact that is of consequence* to the determination of the action." (Evid. Code, § 210, emphasis added.) However, relevance cannot be established by

speculative inferences. (See, e.g., *People v. Babbitt* (1988) 45 Cal.3d 660, 681 [248 Cal. Rptr. 69]; *People v. Brady* (2006) 129 Cal.App.4th 1314, 1337-1338 [29 Cal.Rptr.3d 286].) Moreover, even if evidence is relevant, it may still be excluded if its "probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

As appellant points out, the Government Code relaxes the rules of evidence when it comes to administrative proceedings:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Gov. Code, § 11513(c).) However, the trier of fact in an administrative hearing "is vested with wide discretion in deciding relevancy, and its determination will not be disturbed on appeal unless there is a clear showing of abuse." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].)

With regard to overturning such determinations, the California Constitution provides:

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

(Cal. Const., art. VI, § 13, emphasis added.) Error in "excluding evidence is a ground for reversing a judgment" if a different result "would have been probable if the error had

not occurred." (*Estate of Thottham* (2008) 165 Cal.App.4th 1331, 1341-1342 [81 Cal.Rptr.3d 856].) The burden of demonstrating that a different outcome would have been probable, absent the error, falls on the complaining party—in this case appellant. (*Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 142 [104 Cal.Rptr.3d 291] (*Poniktera*), citing *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432 [77 Cal.Rptr.2d 574].)

As an initial matter, appellant's argument is conclusory. It alleges that continuances are granted much more easily when requested by the Department. In support, appellant only offered evidence of "cases where the Department was granted continuances with little or no evidence." (AOB, p. 10.) The problem is that appellant's proposed evidence was selective; appellant did not, for example, present evidence of cases where similarly situated licensees failed to obtain a continuance.

The other initial problem is that administrative decisions may not be "expressly relied on as precedent unless it is designated as a precedent decision by the agency." (Gov. Code, § 11425.60.) Appellant's briefs fail to identify the particular cases it wished to submit as evidence, much less establish whether those cases were designated as "precedential" by the Department.

As established above, the ALJ is vested with wide discretion in deciding relevancy. Furthermore, the ALJ is empowered with "broad discretion" in granting a continuance since "the factors which influence the granting or denying of a continuance in any particular case are so varied." (*Arnett*, at p. 343; see Ca. St. Civil Rules, rule 3.1332(c).) We cannot say the ALJ erred in sustaining the Department's relevance objection. In sustaining the objection, the ALJ found appellant's proffered evidence to be "all these other things . . . that aren't related to your request." (RRB, p. 19.)

This Board must accept all reasonable inferences from the evidence which support the Department's decision. (*Harris v. Alcoholic Beverage Control Appeals Bd*. (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74] (*Harris*).) Here, the probative value of appellant's proposed evidence is questionable at best; nowhere does appellant establish that its anecdotal evidence involved the same or substantially similar circumstances as the instant matter. Next, the disputed fact of consequence was the denial of appellant's request for a continuance, not the Department's rulings on continuance requests in unrelated cases. The reasonable inference we must draw is that the probative value of appellant's evidence was substantially outweighed by the probability that its admission would lead to an undue consumption of time. If appellant's evidence were admitted, the ALJ would have had to spend considerable time parsing through each piece of evidence, and then compare it to the current matter.

In its briefs, appellant cites to *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470 [22 Cal.Rptr.3d 772] (*Nasha*) and *Stivers v. Pierce* (9th Cir. 1995) 71 F.3d 732 (*Stivers*) for the proposition that its excluded evidence was relevant to the issue of a biased decisionmaker. (AOB, p. 11; Appellant's Closing Brief, p. 9 (ACB).) Both cases are factually distinguishable in that they involved a *particular* claim of bias against a *specific* individual. In *Nasha*, the appellant had a development project pending before a local planning commission. (*Nasha*, *supra*, 125 Cal.App.4th at p. 473.) There, the appellant successfully argued there was an unacceptable probability of bias on part of one member of the commission who had written a newsletter attacking appellant's proposed project. (*Id*. at p. 484.) In *Stivers*, the plaintiffs had their license applications denied by the Nevada State Private Investigators Licensing Board. (*Stivers*, *supra*, 71 F.3d at p. 736.) There, plaintiffs alleged that one of the Board

members had a "pecuniary and personal interest in ensuring that their applications were denied." (*Id*. at pp. 736-737.) Unlike the parties in these two cases, the appellant's claim of bias is vague and aimed at no specific individual involved in the current matter.

Even if the ALJ erred by excluding appellant's evidence, it still had the burden of demonstrating that a different outcome would have been probable without the error. Here, appellant has not met its burden and the decision must stand. Nowhere in its briefs does appellant articulate whether a different result would have been probable had the evidence been admitted. Appellant does not even show that such evidence would have provided good cause to grant a continuance. Even if the continuance were granted, the testimony which appellant sought from either Joseph or Lina Helou would only have impacted the penalty determination, if at all, rather than the ultimate outcome.

Overall, appellant's argument is based on scant evidence and legal support. Appellant offers anecdotal evidence that is neither precedential nor relevant. In its briefs, appellant advances a policy argument that admitting its proposed evidence into the record would (1) allow appellate bodies, such as this Board, to "evaluate the practices and policies of the Department" and (2) provide clearer guidance regarding "what constitutes good cause in the granting of continuances." (AOB, p. 11; ACB, p. 9.) Without more, however, the relevance of the proffered evidence is speculative at best. Accordingly, we affirm the ALJ's decision to exclude the evidence.

III

THE PRIVILEGE AGAINST SELF-INCRIMINATION

Appellant contends the ALJ failed to proceed in the manner required by law by failing to permit Somoza to exercise his Fifth Amendment privilege against self-incrimination. Specifically, appellant argues that the ALJ suppressed Somoza from

exercising the privilege by silencing and cutting him off. (AOB, p. 12.)

The Fifth Amendment privilege against self-incrimination may be asserted in "any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." (*Kastigar v. U.S.* (1972) 406 U.S. 441, 444 [92 S.Ct. 1653].) In order to assert the privilege, a witness must have "reasonable cause to apprehend danger from a direct answer." (*Hoffman v. U.S.* (1951) 341 U.S. 479, 486 [71 S.Ct. 814].) This risk cannot be "merely trifling or imaginary." (*U.S. v. Apfelbaum* (1980) 445 U.S. 115, 128 [100 S.Ct. 948].)

With regard to scope, there is no "blanket Fifth Amendment right to refuse to answer questions in noncriminal proceedings." (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1044 [207 Cal.Rptr. 94].) Rather, a trial court must engage in a "particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded." (*People v. Trujeque* (2015) 61 Cal.4th 227 [188 Cal.Rptr.3d 1].)

The Fifth Amendment privilege may be invoked "explicitly or implicitly, through words, through deeds, or through reference to surrounding circumstances." (*Salinas v. Texas* (2013) 570 U.S. 178, 195 [133 S.Ct. 2174].) However, the privilege is not self-executing and is "deemed waived unless invoked." (*Rogers v. U.S.* (1951) 340 U.S. 367, 371 [71 S.Ct. 438] (*Rogers*).) Waiver of the privilege is "generally considered inherent" when an individual voluntarily "tak[es] the witness stand." (*People v. Thomas* (1974) 43 Cal.App.3d 862, 867 [118 Cal.Rptr. 226]; see also *U.S. v. Wagner* (9th Cir. 1987) 834 F.2d 1474, 1483 (trial judge has no duty to inquire whether waiver of the privilege was voluntary and knowing).) Lastly, this privilege is "solely for the benefit of the witness, and is purely a personal privilege of the witness." (*Rogers*, at p. 440.)

There are numerous problems with appellant's argument here. First, Somoza did not have a realistic threat of self-incrimination in a subsequent criminal proceeding. Prior to the administrative hearing, Somoza faced criminal prosecution for the same conduct at issue and resolved that matter. (RT 73-75.) He confirmed to the ALJ that he had "gone through the criminal prosecution [with] the superior court," received his penalty, and that those proceedings had closed. (RT 74:5-14; 75:1-5.)

Second, appellant attempted to assert a blanket privilege on Somoza's behalf. At the onset of Somoza's testimony, appellant's counsel raised a broad objection that "everyone . . . has a right not to testify in a matter that would tend to expose them to criminal charges." (AOB, p. 4.) Instead of dismissing appellant's contention, the ALJ held a discussion with counsel to explore whether the claim of privilege was well-founded. (*Ibid*.) The ALJ determined it was not, overruled the objection, and instructed Somoza's testimony to proceed. (*Ibid*.)

Third, Somoza did not clearly invoke *his* privilege and, even if he did, waived the privilege through his conduct. Appellant's claim that Somoza clearly wished to exercise his privilege does not withstand scrutiny. Appellant attempts to paint Somoza as a hesitant witness by noting he was "not happy" about testifying and that even the Department's counsel admitted Somoza "clearly didn't want to be here." (AOB, p. 4.) The reason for that is because his presence was compelled by a subpoena. (RT 99.) However, there is a gap between being uncomfortable about testifying versus clearly invoking the Fifth Amendment privilege. This is a gap that appellant has failed to bridge.

When asked if he was ready to testify, Somoza replied, "[y]eah, I guess . . . [b]ut if I have rights … ." (AOB, p. 4.) His statement appeared to get cut short by the ALJ,

who instructed that the hearing "move on." (*Ibid*.) The first part of Somoza's statement expressed consent to continue the questioning, but the second part indicated some reservation on his part. Somoza's words may have sent a mixed message, but his conduct speaks volumes. After the ALJ overruled appellant's objection, Somoza "proceeded to testify" regarding a variety of activities, including purchasing alcohol while under the age of 21. (*Id*. at p. 5.) By taking the witness stand and voluntarily proceeding to answer questions, Somoza waived his privilege.

The final problem with appellant's argument is that it did not have sufficient basis for asserting the privilege on Somoza's behalf. As established above, it is a purely personal privilege for the benefit of the witness. It is telling that appellant characterizes the ALJ's conduct as "highly improper intervention" that resulted in—not harm to Somoza—but "detriment" to *appellant*. (AOB, p. 2.) Critically, appellant does not point to any authority for the proposition that counsel to one of the parties may invoke the privilege on behalf of a non-client witness. Appellant cites to *Barrows v. Jackson* (1953) 346 U.S. 249 [73 S.Ct. 1031] (*Barrows*) for that proposition, but *Barrows* is inapposite here. *Barrows* involved a respondent who was sued for damages after "permitting non-Caucasians to move in and occupy the [restricted] premises" in violation of a racially restrictive covenant. (*Barrows*, at p. 252.) There, the court held that the respondent could assert the constitutional rights of "particular non-Caucasian would-be users" of the restricted land despite them not being parties to the case. (*Id*. at pp. 258-260.) However, due to the "unique" and "peculiar" circumstances present before it, the *Barrows* court described its holding as an exception to the general rule that one may not claim standing to vindicate the constitutional rights of a third party. (*Id*. at pp. 255-257.) Appellant does not establish how *Barrows* applies to a very different set of

circumstances in the instant case.

Even if this Board determines that an error occurred during some point of the administrative process, the decision of the Department may not be reversed unless appellant demonstrates that it suffered prejudice as a result of the error. (*Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345].) As established earlier, the appellant bears the burden of showing it is reasonably probable that a different result would have occurred had the error not taken place. (*Poniktera*, *supra*, 181 Cal.App.4th at p. 142.) Appellant has not met its burden. It contends that "without Mr. Somoza's testimony, the department would have been unable to examine him, and thus would have failed to meet its burden, resulting in the dismissal of the accusation." (AOB, p. 13.) This is conclusory. Even if the privilege were properly asserted, courts have held it is permissible to draw adverse or negative inferences from a witness's refusal to testify or assertion of the privilege in administrative proceedings. (*Szmaciarz v. State Personnel Bd*. (1978) 79 Cal.App.3d 904, 918-919 [145 Cal.Rptr. 396]; see also *Baxter v. Palmigiano* (1976) 425 U.S. 308, 318 [96 S.Ct. 1551] (the Fifth Amendment does not "forbid adverse inferences against parties to civil actions when they refuse to testify").) Thus, the Department would have been allowed to draw negative inferences if Somoza refused to answer any questions relating to the incident at issue. To the extent there was an error, we cannot conclude that appellant was prejudiced by it.

IV

CONCLUSION

In determining whether a decision of the Department is supported by substantial evidence, this Board's review is limited to determining, in light of the entire administrative record, whether substantial evidence exists—even if contradicted—to

reasonably support the Department's factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*).) The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74].) A factual finding of the Department may not be overturned or disregarded merely because a contrary finding would have been equally or more reasonable. (*Boreta*, at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve any evidentiary conflicts in favor of the Department's decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board must also accept all reasonable inferences from the evidence which support the Department's decision. (*Harris*, at p. 113.)

Here, there is no evidentiary conflict to resolve. Appellant concedes clerk Waheeb sold alcohol to Somoza, who was under 21 at the time of the incident. (AOB, pp. 2-3.) The record establishes that the clerk examined Somoza's identification (Findings of Fact, ¶ 10); the identification displayed Somoza's true date of birth—making him 20 years old at the time of the incident (Findings of Fact, ¶ 10; Exh. A); and that the clerk nevertheless sold Somoza a six-pack of Mickey's Fine Malt Liquor (Findings of Fact, ¶ 10.) The ALJ also found that Somoza appeared his age at the administrative hearing. (Findings of Fact, ¶ 14.)

Based on the findings and evidence, the ALJ concluded that appellant's clerk sold an alcoholic beverage to Somoza, an individual under the age of 21, in violation of section 25658(a). (Conclusions of Law, ¶ 4.) The ALJ further concluded that

appellant failed to meet its burden of establishing an affirmative defense under section 25660. (Conclusions of Law, ¶¶ 5-7.) Namely, there was no evidence Somoza provided anything other than his actual identification displaying his true date of birth, and his appearance did not indicate he could be over 21 years old. (Conclusions of Law, ¶ 7.) In sum, there was substantial evidence to support the ALJ's decision that appellant violated section 25658(a). We see no grounds to disturb the ALJ's ruling.

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 ACCUSATION AGAINST: C & C Liquor, LLC Dba: C & C Liquor 18089 Ventura Boulevard Encino, California 91316-3515 Licensee(s).	**File No.: 21-461952** **Reg. No.: 19088655**

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on December 27, 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 June 20, 2019, before Administrative Law Judge D. Huebel, and the written arguments of the parties, adopts the following decision.

The Department seeks to discipline the Respondent's license on the grounds that, on or about August 18, 2018, the Respondent-Licensee's agent or employee, Ibraam Fayez Waheeb, at the licensed premises, sold, furnished, or gave, or caused to be sold, furnished, or given, an alcoholic beverage to Evan Somoza, a person under the age of 21 years, in violation of Business and Professions Code section 25658(a).[1] (Exhibit 1A.) (Count 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 June 20, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on March 26, 2019.

2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on January 16, 2008 (the Licensed Premises).

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

3. Respondent has been the subject of the following discipline:[2]

Date of Violation	Reg. No.	Violation	Penalty
December 10, 2013	14080190	BP §25658(a)	POIC in lieu of 10 day stayed sus.

The foregoing disciplinary matter is final. (Exhibit 2.)

4. On August 18, 2018, at approximately 9:15 p.m. Agent Clark and Agent Geertman, both in a plain clothes capacity,[3] arrived at the Licensed Premises to investigate a citizen complaint of sales of alcoholic beverages to minors.[4] Neither agent wore anything that would identify them as peace officers. The agents sat in their state vehicle observing the Licensed Premises for a few minutes when their attention was drawn to two youthful appearing females entering the Licensed Premises. Agent Clark recognized the two females from having seen them at the Licensed Premises in the past, on which occasion she observed one of the females exit the store with a black bag. On August 18, the two agents stepped out of the state vehicle. Agent Geertman followed the two youthful appearing females into the Licensed Premises and posed as a customer therein. Agent Clark walked to the front of the store and remained outside the entrance to monitor the front of the store and the parking lot. From Agent Clark's vantage point she observed the two youthful appearing females select alcoholic beverages, which they took to the sales counter.

5. Behind the sales counter stood clerk Ibraam Fayez Waheeb (hereinafter clerk Waheeb). Agent Clark observed the two youthful appearing females engaging in what appeared to be a friendly conversation with clerk Waheeb for approximately 10 minutes; they appeared, to Agent Clark, to know each other. Agent Clark found it strange that the clerk engaged in a lengthy conversation with the two youthful appearing females, because in her experience conducting minor decoy operations, clerks normally interact with minors for a minute or two, and upon learning they are minors will immediately take the alcoholic beverage away, ask the minors who are attempting to purchase alcohol to leave the premises, or advise them the alcohol will not be sold to them because they are not 21 years of age. During the time that clerk Waheeb spoke with

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[2] There is some evidence in testimony that there was another prior violation for the licensed premises in 1990, but this was not alleged in the accusation in this matter. In 1990, the licensees consisted of the same individuals who are currently licensed under a different corporate structure. As discussed more fully below, but for the violation in 2013, the previous violation in 1990 would be a relevant factor in determining the appropriate penalty.

[3] Agent Clark testified she wore the same thing she did each shift, which was blue jeans, a black shirt and either boots or tennis shoes. Neither agent had anything visible that would identify them as police officers in their plain clothes attire, until they identified themselves as officers or agents to the clerk and Agent Clark pulled out her badge from underneath her shirt.

[4] Respondent objected to the reason for the complaint based on hearsay, which objection was overruled as not hearsay but effect on the listener, not used to prove the truth of the matter.

the two youthful appearing females who were attempting to purchase alcohol clerk Waheeb did not appear, to Agent Clark, to be frightened.

6. During the conversation between clerk Waheeb and the two youthful appearing females, clerk Waheeb would look outside and see Agent Clark. At some point, clerk Waheeb left the two girls at the sales counter, exited the store, approached Agent Clark, scolded Agent Clark for loitering, and asked her to leave. Agent Clark explained to clerk Waheeb that she was waiting for a friend, indicating toward Agent Geertman, who was inside the store. Clerk Waheeb went back inside the store and Agent Clark remained where she was.

7. Agent Geertman continued posing as a customer in the store and did not purchase anything. At some point clerk Waheeb asked Agent Geertman twice if he needed any help and Agent Geertman did not respond.

8. In the meantime, a youthful appearing male approached Agent Clark as she stood outside the Licensed Premises. The youthful appearing male was later identified as Evan Somoza (hereinafter referred to as Evan). Evan asked Agent Clark if she wanted to buy Xanax. She asked him questions about Xanax and later declined his offer. After approximately five minutes, Agent Geertman exited the Licensed Premises, the two youthful appearing females exited the store without having purchased the alcoholic beverages, and Evan left Agent Clark and entered the Licensed Premises. Agent Geertman joined Agent Clark on the sidewalk immediately in front of the store.

9. Clerk Waheeb exited the store, approached the agents, and scolded them for loitering and asked them to leave. Clerk Waheeb walked back inside the store. The agents moved a little bit further from where they stood but remained in a position to observe inside the Licensed Premises, with clerk Waheeb still able to see the agents. Agent Clark believed clerk Waheeb was diligently performing his duty regarding asking the agents not to loiter in front of the store; as the licensee has a duty to ensure persons do not loiter in front of the store. Agent Clark saw Evan select a 6-pack of alcoholic beverages and take it to the sales counter.

10. At the sales counter, clerk Waheeb asked Evan for his identification (ID). Evan produced his valid California ID Card, which the clerk looked at and handed back. Evan's California ID Card has a horizontal orientation and showed his correct date of birth, September 1, 1997, which made him 20 years old at the time. (Exhibit A.) Clerk Waheeb saw the birth year of 1997, proceeded with the sales transaction, and sold to Evan a 6-pack of 12-fluid-ounce bottles of Mickeys Fine Malt Liquor. (Exhibit 3.[5]) Mickey's Fine Malt Liquor is an alcoholic beverage.

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[5] At the end of the hearing, Exhibit 3 was remanded to the Department to be kept there until such time as all appeals have been exhausted and the matter is final.

Clerk Waheeb placed the 6-pack of Mickeys Fine Malt Liquor into a black plastic bag, with which Evan exited the store.

11. The agents stopped Evan outside of the Licensed Premises, approximately eight to ten feet from the front entrance, and identified themselves as police officers. The agents escorted Evan to a nearby gas station where Agent Clark patted him down for weapons, seized the 6-pack of Mickeys Fine Malt Liquor, and Agent Geertman searched Evan for identification. Agent Geertman did not find a fake ID on Evan, but found his valid California ID Card. (Exhibit A.) Evan had no other ID on him. Agent Geertman confirmed with the California Highway Patrol dispatch that Evan was 20 years old. A citation was issued to Evan. A photograph was taken of Evan. (Exhibit 4.)

12. One of the youthful appearing females from earlier, who was later identified as Joelle Perry (hereinafter referred to as Joelle), approached Agent Clark to ask about and check on Evan. Joelle explained she knew Evan, having met him on an online dating forum called "Tinder." Joelle told Agent Clark she was 15-years old and that the other youthful appearing female was her friend, who was 19-years old.

13. Agent Clark later approached clerk Waheeb, identified herself as a police officer to him, and displayed her state issued badge. Clerk Waheeb appeared to Agent Clark to be irritated. Clerk Waheeb told her that he had checked Evan's ID and claimed he thought he saw the date of birth was April or May of 1997. Agent Clark showed clerk Waheeb Evan's ID and the date of birth of September 1, 1997. (Exhibit A.) Clerk Waheeb claimed Evan did not show him that ID but a different ID. Clerk Waheeb claimed he was very distracted during the sales transaction.

14. Evan Somoza appeared and testified at the hearing. Evan confirmed he was 20 years old on August 18, 2018, when he had purchased the said 6-pack of Mickeys Fine Malt Liquor (Exhibit 3) at the Licensed Premises. Evan went to the Licensed Premises that night because one of the girls he was with, who was waiting in his car and 19 years old, had told him that the Licensed Premises will sell alcohol to him.[6] At the hearing, Evan appeared his age.

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

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[6] Respondent objected to the girl's statement to Evan based on hearsay, which objection was overruled as not hearsay but effect on the listener, not used to prove the truth of the matter.

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 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on August 18, 2018, the Respondent-Licensee's employee, clerk Ibraam Fayez Waheeb, inside the Licensed Premises, sold alcoholic beverages, to-wit: a 6-pack of 12-ounce bottles of Mickeys Fine Malt Liquor, to Evan Somoza, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-14.) (Count 1.)

5. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premise in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b).

6. The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.[7] To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. This section applies to identifications issued by government agencies as well as those which purports to be.[8] Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or he could be 21 years of age and the seller makes a reasonable inspection of the identification offered.

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[7] *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

[8] *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

7. In the present case, the Respondent failed to meet its burden of proof in establishing an affirmative defense under Section 25660. Respondent failed to present any evidence that the ID presented by Evan was anything other than his actual ID or that it showed anything other than Evan's actual date of birth. Moreover, Evan's appearance did not indicate he could be 21 years old. As such, there is simply no basis upon which Respondent could assert that the clerk reasonably relied upon an identification showing Evan to be over the age of 21.

8. Clerk Waheeb's hearsay statements to Agent Clark that he was scared, very distracted, thought he saw April or May on the ID, and that Evan had shown the clerk a different ID than Evan's valid California ID Card (which Evan and Agent Clark showed the clerk) are disbelieved based on considering the factors of Evidence Code section 780. These include motive as an employee potentially subject to discipline and confronted with the violation, as well as the weaker, less satisfactory evidence of clerk Waheeb's hearsay statements that were offered when it was within the power of the Respondent to produce stronger and more satisfactory evidence; as such, the evidence offered is viewed with distrust. (Evidence Code section 412.) Furthermore, Agent Clark's sworn direct testimony is more credible that the clerk did not appear scared and no ID, fake or otherwise, was found on Evan on August 18, 2018, other than Evan's valid California ID Card, which Agent Geertman found after conducting a search of Evan's person. (Exhibit A.) There was no evidence there was anything threatening about the agents' presence that would have prevented clerk Waheeb from performing his duties regarding the sales transaction with Evan.

PENALTY

The Department requested the Respondent's license be suspended for a period of 20 days, based on Respondent's prior discipline (Exhibit 2). The Department argued there was evidence of an intentional sale of alcohol to Evan and a continuing course of conduct relating to the clerk's behavior and actions on August 18, 2018, and the reason Evan went to the Licensed Premises that evening.[9]

The Respondent recommended either the standard 15-day penalty or a 10-day, all-stayed, suspension based on the clerk making a mistake, his distraction by the agents, and the length of licensure with minimal discipline of two violations, one in 1990 and one in 2013. The Respondent pointed out that Exhibit 2 indicates that C & C Liquor, LLC was previously "licensed as Joseph C. Helou and Raymonde Helou from January 5, 1988 to January 16, 2008 and as [C & C Liquor, LLC] since January 16, 2008." Respondent therefore claimed that

[9] Since both the reason given for the citizen complaint and Evan's reason for going to the Licensed Premises were admitted based on the effect of the listeners and not for the truth of the matters asserted, they were not considered to prove the truth of the statements. The evidence, in fact, showed otherwise, namely, that the Licensed Premises did not readily sell alcoholic beverages to minors, as discussed more fully below.

mitigation of discipline is warranted based upon the full period of licensure since 2008, relying upon the assertion that the Helou's are the sole members of the current LLC licensee. The Respondent also argued there was additional evidence of mitigation in that clerk Waheeb took the correct actions of refusing alcohol sales to the two young women and asking the agents not to loiter around the store.

With respect to the change in licensees, other than the reference to the cited language in Exhibit 2, there is no evidence in the record confirming that the only real change has been in the ownership structure from two individuals to the same two individuals now being the sole members of the LLC. This fact seems to be assumed and may well be true. However, since Respondent argued this issue in support of its claim of mitigation, it was its burden to present evidence. Regardless, as a general rule, if the same individuals exercise the same degree of ownership and control of the licensed business both before and after a change in corporate form, it would be reasonable to consider the entire length of licensure under all such ownership structures for purposes of determining the level of discipline, assuming it would be otherwise appropriate to consider such length of licensure in any given case. As discussed below, in this case it has no effect on the ultimate result.

The Department's arguments that the sale to Evan was purposeful and a continuing course of conduct relating to the clerk's behavior and actions on August 18, 2018, are based upon speculation. The evidence established that clerk Waheeb was somewhat diligent in performing his duties. He refused the sale of alcohol to the two youthful appearing females who were attempting to purchase alcohol prior to Evan, he instructed the agents not to loiter, and he requested to see Evan's ID, as was his duty. Clerk Waheeb's actions on August 18, 2018, clearly show the Licensed Premises does not readily sell alcohol to minors. When Evan was at the sales counter clerk Waheeb was still able to see the two agents in front of the Licensed Premises. There was no evidence the clerk knew the undercover officers were agents; in fact, they wore nothing that identified them as agents. When clerk Waheeb saw Evan's horizontal formatted ID (not in the minor's vertical format), with the birth year 1997, it is more probable than not that he made a mistake in looking at the birth year and assumed Evan was already 21. It was at this point that clerk Waheeb failed to diligently perform his duties, as there was nothing in the record to establish anything ominous about the agent's presence that would have prevented clerk Waheeb from performing his duties in diligently inspecting the ID and Evan. Accordingly, neither of the Department's asserted grounds for aggravating the discipline are founded.

Although there was at least a 17-year, four-month discipline-free history when the premises was licensed as Joseph C. Helou and Raymonde Helou (from September 13, 1990, to January 16, 2008); and a 5-year, 10-month discipline-free history when the premises was licensed as C & C Liquor, LLC (from January 16, 2008, to December 9, 2013, when the most recent prior violation

occurred), and even assuming no change in management or control, these periods of discipline-free licensure are irrelevant to the analysis of mitigating factors in this case. Mitigation for the previous periods of discipline-free history was presumably already given in assessing discipline for the prior sustained violations. Respondent cannot use the same discipline-free history for mitigation purposes in subsequent sustained violations. Only the 4-year, 8-month discipline-free history (from December 11, 2013, to August 17, 2018) is relevant in this case since that is the amount of time since the last sustained violation against Respondent. Taken by itself, the less than five years (four years, eight months) of discipline-free history does not warrant mitigation from the recommended 15-day suspension under rule 144.

Under the specific circumstances of this case, there is, however, some basis for mitigation. The act of the clerk refusing to make a sale to a minor immediately prior to the sale in question, as observed by the Agents, shows diligence on the clerk's part. Together with the clerk requesting that the Agents not loiter in front of the licensed premises, and the nearly five-year discipline-free history, some mitigation from the standard 15-day penalty under rule 144 is warranted. The penalty recommended herein complies with rule 144.

ORDER

The Respondent's off-sale general license is hereby suspended for a period of 15 days, with execution of 5 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 for similar misconduct 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 re-impose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: December 27, 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:

C & C LIQUOR, LLC
C & C LIQUOR
18089 VENTURA BLVD
ENCINO, CA 91316-3515

OFF-SALE GENERAL - LICENSE

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

VAN NUYS DISTRICT OFFICE

File: 21-461952

Reg: 19088655

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: September 6, 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:

C & C Liquor, LLC Dba: C & C Liquor 18089 Ventura Boulevard Encino, California 91316-3515 Respondent	File: 21-461952 Reg.: 19088655 License Type: 21 Word Count: 18,097 Reporter: Savauna Winn Kennedy Court Reporters
Off-Sale General License	**PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on June 20, 2019.

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

Donna Hooper, Attorney, represented the Respondent, C & C Liquor, LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about August 18, 2018, the Respondent-Licensee's agent or employee, Ibraam Fayez Waheeb, at said premises, sold, furnished, gave or caused to be sold, furnished or given, alcoholic beverages, to-wit: malt beverage, to Evan Somoza, a person under the age of 21 years, in violation of Business and Professions Code section 25658(a).[1] (Exhibit 1A.) (Count 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 June 20, 2019.[2]

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

[2] Prior to the hearing the Respondent filed a motion to continue the hearing, which was denied by Chief ALJ Lewis. (Exhibit 1B.) At the hearing the Respondent renewed its motion to continue the hearing. The undersigned questioned both parties and reviewed the documents presented; after thorough review and consideration, based on the entire record relating to the said motion, it was determined that good cause to continue the hearing did not exist.

FINDINGS OF FACT

1. The Department filed the accusation on March 26, 2019.

2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on January 16, 2008 (the Licensed Premises).

3. Respondent has been the subject of the following discipline:

Date of Violation	Reg. No.	Violation	Penalty
December 10, 2013	14080190	BP §25658(a)	POIC in lieu of 10 day stayed sus.

The foregoing disciplinary matter is final. (Exhibit 2.)

4. On August 18, 2018, at approximately 9:15 p.m. Department Agents Clark and Geertman, both in a plain clothes capacity[3], arrived at the Licensed Premises to investigate a citizen complaint of sales of alcoholic beverages to minors.[4] Neither agent wore anything that would identify them as peace officers. The agents sat in their state vehicle observing the Licensed Premises for a few minutes when their attention was drawn to two youthful appearing females entering the Licensed Premises. Agent Clark had recognized the two females as having seen them at the Licensed Premises in the past, at which time she observed one of the females exit the store with a black bag. Both agents stepped out of the state vehicle. Agent Geertman followed the two youthful appearing females into the Licensed Premises and posed as a customer therein. Agent Clark walked to the front of the store and remained outside the entrance to the store, to monitor the front of the store and the parking lot. From Agent Clark's vantage point she observed the two youthful appearing females select alcoholic beverages, which they took to the sales counter.

5. Behind the sales counter stood clerk Ibraam Fayez Waheeb (hereinafter clerk Waheeb). Agent Clark observed the two youthful appearing females engaging in, what appeared to be, a friendly conversation with clerk Waheeb for approximately 10 minutes; they appeared, to Agent Clark, to know each other. Agent Clark found it strange that the clerk engaged in a lengthy conversation with the two youthful appearing females because in her experience conducting minor decoy operations clerks normally interact with minors for a minute or two, and upon learning they are minors will immediately take the alcoholic beverage away, ask the minors who are attempting to purchase alcohol to leave

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[3] Agent Clark testified she wore the same thing she did each shift, which was blue jeans, a black shirt and either boots or tennis shoes. Neither agent had anything visible which would identify them as police officers in their plain clothes attire, until they identified themselves as officers or agents to the clerk and Agent Clark pulled out her badge from underneath her shirt.

[4] Respondent objected to the reason for the complaint based on hearsay, which objection was overruled as not hearsay but effect on the listener, not used to prove the truth of the matter.

the premises or advise them the alcohol will not be sold to them because they are not 21 years of age. During the time that clerk Waheeb spoke with the two youthful appearing females who were attempting to purchase alcohol clerk Waheeb did not appear, to Agent Clark, to be frightened.

6. During the conversation between clerk Waheeb and the two youthful appearing females, clerk Waheeb would look outside and see Agent Clark. At some point, clerk Waheeb, left the two girls at the sales counter, exited the store, approached Agent Clark, scolded Agent Clark for loitering and asked her to leave. Agent Clark explained to clerk Waheeb that she was waiting for a friend, indicating toward Agent Geertman, who was inside the store. Clerk Waheeb went back inside the store and Agent Clark remained where she was.

7. Agent Geertman continued posing as a customer in the store and did not purchase anything. At some point clerk Waheeb asked Agent Geertman twice if he needed any help and Agent Geertman did not respond.

8. In the meantime, a youthful appearing male approached Agent Clark as she stood outside the Licensed Premises. The youthful appearing male was later identified as Evan Somoza (hereinafter referred to as Evan). Evan asked Agent Clark if she wanted to buy Xanax. She asked him questions about Xanax and later declined his offer. After approximately five minutes, Agent Geertman exited the Licensed Premises, the two youthful appearing females exited the store without having purchased the said alcoholic beverages, and Evan left Agent Clark and entered the Licensed Premises. Agent Geertman joined Agent Clark on the sidewalk immediately in front of the store.

9. Clerk Waheeb exited the store, approached the agents, and scolded them for loitering and asked them to leave. Clerk Waheeb walked back inside the store. The agents moved a little bit further from where they stood but remained in a position to observe inside the Licensed Premises, with clerk Waheeb still able to see the agents. Agent Clark believed clerk Waheeb was diligently performing his duty regarding asking the agents not to loiter in front of the store; as the licensee has a duty to ensure persons do not loiter in front of the store. Agent Clark saw Evan select a 6-pack of alcoholic beverages and take it to the sales counter.

10. At the sales counter, clerk Waheeb asked Evan for his identification (ID). Evan produced his valid California ID Card, which the clerk looked at and handed back. Evan's California ID Card has a horizontal orientation and showed his correct date of birth, September 1, 1997, which made him 20 years old at the time. (Exhibit A.) Clerk Waheeb saw the birth year of 1997, proceeded with the sales transaction and sold to Evan

a 6-pack of 12 fluid ounce bottles of Mickeys Fine Malt Liquor. (Exhibit 3[5].) Mickey's Fine Malt Liquor is an alcoholic beverage. Clerk Waheeb placed the 6-pack of Mickeys Fine Malt Liquor into a black plastic bag, with which Evan exited the store.

11. The agents stopped Evan outside of the Licensed Premises, approximately eight to 10 feet from the front entrance, and identified themselves as police officers. The agents escorted Evan to a nearby gas station where Agent Clark patted him down for weapons, seized the 6-pack of Mickeys Fine Malt Liquor, and Agent Geertman searched Evan for identification. Agent Geertman did not find a fake ID on Evan, but found his valid California ID Card. (Exhibit A.) Evan had no other ID on him. Agent Geertman confirmed with the California Highway Patrol dispatch that Evan was 20 years old. A citation was issued to Evan. A photograph was taken of Evan. (Exhibit 4.)

12. One of the youthful appearing females from earlier, who was later identified as Joelle Perry (hereinafter referred to as Joelle), approached Agent Clark to ask about and check on Evan. Joelle explained she knew Evan, having met him on an on-line dating forum called, "Tinder." Joelle told Agent Clark she was15 years old and that the other youthful appearing female was her friend, who was 19 years old.

13. Agent Clark later approached clerk Waheeb, identified herself as a police officer to him, and displayed her state issued badge. Clerk Waheeb appeared irritated to Agent Clark. Clerk Waheeb told her that he had checked Evan's ID and claimed he thought he saw the date of birth was April or May of 1997. Agent Clark showed clerk Waheeb Evan's ID and the date of birth of September 1, 1997. (Exhibit A.) Clerk Waheeb claimed Evan did not show him that ID but a different ID. Clerk Waheeb claimed he was very distracted during the sales transaction.

14. Evan Somoza appeared and testified at the hearing. Evan confirmed he was 20 years old on August 18, 2018, when he had purchased the said 6-pack of Mickeys Fine Malt Liquor (Exhibit 3) at the Licensed Premises. Evan went to the Licensed Premises that night because one of the girls he was with, who was waiting in his car and 19 years old, had told him that the Licensed Premises will sell alcohol to him.[6] At the hearing, Evan appeared his age.

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

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[5] At the end of the hearing, Exhibit 3 was remanded to the Department to be kept there until such time as all appeals have been exhausted and the matter is final.

[6] Respondent objected to the girl's statement to Evan based on hearsay, which objection was overruled as not hearsay but effect on the listener, not used to prove the truth of the matter.

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 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on August 18, 2018, the Respondent-Licensee's employee, clerk Ibraam Fayez Waheeb, inside the Licensed Premises, sold alcoholic beverages, to-wit: a 6-pack of 12 ounce bottles of Mickeys Fine Malt Liquor, to Evan Somoza, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-14.) (Count 1.)

5. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premise in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b).

6. The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.[7] To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. This section applies to identifications actually issued by government agencies as well as those which purport to be.[8] Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or he could be 21 years of age and the seller makes a reasonable inspection of the identification offered.

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[7] *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

[8] *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

7. In the present case, the Respondent failed to meet its burden of proof in establishing an affirmative defense under Section 25660. Despite asking for Evan's ID, clerk Waheeb failed to exercise due diligence in inspecting the minor's ID and Evan. Had he done so, he would have readily seen that the ID revealed Evan to still be 20 years of age, as he appeared in-person, and that Evan's appearance did not indicate he could be 21 years old.

8. Clerk Waheeb's hearsay statements to Agent Clark that he was scared, very distracted, thought he saw April or May on the ID, and Evan had shown the clerk a different ID than Evan's valid California ID Card, which Evan and Agent Clark showed the clerk, are disbelieved based on considering the factors of Evidence Code section 780, including, motive as an employee potentially subject to discipline and confronted with the violation as well as that the hearsay statements are weaker, less satisfactory evidence offered when it was within the power of the party to produce stronger and more satisfactory evidence; as such, the evidence offered is viewed with distrust. (Evidence Code section 412.) Furthermore, Agent Clark's sworn direct testimony is more credible that the clerk did not appear scared and no other ID, fake or otherwise, was found on Evan on August 18, 2018, other than Evan's valid California ID Card, which Agent Geertman found after conducting a search of Evan's person. (Exhibit A.) There was no evidence there was something threatening about the agent's presence that would have prevented clerk Waheeb from performing his duties regarding the sales transaction with Evan.

PENALTY

The Department requested the Respondent's license be suspended for a period of 20 days, based on Respondent's prior discipline (Exhibit 2). The Department argued there was evidence of an intentional sale of alcohol to Evan and a continuing course of conduct relating to the clerk's behavior and actions on August 18, 2018, and the reason Evan went to the Licensed Premises that evening[9].

The Respondent recommended either the standard 15-day penalty or a 10-day, all-stayed, suspension based on the clerk making a mistake, his distraction by the agents, and the length of licensure with minimal discipline of two violations, one in 1990 and one in 2013. The Respondent pointed out that Exhibit 2 indicates that C & C Liquor, LLC was previously "licensed as Joseph C. Helou and Raymonde Helou from January 5, 1988 to January 16, 2008 and as [C & C Liquor, LLC] since January 16, 2008." The Respondent argued there was additional evidence of mitigation in that clerk Waheeb took the correct actions of refusing alcohol sales to the two young women and asking the agents not to loiter around the store.

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[9] Since both the reason given for the citizen complaint and Evan's reason for going to the Licensed Premises was admitted based on the effect of the listeners and not for the truth of the matters asserted, they were not considered to prove the truth of the statements. The evidence, in fact, showed otherwise, namely, that the Licensed Premises did not readily sell alcoholic beverages to minors, as discussed more fully below.

The Department opined speculative factors in support of its argument the sale to Evan was purposeful and a continuing course of conduct relating to the clerk's behavior and actions on August 18, 2018. The evidence established that clerk Waheeb was somewhat diligent in performing his duties. He refused the sale of alcohol to the two youthful appearing females who were attempting to purchase alcohol prior to Evan, he instructed the agents not to loiter and requested to see Evan's ID, as was his responsibility. Clerk Waheeb's actions on August 18, 2018, clearly show the Licensed Premises does not readily sell alcohol to minors. When Evan was at the sales counter clerk Waheeb was still able to see the two agents in front of the Licensed Premises. There was no evidence the clerk knew the undercover officers were agents, in fact, they wore nothing that identified them as agents. When clerk Waheeb saw Evan's horizontal formatted ID (not in the minor's vertical format), with the birth year 1997, it is more probable than not that he made a mistake in looking at the birth year and assumed Evan was already 21. It was at this point that clerk Waheeb failed to diligently perform his duties, as there was nothing in the record to establish something ominous about the agent's presence that would have prevented clerk Waheeb from performing his duties in diligently inspecting the ID and Evan.

There was a 17-year, four-month discipline-free history when the premises was licensed as Joseph C. Helou and Raymonde Helou (from violation date September 13, 1990 to January 16, 2008); a 5-year, 10-month discipline-free history when the premises was licensed as C & C Liquor, LLC (from January 16, 2008 to December 9, 2013); and a 4-year, 8-month discipline-free history (from December 11, 2013 to August 17, 2018). The evidence in the record and this minimal disciplinary action over an approximate 30-year time span does not establish a continuing course or pattern of conduct as argued by the Department counsel. However, the history is not free of discipline, and as such some mitigation is warranted for a portion of that licensure without discipline. The penalty recommended herein complies with rule 144.

ORDER

The Respondent's off-sale general license is hereby suspended for a period of 10 days, with execution of 10 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 re-impose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: July 1, 2019

D. Huebel,
Administrative Law Judge

☐ Adopt

☒ Non-Adopt: _____

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By: _____

Date: 8/27/19