

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

AB-9952

File: 47-587090; Reg: 21090709

J & E Fonseca Tacos, Inc.,
dba Culichi Town
2243 Arden Way
Sacramento, CA 95825,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: January 20, 2023
Teleconference

ISSUED JANUARY 23, 2023

Appearances: *Appellant:* Raquel A. Hatfield, of Henderson and Hatfield, P.C., as
counsel for J & E Fonseca Tacos, Inc.,

Respondent: Sean D. Klein, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

J & E Fonseca Tacos, Inc., doing business as Culichi Town (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ revoking its license (with the revocation stayed for a period of three years, provided no further cause for discipline arises during that time) and concurrently suspending its license for 30 days, because appellant's agent or employee committed an assault with a firearm in the parking lot of the licensed premises, causing serious bodily injury to two

¹ The decision of the Department, dated August 23, 2022, is set forth in the appendix.

persons; carried a loaded firearm in a public place; and because appellant kept or permitted a disorderly house.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on April 5, 2018.

There is no record of prior departmental discipline against the license.

On January 4, 2021, the Department instituted an accusation against appellant.

A First Amended Accusation was filed on April 11, 2022, and a Second Amended Accusation was filed on April 14, 2022 to correct drafting errors. The six-count accusation charged that:

(1) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, committed an assault with a firearm against Edwin Velasco-Esquivas, upon the Licensed Premises, in violation of Penal Code section 245(a)(2), such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and

(2) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, committed a battery against Edwin Velasco-Esquivas, causing serious bodily injury, upon the Licensed Premises, in violation of Penal Code section 243(d), such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and

(3) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, committed an assault with a firearm against Luis Espinosa-Reyes, upon the Licensed Premises, in violation of Penal Code section 245(a)(2), such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and

(4) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, committed a battery against Luis Espinosa-Reyes, causing serious bodily injury, upon the Licensed Premises, in violation of Penal Code section 243(d), such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and

(5) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, carried a loaded firearm, in a public place in violation of Penal Code section 25850, such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and

(6) On or about September 15, 2019, Respondent-Licensee(s) kept or permitted, in conjunction with a licensed premises, a disorderly house, or to which people resort, to the disturbance of the neighborhood or in which people abide or resort, which is injurious to the public morals, health, convenience or safety, in violation of Business and Professions Code section 25601.

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

(Decision at pp. 1-2.)

At the administrative hearing held on April 14, 2022, documentary evidence was received and testimony concerning the violations charged was presented by Department Agent Cynthia Jimenez, and members of the Sacramento Sheriff's Office: Deputy Irene Venegas, Deputy Benjamin Gil, Sergeant Chris Arbuckle and Detective Neay Chhlang.

Appellant's employee Ruben Montiel and general manager Alejandro Sanchez testified on its behalf. Attorney Dean Lueders represented appellant at the evidentiary hearing in this matter, but he subsequently withdrew and attorney Raquel Hatfield substituted in as counsel.

Testimony established that appellant contracted with A & O Private Security, a licensed security company (A&O), to provide unarmed security guards during busier

weekend hours at the licensed premises. The security guards wore uniforms and were assigned to the premises by A&O based on the needs communicated by the appellant. On September 15, 2019, one security guard, Dimitri² Duruisseau (Duruiseau), was assigned to the premises, as he had been regularly over the previous two weeks. (Findings of Fact (FF) ¶ 5.)

On September 15, 2019, a party of 8 to 10 people entered the licensed premises. They remained there into the evening hours, drinking heavily. A dispute arose between a member of this party and the band providing live musical entertainment. Duruisseau attempted to remove the individual to the parking lot adjacent to the premises. Other members of the group joined them outside, as well as other patrons from the premises. Fights ensued between Duruisseau and several members of the group. Video footage showed multiple individuals fighting with each other and other persons trying to break things up. (FF ¶¶ 6-7; Exh. D-2.)

Eventually there was a lull in the fighting and individuals were holding Duruisseau and another person back from fighting each other. A female individual got between them and Duruisseau knocked her to the ground. A bottle was thrown at Duruisseau by someone in the crowd. It did not strike him, but hit another bystander before breaking on the ground. (FF ¶ 8; Exh. D-2.)

After the bottle was thrown, Duruisseau removed a firearm from his pants pocket and fired approximately three rounds into the group he had been fighting with. Two men were struck by the bullets fired by Duruisseau. One male, later identified as Luis

² The security guard's first name is spelled variously as Demitri or Dimitri in the record.

Espinosa-Ramos,³ was struck in the abdomen and immediately fell to the ground. He was hospitalized for multiple days and required surgery to remove the bullet. The second male, later identified as Edwin Velasco-Esquivas, was also struck in the abdomen area and suffered a grazing wound to his leg. He was hospitalized for multiple days and required surgery to remove the bullet. (FF ¶ 9; Exh. D-2.)

Law enforcement personnel received multiple calls about the incident — from appellant's employee and several patrons. Both law enforcement and emergency medical personnel began arriving about ten minutes after the shooting. They were unable to locate Duruisseau, who was last seen by an employee walking away from the scene. (FF ¶ 11.)

Appellant's security guard contract with A & O was subsequently terminated. Testimony established that Duruisseau was not authorized to carry a firearm because appellant did not contract for an armed guard. Testimony also established that appellant would have sent Duruisseau home had it known he was in possession of a firearm. (FF ¶ 12.)

Although not part of the record, Detective Chhlang's report indicated that the case would be submitted to the Sacramento County District Attorney's office with a request for a warrant for Demitri Duruisseau's arrest. (Unadmitted Chhlang Report at p. 10.) Criminal charges, if any, are not part of this matter.

On June 9, 2022, the administrative law judge (ALJ) issued a proposed decision, sustaining counts one through five of the accusation — two counts of assault, two counts of battery, and one count of carrying a loaded firearm in a public place;

³ Identified as Luis Espinosa-Ramos in the second amended accusation. This individual is also referred to in exhibits and testimony as Luis Espinosa-Reyes.

dismissing count six — regarding the disorderly house charge; and recommending that the license be revoked (with the revocation stayed for a period of three years, provided that no further cause for discipline arises during that time). In addition, the ALJ recommended that the license be suspended for 30 days for each of the sustained counts, with the suspensions to run concurrently. The Department adopted the proposed decision on August 22, 2022, and a Certificate of Decision was issued the following day.

Appellant then filed a timely appeal raising the following issues: (1) the decision is not supported by substantial evidence, and (2) the penalty is unduly harsh.

CODE SECTIONS CITED IN THIS MATTER

PROVIDED FOR REFERENCE

(1) **Penal Code section 245(a)(2)** provides, in relevant part:

(a)(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment. (Pen. Code § 245, subd. (a)(2).)

(2) **Penal Code section 242** defines battery as follows:

A battery is any willful and unlawful use of force or violence upon the person of another. (Pen. Code § 242.)

(3) **Penal Code section 243(d)** provides:

(d) When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years. (Pen. Code § 243, subd. (d).)

(4) **Penal Code section 25850** provides, in relevant part:

(a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

(c)(4) Where the person is not in lawful possession of the firearm, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony. (Pen. Code § 25850, subd. (a) and (c)(4).)

(5) **Business and Professions Code section 25601** provides:

Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor. (Bus. and Prof. Code § 25601.)

(6) **Article XX, section 22 of the California Constitution and Business and Professions Code 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. (Cal. Const. Art. XX, § 22; Bus. and Prof. Code § 24200, subd. (a).)

(7) **Business and Professions Code 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. (Bus. and Prof. Code § 24200, subd. (b).)

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends that the decision is not supported by substantial evidence. (AOB at pp. 3-5.)

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*).

“Substantial evidence” is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456].)

Substantial evidence, of course, is not synonymous with “any” evidence, but is evidence which is of ponderable legal significance. It must be “reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.” [Citations.] Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be “substantial,” while a lot of extremely weak evidence might be “insubstantial.”

(*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647] (*Toyota*).

Our standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn

the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (2004) 118

Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (Masani).) The Board is prohibited from

reweighing the evidence or exercising its independent judgment to overturn the

Department's factual findings to reach a contrary, although perhaps equally reasonable,

result. *(Ibid.)*

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101

Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212

Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads

to an examination by the Appeals Board to determine, in light of the whole record,

whether substantial evidence exists, even if contradicted, to reasonably support the

Department's findings of fact, and whether the decision is supported by the findings.

The Appeals Board cannot disregard or overturn a finding of fact by the Department

merely because a contrary finding would be equally or more reasonable. (Cal. Const.

Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta, supra; Harris, supra*, at p. 114.)

Appellant asserts that Finding of Fact paragraph 11 — that Velasco and Espinosa were visibly intoxicated — is not supported by substantial evidence because appellant had no knowledge of whether these patrons had been drinking prior to arrival at the licensed premises. (AOB at p. 3.) We question the relevance of this assertion in light of the sustained counts, none of which concern the intoxication level of patrons.

Appellant also asserts that Conclusions of Law (CL) paragraphs 9, 15 and 16 are not supported by substantial evidence. It maintains it had no constructive knowledge that Duruisseau was armed; that *Laube* is misapplied, because there was no evidence of deliberate and repeated conduct; and that the Department did not establish that the group of patrons had been drinking since early afternoon or that they were visibly intoxicated. (AOB at p. 3, citing *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779 (*Laube*).]; CL ¶¶ 9; 15-16.)

Decisions of both this Board and higher courts have consistently found that a licensee may be held liable for the actions of its agents or employees.

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

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

It is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

In *Laube*, the court observed that the ALJ's factual findings include:

[T]he element of the licensee's knowledge of illegal and improper activity on his or her premises; this knowledge may be either actual knowledge or constructive knowledge imputed to the licensee from the knowledge of his or her employees.

(*Laube, supra*, at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123].) The *Laube* court noted:

A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube, supra*.) Importantly, as the court of appeals observed in *McFaddin*:

It is not necessary for a licensee to knowingly allow its premises to be used in a prohibited manner in order to be found to have permitted its use. . . . Further, the word "permit" implies no affirmative act. It involves no intent. It is mere passivity, *abstaining from preventative action*.

(*McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1389-1390 [257 Cal.Rptr. 8], internal quotations omitted, emphasis in original.)

Similarly, in *Reimel*, the court stated:

[A] licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation. [Citations.]

(*Reimel v. Alcoholic Beverage Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal.Rptr. 641], internal quotations omitted.)

In *Garcia v. KND Development 52, LLC* (2020) 58 Cal.App.5th 736, 744 [272 Cal.Rptr.3d 706], the Court stated, “[a]n agent has such authority as the principal, actually or ostensibly, confers upon him.” “[A]gency does not deal with whether an individual is in fact an actual employee, but rather, what the alleged principal by his acts

has led others to believe.” (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 506 [61 Cal.Rptr.3d 754], internal citation and quotation marks omitted.)

The ALJ found in his decision that the evidence established that Duruisseau was acting as appellant’s agent:

3. Respondent has further asserted that the actions of Duruisseau cannot be attributed to the Respondent because he was not an employee of the Licensee and agency has not been established. Department asserts that Duruisseau was a constructive employee of the Respondent and, in the alternative, that sufficient agency has been established to impute his actions to the Respondent. The record in this matter is vague as to whether constructive or dual employment was established. There is some evidence that the Respondent had some influence over the details of Duruisseau's working conditions. **The record, however, clearly establishes that Duruisseau was an agent of the Respondent and was acting directly in furtherance of that agency during the incident at issue.** Duruisseau was actively assigned to work at the Licensed Premises by A&O during the time period leading up to the shooting. His security guard job specifically included dealing with unruly patrons in the Licensed Premises, which is what he was in the process of doing as the incident escalated from a fisticuff altercation to a shooting. This agency was directly related to the Respondent's duties under the Alcoholic Beverage Control Act (The Act) because the unruliness of these patrons was connected to their consumption of alcoholic beverages in the Licensed Premises. As such, the reliance of the Respondent on *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 and related cases that carve out narrow exceptions to imputed liability is misplaced. In this matter, the Department has sufficiently established that Duruisseau was an agent of the Respondent during the incident at issue.

(Decision at pp. 6-7, emphasis added.)

In addition, the ALJ found that other employees knew or should have known a problem was developing in the premises, yet failed to take preventive action:

16. The group that later engaged in the confrontation with Duruisseau had been in the Licensed Premises since early afternoon. Multiple individuals in the group had consumed alcoholic beverages inside of the Licensed Premises to the point that they were visibly intoxicated. There is significant evidence that there was over service of alcoholic beverages inside of the Licensed Premises that contributed to this group being unruly

and volatile. This group had a confrontation, inside of the Licensed Premises with musicians that were performing inside of the Licensed Premises. The Respondent's manager, Ruiz and other employees were in the Licensed Premises while this occurred, and they were in a position to work together with Duruisseau, the lone security guard in the Licensed Premises, to develop a safer plan for addressing the unruly group. This was not done, and the resulting escalating conflict was no surprise. As the conflict between Duruisseau and the group worsened, Ruiz was placed on specific notice of this, prior to the shooting, yet he took no action, other than watching the confrontation, until after the shooting occurred.

17. Ruiz and other agents or employees of the Respondent evaded the duties the circumstances called for. This, combined with the unlawful conduct of Duruisseau, justifies that his actions be imputed to the Respondent. The Department has established, by a preponderance of the evidence, counts 1 through 5 in the Second Amended Accusation and they have shown that continuation of the license, without consequence, would be contrary to public welfare or morals.

(Decision at pp. 9-10.) We agree with this assessment and find it is supported by substantial evidence in the record.

In the instant matter, as the ALJ found, the security guard presented himself to the patrons on behalf of appellant when he removed an individual from the establishment and attempted to deal with his angry companions. No other conduct was required to create an agency relationship — his acts, in attempting to maintain order — would have led any observer to believe he was acting on behalf of appellant. The doctrine of *respondeat superior* provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].)

The policy reasons for this general rule (that licensees are vicariously liable for — and responsible for preventing — foreseeable misconduct by individuals in the licensed premise) are evident. Without it, a licensee could escape discipline simply by

maintaining a practiced state of ignorance. It would defy reason and the mandate of the State Constitution (which authorizes the Department to suspend or revoke a license when continuation of the license would be contrary to public welfare or morals) to interpret the law in a manner that rewards licensees for distancing themselves from the operation of their premises or allows licensees to escape responsibility for reasonably foreseeable activity in their premises.

Appellant's assertions that it had no constructive knowledge that Duruisseau was armed, and that absent evidence of deliberate and repeated conduct, Duruisseau's actions cannot be imputed to it, are unavailing. Case law supports the ALJ's finding that Duruisseau was appellant's agent and was acting directly in furtherance of that agency during the incident at issue. Accordingly, appellant is responsible for the actions of its agent.

As to appellant's contention that the Department did not establish that the group of patrons involved in the fight with Duruisseau had been drinking since early afternoon or that they were visibly intoxicated, we fail to see how this is relevant to the sustained counts. Nevertheless, multiple references in the record do confirm that the members of the group had been drinking. (See RT at pp. 53, 62; exh. D-4 at p. 2.) The conduct of the security guard and appellant's employees are at issue here, however, not the behavior of the patrons. Accordingly, we do not address this assertion further.

As to the sustained counts, and whether or not they are supported by substantial evidence, the ALJ found:

10. With respect to Counts 1 through 5, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and section 24200(a) on the basis that on September 15, 2019, Respondent's agent, Demitri Duruisseau, carried a firearm in a public place in violation of Penal Code section 25850 (Count

5), upon the Licensed Premises, and then committed assaults with a firearm against Edwin Velasco-Esquivas and Luis Espinosa-Ramos, in violation of Penal Code section 245(a)(2) (Counts 1 and 3), and committed battery causing serious bodily injury against Edwin Velasco-Esquivas and Luis Espinosa-Ramos, in violation of Penal Code section 243(d) (Counts 2 and 4) upon the Licensed Premises. The evidence does not establish a violation of Business and Professions Code section 25601 as alleged in Count 6 of the Second Amended Accusation. (Findings of Fact, ¶¶ 1-12.)

11. It is undisputed that on September 15, 2019, while Duruisseau was acting as a security guard for the Respondent, he shot Velasco and Espinosa, in the parking lot of the Licensed Premises. The shooting occurred in the parking lot of Culichi Town, adjacent to the front entrance. This was an area under the curtilage and control of the Respondent and used by patrons of the Licensed Premises. Both men suffered significant gunshot wounds to their abdominal areas as a result of being shot by Duruisseau. These injuries were significant enough to meet the "great bodily injury" requirement of Penal Code section 243(d). They were inflicted by Duruisseau with a firearm in violation of Penal Code section 245(a)(2). (Findings of Fact, ¶¶ 1-12.)

12. Duruisseau was carrying the firearm he used in violation of Penal Code section 25850 because he was not licensed to carry it in a concealed manner, and it was used in a public place. There is no evidence justifying his possession of the firearm on September 15, 2019. . . .

(Decision at p. 8.)

We have carefully reviewed the extensive record in the matter and find no error in the findings or conclusions of the Department's decision — they are amply supported by substantial evidence and the Board cannot reweigh the evidence to reach a contrary conclusion.

II

PENALTY

Appellant contends the penalty is unduly harsh. It maintains the penalty is punitive and that the decision fails to acknowledge factors in mitigation presented by appellant. (AOB at p. 5.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) “‘Abuse of discretion’ in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]” (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

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

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq.*), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled “Penalty Guidelines” (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Cal. Code Regs., tit. 4, § 144.)

The ALJ made the following observations in regards to the penalty:

Counts 1 and 3 are felonies of moral turpitude, which have a presumptive penalty of revocation, absent mitigating circumstances. The Department, in recognition of the mitigating circumstances, did not seek outright revocation. They requested that the Respondent's license be revoked, with a stay for 3 years and a 30-day actual suspension, given the severity of the facts in this matter.

The Respondent sought an outright dismissal of the allegations by arguing that the actions of Duruisseau cannot be imputed to the Respondent. As noted in the findings in this matter, that alternative narrative has been rejected.

Counts 2 and 4 are alternative statements of conduct alleged in Counts 1 and 3, so it would be inappropriate to punish these counts separately. Count 5, the possession of the firearm was an ongoing violation that directly led to the serious escalation that occurred in this matter. However, addressing the assault with a firearm intrinsically addresses this count.

Mitigation is warranted. The Respondent has no prior discipline against the license at issue. The Respondent immediately took action to prevent a recurrence of the incident by severing ties with A&O. The Respondent

was cooperative with the investigation. These are appropriate factors in mitigation pursuant to Rule 144.

In the present case, a stayed revocation is warranted. While the Respondent has no prior discipline, the shooting incident was appalling and could have resulted in death or injury to a larger number of people.

The penalty recommended herein complies with rule 144.

(Decision at p. 12.)

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

ORDER

The decision of the Department is affirmed.⁴

SUSAN A. BONILLA, CHAIR
 MEGAN McGUINNESS, MEMBER
 SHARLYNE PALACIO, 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 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

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

J & E FONSECA TACOS, INC.
CULICHI TOWN
2243 ARDEN WAY
SACRAMENTO, CA 95825

ON-SALE GENERAL EATING PLACE - LICENSE

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

SACRAMENTO DISTRICT OFFICE

File: 47-587090

Reg: 21090709

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 August 22, 2022. 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, 400 R St, Suite 320, Sacramento, CA 95811. 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 October 3, 2022, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: August 23, 2022



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

J & E Fonseca Tacos, Inc.
DBA Culichi Town
2243 Arden Wy
Sacramento, California 95825

Respondent

} File: 47-587090
}
} Reg.: 21090709
}
} License Type: 47
}
} Word Count: 19,770
}
} Reporter:
} Paige Hutchinson CSR# 13459
} iDepo Reporters
}
} **PROPOSED DECISION**

On-Sale General Eating Place License

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter via videoconference on April 14, 2022.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Dean Leuders, Attorney represented J & E Fonseca Tacos, Inc. (Respondent) at the evidentiary hearing in this matter. After the evidentiary hearing, Raquel Hatfield, Attorney substituted in as counsel after the withdrawal of Dean Leuders.

The Department seeks to discipline Respondent's license pursuant to six counts alleged in the Second Amended Accusation on the grounds that:

- (1) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, committed an assault with a firearm against Edwin Velasco-Esquivas, upon the Licensed Premises, in violation of Penal Code section 245(a)(2), such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and
- (2) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, committed a battery against Edwin Velasco-Esquivas, causing serious bodily injury, upon the Licensed Premises, in violation of Penal Code section 243(d), such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and

- (3) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, committed an assault with a firearm against Luis Espinosa-Reyes, upon the Licensed Premises, in violation of Penal Code section 245(a)(2), such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and
- (4) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, committed a battery against Luis Espinosa-Reyes, causing serious bodily injury, upon the Licensed Premises, in violation of Penal Code section 243(d), such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and
- (5) On or about September 15, 2019, Respondent-Licensee's agent or employee, Demitri Duruisseau, carried a loaded firearm, in a public place in violation of Penal Code section 25850, such violation being grounds for suspension or revocation of the license under Business and Professions Code section 24200(a), and
- (6) On or about September 15, 2019, Respondent-Licensee(s) kept or permitted, in conjunction with a licensed premises, a disorderly house, or to which people resort, to the disturbance of the neighborhood or in which people abide or resort, which is injurious to the public morals, health, convenience or safety, in violation of Business and Professions Code section 25601.

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

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing on April 14, 2022. The matter was argued and submitted for decision after both parties submitted post hearing briefings between April 28, 2022, and May 19, 2022.

FINDINGS OF FACT

1. The Department filed the initial Accusation on January 4, 2021. A First Amended Accusation was filed on April 11, 2022, and a Second Amended Accusation was filed on April 14, 2022, correcting drafting errors in the First Amended Accusation.
2. There is no record of prior Department discipline against the Respondent's license which was issued on April 5, 2018. The Respondent holds a Type 47 On-Sale General Eating Place License

for a business known as Culichi Town at 2243 Arden Way in Sacramento, California (Licensed Premises). There is a multiple lane parking lot adjacent to the entrance of the Licensed Premises that is used by patrons. The interior of the Licensed Premises has a kitchen, seating for patrons who are served food, a fixed bar, and an area for live entertainment.

3. On Sunday, September 15, 2019, the Licensed Premises had a contract with A&O Private Security (A&O) to provide security guard service during certain operating hours at the Licensed Premises. A&O was a licensed security company with the State of California. (Exhibit L-1) The Licensed Premises hired the services of A&O security guards during busier hours on the weekends to assist with typical security needs that arose in a venue that provided alcohol and musical entertainment to crowds of patrons. A&O would decide what guards were going to be assigned to the Licensed Premises based on the needs communicated by the Respondent. The Respondent would also communicate with A&O about their time need which A&O would then fulfill by assigning guard shifts to employees selected by A&O. The Respondent would have the assigned guard or guards sign in when they arrived and departed. Assigned guards would interact with the Respondent's on-site staff regarding needs. Their security guard work was performed in the Licensed Premises or in the adjacent lot when needed. The assigned security guards wore a uniform. This allowed them to be identified by staff of the Licensed Premises and patrons if a security need arose. The contract with A&O only called for unarmed guards.

4. The Licensed Premises had a manager on site during typical hours of operation. On September 15, 2019, the manager on duty was Ruben Montiel Ruiz (Ruiz). Ruiz was aware that the security guard from A&O that day was Demitri Duruisseau (Duruisseau). Records received during the hearing established that Duruisseau had the required State of California security guard certification to work as an unarmed security guard during the period of his assignments to the Licensed Premises. Duruisseau did not have any firearms registered to him and there were no records showing the Duruisseau had the required certification to carry a firearm for security purposes after a search of the database was conducted by the Department after the shooting. (Exhibit L-1)

5. Ruiz was aware that Duruisseau had been assigned regularly to the Licensed Premises for approximately two weeks and he had a favorable impression of him. Duruisseau signed in for work at the Licensed Premises on September 15, 2019, and began performing his typical work. He was the only assigned security guard that day. The expectation of the Respondent was that the security guards would be proactive and head off problems before they became dangerous or out of control. Ruiz was aware of Duruisseau's assignment to the Licensed Premises that day. Ruiz was aware that Duruisseau had been assigned regularly to the Licensed Premises for approximately two weeks prior to September 15, 2019.

6. On September 15, 2019, a party of approximately 8-10 people entered the Licensed Premises in the early afternoon. They remained present in the Licensed Premises into the evening hours. Multiple persons in the group were drinking heavily and were visibly intoxicated. Between 8-8:15 p.m., At least one of the members of the group got into a dispute with a band inside of the

Licensed Premises regarding the live musical entertainment and the cover charge they had paid. Because of their unruly behavior, Duruisseau physically escorted one of the members of the group out of the Licensed Premises into the parking lot adjacent to the main entrance. Duruisseau's effort to remove that individual led to the group following him and the individual from the interior of the Licensed Premises into the adjacent parking lot of the Licensed Premises. The video footage from the Licensed Premises showed a crowd following Duruisseau into the parking lot beginning at 8:11 p.m. (Exhibits D-2 and D-3)

7. While outside, Duruisseau physically fought with multiple members of the group. The video footage showed at least one other male from the group being held back from fighting with Duruisseau. Additional persons exited from the Licensed Premises beyond the initial group. The video footage showed multiple persons fighting with each other and Duruisseau. The footage also showed persons trying to restrain others from fighting. (Exhibits D-2 and D-3)

8. There was a short lull in the fighting when Duruisseau and a male from the group who was fighting with him were separated. Both men continued to try to lunge at each other while they were restrained by persons in the crowd. A female got between Duruisseau and the man he was trying to fight with. She appeared to be trying to stop them from fighting with each other. Duruisseau physically knocked her to the ground when she approached him. The crowd began to act more agitated after Duruisseau knocked her down. Someone from the crowd tossed a bottle in the direction of Duruisseau but it did not strike him. The bottle struck another person in the hand, then broke. (Exhibits D-2 and D-3)

9. Just after the bottle was tossed, Duruisseau removed a firearm from his pants pocket and fired approximately three rounds into the group he had been fighting with. Two men were struck by the bullets fired by Duruisseau. One male, later identified as Luis Espinosa-Ramos¹ (Espinosa), was struck in the abdomen and immediately fell to the ground. He was hospitalized for multiple days and required surgery to remove the bullet from his abdomen. The second male was later identified as Edwin Velasco-Esquivas (Velasco). Velasco was also struck in the abdomen area and suffered a grazing wound to his leg. He was hospitalized for multiple days and required surgery to remove the bullet from his abdomen. (Exhibits D-2 and D-3)

10. Prior to the shooting, Ruiz was approached in the kitchen of the Licensed Premises by one of the staff. Ruiz was told that a crowd was gathering outside and that an altercation was taking place. Ruiz went outside and observed the ongoing dispute among Duruisseau and the people from the group. Ruiz did not communicate with Duruisseau until after the shooting. Ruiz saw Duruisseau push the woman to the ground and saw the bottle being tossed in Duruisseau's direction. Ruiz was surprised when Duruisseau pulled the gun from his pants pocket and shot at the crowd. After the shooting, Ruiz saw Duruisseau try to help one of the people he shot. Duruisseau was agitated, so Ruiz tried to calm him down. Ruiz also rendered aid to one of the

¹ In the Second Amended Accusation, this individual is identified as Luis Espinosa-Reyes. In testimony in this matter and in the received reports, he is identified as Luis Espinosa-Ramos.

men who had been shot. Ruiz called law enforcement about the shooting. This was the only call Ruiz made regarding the developing altercation that led to the shooting. Law enforcement also received additional calls from patrons of the Licensed Premises about the shooting. Multiple law enforcement officials and medical personnel began to arrive at the Licensed Premises about 10 minutes after the shooting. (Exhibits D-2 and D-3)

11. After the shooting but prior to the arrival of law enforcement, Ruiz asked Duruisseau why he shot them. Duruisseau did not answer his question. Ruiz then saw Duruisseau leave the parking lot and walk away from the scene by foot. This was the last contact that anyone from the Respondent had with Duruisseau about the shooting. When officers arrived, they were unable to find Duruisseau. Ruiz spoke with law enforcement at the scene, and he gave them access to the video footage so they could see what had unfolded during the altercation. (Exhibit D-2) The law enforcement at the scene and the officers who went to the hospital all observed that Velasco and Espinosa were visibly intoxicated and that they had gunshot wounds to their torsos that required hospitalization.

12. Respondent witness Alejandro Sanchez (Sanchez), testified in this matter. Sanchez works as a general manager for multiple locations operated by the Respondent. He was the general manager of the Licensed Premises location during the incident at issue. Sanchez confirmed that Duruisseau was not authorized to have a firearm because the Respondent did not contract for an armed guard. The Respondent did not receive any complaints about Duruisseau during the time he was assigned to the Licensed Premises. Had the Respondent been aware that Duruisseau had a firearm prior to the shooting, they would have sent him home and contacted A&O. As a result of the shooting incident, the Respondent terminated the security guard contract with A&O.

CONCLUSIONS OF LAW

1. In this matter, the Respondent has challenged the authority of the Department to investigate and bring an action against the Respondent and the appropriate scope of review to be applied. The Respondent cited *Ettinger v. Board of Medical Quality* (1982) 135 Cal.App.3d 855 and attempted to correlate the standard of review before the Board of Medical Quality to the standard of review applicable to the Department's Accusation. Because of the different concerns addressed by the Department's actions, the comparison is inapplicable. *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286 has an extensive discussion of the Department's statutory authority and powers under the State Constitution. In discussing the Department's ability to bring a disorderly house action against a licensee, the court found that:

“[t]he California Constitution authorizes the revocation of a license where the premises have essentially become a public nuisance. The constitutional provision says that the existence on the licensed premises of a condition injurious to the public welfare is enough for revocation. (Cal. Const., art. XX, § 22.) As in applying the law of nuisance, fault is not relevant; the power of the Department derives from the police power, to prevent

nuisances regardless of anyone's fault in creating them. Thus it is said that the licensee is charged with preventing his premises from becoming a nuisance and it will not avail him to plead that he cannot do so. (*Givens v. Dept. Alcoholic Bev. Control, supra*, 176 Cal.App.2d 529, 1 Cal.Rptr. 446.)

This interpretation of the power of the Department dates back to the very earliest decisions interpreting the Alcoholic Beverage Control Act, all of which held that there is no inherent right to sell intoxicating liquors, that the liquor business is fraught with danger to the community, and may therefore be either entirely prohibited, or permitted under such conditions as are prescribed by the regulatory agency, which has broad power in this respect. (See, e.g., *Tokaji v. State Board of Equalization* (1937) 20 Cal.App.2d 612, 615–616, 67 P.2d 1082; *Empire Vintage Co. v. Collins* (1940) 40 Cal.App.2d 612, 617, 105 P.2d 391.) The courts viewed a liquor license as different from a license to conduct any other business, and believed that a license to sell liquor “is not a proprietary right within the meaning of the due process clause of the Constitution [Citation], nor is it a contract [Citation]; it is but a permit to do what would otherwise be unlawful, and consequently, a statute authorizing its revocation does not violate the due process clause, and it may be revoked without notice or hearing without invading any constitutional guarantees. [Citations.]

The statute was later amended to provide licensees procedural rights in challenging discipline or revocation, but although due process, notice and a hearing became available to the licensee, the fundamental premise for revocation remained, as expressed in the cases cited above such as *Givens, Harris, and Morell*, the existence of a public nuisance in and about the licensed premises, regardless of the degree of fault of the licensee. Accordingly a legal finding of good cause for revocation is tested by an abuse of discretion standard (*Hansen v. State Board of Equalization* (1941) 43 Cal.App.2d 176, 110 P.2d 453), and a license may be revoked or denied when a licensed premises becomes a nuisance or a police problem. (*Parente v. State Board of Equalization* (1934) 1 Cal.App.2d 238, 36 P.2d 437; 297 *Harris v. Alcoholic Bev. Con. Appeals Bd., supra*, 212 Cal.App.2d 106, 28 Cal.Rptr. 74; *Morell v. Dept. of Alcoholic Bev. Control, supra*, 204 Cal.App.2d 504, 22 Cal.Rptr. 405.)” *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 296–297

2. The provisions for hearings are set forth in the Alcoholic Beverage Control Act and the Administrative Procedures Act. The appropriate standard of review will be applied in this matter.
3. Respondent has further asserted that the actions of Duruisseau cannot be attributed to the Respondent because he was not an employee of the Licensee and agency has not been established. Department asserts that Duruisseau was a constructive employee of the Respondent and, in the alternative, that sufficient agency has been established to impute his actions to the Respondent. The record in this matter is vague as to whether constructive or dual employment was established. There is some evidence that the Respondent had some influence over the details of Duruisseau’s working conditions. The record, however, clearly establishes that Duruisseau was an agent of the Respondent and was acting directly in furtherance of that agency during the

incident at issue. Duruisseau was actively assigned to work at the Licensed Premises by A&O during the time period leading up to the shooting. His security guard job specifically included dealing with unruly patrons in the Licensed Premises, which is what he was in the process of doing as the incident escalated from a fisticuff altercation to a shooting. This agency was directly related to the Respondent's duties under the Alcoholic Beverage Control Act (The Act) because the unruliness of these patrons was connected to their consumption of alcoholic beverages in the Licensed Premises. As such, the reliance of the Respondent on *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App4th 570 and related cases that carve out narrow exceptions to imputed liability is misplaced. In this matter, the Department has sufficiently established that Duruisseau was an agent of the Respondent during the incident at issue.

4. 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.

5. Business and Professions Code 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.

6. Penal Code section 25850 provides in relevant part:

(a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.....

(b)(4) Where the person is not in lawful possession of the firearm, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.

7. Penal Code section 245(a)(2) provides in relevant part:

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.

8. Penal code section 242 provides that a battery is any willful and unlawful use of force or violence upon the person of another. Penal code section 243(d) provides that when a battery is

committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years. Penal code section 243 further defines “Serious bodily injury” as a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

9. In determining whether a violation of the above sections has been caused or permitted by the licensee, the knowledge of the licensee itself and its agents and/or employees will be examined and weighed. “[T]his knowledge may be either actual knowledge or constructive knowledge imputed to the licensee from the knowledge of his or her employees. (See *Fromberg v. Dept. Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233–234, 337 P.2d 123; *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395, 401–402, 300 P.2d 366.)” *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367.

10. With respect to Counts 1 through 5, cause for suspension or revocation of the Respondent’s license exists under Article XX, section 22 of the California State Constitution and section 24200(a) on the basis that on September 15, 2019, Respondent’s agent, Demetri Duruisseau, carried a firearm in a public place in violation of Penal Code section 25850 (Count 5), upon the Licensed Premises, and then committed assaults with a firearm against Edwin Velasco-Esquivas and Luis Espinosa-Ramos, in violation of Penal Code section 245(a)(2) (Counts 1 and 3), and committed battery causing serious bodily injury against Edwin Velasco-Esquivas and Luis Espinosa-Ramos, in violation of Penal Code section 243(d) (Counts 2 and 4) upon the Licensed Premises. The evidence does not establish a violation of Business and Professions Code section 25601 as alleged in Count 6 of the Second Amended Accusation. (Findings of Fact ¶¶ 1-12)

11. It is undisputed that on September 15, 2019, while Duruisseau was acting as a security guard for the Respondent, he shot Velasco and Espinosa, in the parking lot of the Licensed Premises. The shooting occurred in the parking lot of Culichi Town, adjacent to the front entrance. This was an area under the curtilage and control of the Respondent and used by patrons of the Licensed Premises. Both men suffered significant gunshot wounds to their abdominal areas as a result of being shot by Duruisseau. These injuries were significant enough to meet the “great bodily injury” requirement of Penal Code section 243(d). They were inflicted by Duruisseau with a firearm in violation of Penal Code section 245(a)(2). (Findings of Fact ¶¶ 1-12)

12. Duruisseau was carrying the firearm he used in violation of Penal Code section 25850 because he was not licensed to carry it in a concealed manner, and it was used in a public place. There is no evidence justifying his possession of the firearm on September 15, 2019. Regarding the assault and battery allegations in Counts 1 through 4 in the Second Amended Accusation, given the facts of this matter, the question of whether Duruisseau appropriately acted in self-defense needs to be resolved before a finding of unlawfulness can be supported. (Findings of Fact ¶¶ 1-12)

13. Section 505 of California's Criminal Jury Instructions (CALCRIM) is a succinct outline of what must be established for self-defense under California law. A criminal defendant will be considered to have acted in self-defense, if they can prove:

- (a) They reasonably believed that they (or someone else) were in imminent danger of being harmed;
- (b) They reasonably believed that the imminent use or force was necessary to defend against that danger; and
- (c) They only used the amount of force that was reasonably necessary to defend against that danger.

14. This defense would not be available if Duruisseau was the initial aggressor, but it is not clear from the state of the evidence whether Duruisseau or one of the unruly patrons initiated the fisticuffs that occurred in the parking lot. Duruisseau's behavior, particularly, his shoving one of the women to the ground, certainly escalated the confrontation with the crowd. The unruly crowd had already moved to the parking lot, so Duruisseau was in a position to reenter the Licensed Premises, rather than continue the confrontation. While an argument can be made supporting that Duruisseau reasonably felt he was in danger of being harmed, his assault towards members of the group with a firearm was excessive force that was significantly out of proportion to the danger posed by the group. As a result, any self-defense justification must fail.

15. The Respondent cited *Laube v. Stroh* (1992) 2 Cal.App.4th 364 and *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 in asserting that the *conduct* of Duruisseau should not be imputed to the Respondent because it was such an unexpected departure from what the Respondent should have reasonably anticipated would occur. In making this assertion, the Respondent focused on the sudden production of a firearm by Duruisseau and how the Respondent could not have foreseen the shooting or intervened safely. The Respondent's analysis ignores the actions and inactions of its employees and agents that contributed to the altercation that led to the shooting. A close reading of *Laube* and a consideration of the specific facts of this case supports the conclusion that imputed liability for Duruisseau's conduct is appropriate. In discussing imputed liability, the *Laube* court noted that:

“A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to “permit” by a failure to take preventive action.” *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379

16. The group that later engaged in the confrontation with Duruisseau had been in the Licensed Premises since early afternoon. Multiple individuals in the group had consumed alcoholic

beverages inside of the Licensed Premises to the point that they were visibly intoxicated. There is significant evidence that there was over service of alcoholic beverages inside of the Licensed Premises that contributed to this group being unruly and volatile. This group had a confrontation, inside of the Licensed Premises with musicians that were performing inside of the Licensed Premises. The Respondent's manager, Ruiz and other employees were in the Licensed Premises while this occurred, and they were in a position to work together with Duruisseau, the lone security guard in the Licensed Premises, to develop a safer plan for addressing the unruly group. This was not done, and the resulting escalating conflict was no surprise. As the conflict between Duruisseau and the group worsened, Ruiz was placed on specific notice of this, prior to the shooting, yet he took no action, other than watching the confrontation, until after the shooting occurred.

17. Ruiz and other agents or employees of the Respondent evaded the duties the circumstances called for. This, combined with the unlawful conduct of Duruisseau, justifies that his actions be imputed to the Respondent. The Department has established, by a preponderance of the evidence, counts 1 through 5 in the Second Amended Accusation and they have shown that continuation of the license, without consequence, would be contrary to public welfare or morals.

18. Business and Professions Code section 25601 defines a disorderly house as follows; "Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

19. A Department licensee has an affirmative duty to maintain his or her premises in a lawful and orderly fashion (*Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529). A disorderly house charge is synonymous in the law with a nuisance allegation, wherein a person, or licensee in this matter, permits ongoing illegal activity to continue unchecked (*Yu v. Alcoholic Beverage Control Appeals Board* (1992) 3 Cal.App.4th 286). Disorderly house accusations are inherently aimed at stopping persistent violations of the law.

20. The court in *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, observed; "Where... objectionable behavior in a licensed establishment is of a continuing nature and not merely an isolated or accidental instance, it is an inescapable conclusion that the licensees have permitted and suffered the resultant condition which offends public welfare and morals and violates the statutory prohibition against keeping a disorderly house." In Count 6, the Department pled a single violation date of September 15, 2019, to allege liability under section 25601. This was pled in conjunction with counts 1 through 5. As established in *Morell*, a violation of this section must rest on more than an isolated or accidental instance of violating the statutes that are the basis of an offense to public welfare or morals.

21. Under the circumstances of this matter, liability under Section 25601 was not established by the Department. The Department's evidence arose from one incident on September 15, 2019. While the conduct by Duruisseau was shocking and serious, there was no evidence of ongoing behavior by the Respondent, beyond the negligence of staff on that date, that contributed to this isolated incident. The Respondent's decision to immediately terminate the contract with A&O was further evidence that the Respondent did not intend to permit what had occurred and that the incident flowed from isolated negligence, and not pervasive inaction or tacit permission. (Findings of Fact, ¶¶ 1-12)

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

PENALTY

Counts 1 and 3 are felonies of moral turpitude, which have a presumptive penalty of revocation, absent mitigating circumstances. The Department, in recognition of the mitigating circumstances, did not seek outright revocation. They requested that the Respondent's license be revoked, with a stay for 3 years and a 30-day actual suspension, given the severity of the facts in this matter.

The Respondent sought an outright dismissal of the allegations by arguing that the actions of Duruisseau cannot be imputed to the Respondent. As noted in the findings in this matter, that alternative narrative has been rejected.

Counts 2 and 4 are alternative statements of conduct alleged in Counts 1 and 3, so it would be inappropriate to punish these counts separately. Count 5, the possession of the firearm was an ongoing violation that directly led to the serious escalation that occurred in this matter. However, addressing the assault with a firearm intrinsically addresses this count.

Mitigation is warranted. The Respondent has no prior discipline against the license at issue. The Respondent immediately took action to prevent a recurrence of the incident by severing ties with A&O. The Respondent was cooperative with the investigation. These are appropriate factors in mitigation pursuant to Rule 144.

In the present case, a stayed revocation is warranted. While the Respondent has no prior discipline, the shooting incident was appalling and could have resulted in death or injury to a larger number of people.

The penalty recommended herein complies with rule 144.

ORDER

Counts 1 through 5 are sustained. Count 6 is dismissed. The Respondent's On-Sale General Eating Place License is hereby revoked, with the revocation stayed for three years from the effective date of this decision, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within the period of the stay.


Should such a 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 revoke Respondent's license, and should no such determination be made, the stay shall become permanent.

In addition, the license shall be suspended for 30 days for each count. The suspension for each count is to run concurrent with a total suspension of 30 days.

Dated: June 9, 2022



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>08/12/22</u> _____