

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

AB-9954

File: 47-536046; Reg: 20090067

EVERK HOSPITALITY GROUP, INC.,
dba Luxs
1144 East Champlain Drive, Suite 108
Fresno, CA 93720-5027,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: January 20, 2023
Telephonic

ISSUED JANUARY 23, 2023

Appearances: *Appellant:* Josh H. Escovedo, of Weintraub, Tobin, Chediak, and Grodin Law Corporation, as counsel for Everk Hospitality Group, Inc.,

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

OPINION

Everk Hospitality Group, Inc., doing business as Luxs (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department),¹ revoking its on-sale general eating place license because it operated the premises as a disorderly house and created a law enforcement problem; its employee used unlawful force against a patron; and it failed to take reasonable steps to correct objectionable

¹ The decision of the Department, dated August 30, 2022, is set forth in the appendix.

conditions on the licensed premises, constituting a nuisance, within a reasonable time after receipt of notice to make those corrections.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale eating place license was issued on August 9, 2013. There is no record of prior departmental discipline against the license.

On May 5, 2020, the Department instituted a four-count accusation against appellant charging that: it operated the premises as a disorderly house, in violation of Business and Professions Code section 25601;² it created a law enforcement problem, in violation of section 24200, subdivisions (a) and (b); its employee used unlawful force³ against a patron, in violation of Penal Code section 242; and it failed to take reasonable steps to correct objectionable conditions on the licensed premises, constituting a nuisance, within a reasonable time after receipt of notice to make those corrections, in violation of section 24200, subdivision (e).

At the administrative hearings held on October 20, 2020 and May 19, 2022, documentary evidence was received and testimony concerning the violations charged was presented by Department Agent Lori Kohman; Stacy Voss and Arshya Shahriari, patrons at the premises; Tiffany Tom, a bartender at a nearby premises; and Fresno Police Officers Rebekah Wells, Allison Marie Kincaid, Danny Kim, David Wilkin, Rodney Zumkehr, and Darin Chandler. Owner Louis Everk and Fresno Police Officer Michael Manfredi testified on appellant's behalf.

² Unless otherwise noted, all statutory references are to the California Business and Professions Code.

³ A battery is any willful and unlawful use of force or violence upon the person of another. (Pen. Code § 242.)

Testimony established that prior to the accusation, in January 2018, the Department received a complaint from the Fresno Police Department (FPD) regarding a pattern of disproportionate calls for service to the premises, constituting a drain on FPD resources — including incidents involving overly intoxicated persons, disturbances in both the premises and adjacent parking lot, as well as fights and weapon use or possession in and around the premises by both patrons and employees of the premises. On January 26, 2018, the Department sent a certified letter to appellant regarding the concerns raised by the FPD, ordering it to come into compliance within 20 days to avoid disciplinary action against the license for failure to correct the described nuisance behavior. (Findings of Fact (FF) ¶¶ 4-6; exh. D-2.)

Notwithstanding the Department's directive, subsequent records reflect at least 60 responses by the FPD to the address of the premises, between July 1, 2018 and November 28, 2019, for a variety of service calls requiring the use of law enforcement and/or emergency medical personnel. (FF ¶ 7; Exh. D-11.) Detailed testimony was provided about four such incidents which involved, *inter alia*, charges of battery resulting in serious bodily injury, assault on a police officer, and attempted homicide. (FF ¶¶ 10-12, 14; exhs. D-1; D-3 through D-6; and D-11.)

The administrative law judge (ALJ) issued a proposed decision on June 23, 2022, sustaining all four counts of the accusation and recommending that the license be revoked. The Department adopted the proposed decision in its entirety on August 26, 2022, and a Certificate of Decision was issued four days later.

Appellant then filed a timely appeal raising the following issue: the decision's findings are not supported by substantial evidence in light of the whole record. In particular, appellant objects to Findings of Fact paragraph 12 and Conclusions of Law

(CL) paragraph 24. Appellant also contends the ALJ's findings pertaining to appellant "permitting" a disorderly house or use of the property in a manner contrary to public welfare and morals are not supported by substantial evidence. (AOB at pp. 5-10.)

These issues will be discussed together.

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*).

As we have noted many times, 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] (Harris).)

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.)

The California Constitution provides, "The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it

shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." (Cal. Const., art. XX, § 22.) The Business and Professions Code further provides:

The following are the grounds that constitute a basis for the suspension or revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals. . . .

(b) [T]he violation or the causing or permitting of a violation by a licensee of this division, . . . any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

¶ . . . ¶

(e) Failure to take reasonable steps to correct objectionable conditions on the licensed premises, including the immediately adjacent area that is owned, leased, or rented by the licensee, that constitute a nuisance, within a reasonable time after receipt of notice to make those corrections from the department . . .

(Bus. & Prof. Code, § 24200(a), (b), and (e).)

California courts have long found that "[w]here premises licensed for the sale of alcoholic beverage are operated in such a manner as to make them a law enforcement problem for the police, public welfare and morals are directly involved and affected."

(*Harris, supra*, at 118 [holding that premises presented law enforcement problem meriting license revocation]; see also *Torres v. Dept. of Alcoholic Bev. Control* (1961) 192 Cal.App.2d 541 [13 Cal.Rptr. 531] [denying license due to law enforcement problems]; *Parente v. State Bd. of Equalization* (1934) 1 Cal.App.2d 238 [36 P.2d 437] [denying license due to law enforcement problems].) The *Harris* court wrote:

If the law enforcement problem emerges, as it does here, from repeated instances of intoxicated patrons found on the premises in violation of a local ordinance, it is fatuous to maintain that these conditions of doing business do not offend public welfare or morals until or unless the intoxicated patron has aggravated them by performing some additional improper, illegal or immoral act on the premises. A tolerant society and sensible law enforcement may accept on occasion the bibulous patron in the bar. But pacific behavior does not confer upon the common drunk a vested right in a public place. Moreover, where, as here, the presence of such a patron on the premises and his removal and arrest by public authority occur with alarming regularity, **it is naive to suppose that these conditions of the establishment prevailed without the permission and consent of the licensee.**

(*Harris, supra*, at pp. 118-119, emphasis added.)

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. & Prof. Code, § 25601.)

The knowledge of the licensee is not required in a disorderly house case.

"Section 25601 does not provide that the condition of the licensed premises denounced by it must be knowingly created." (*Harris, supra*, at p. 123, quoting *Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 511 [22 Cal.Rptr. 405] (Morell).)

"The word 'permit' implies no affirmative act. It involves no intent. It is mere passivity, abstaining from preventative action." (*Harris, supra*, at p. 123, citing *Dorris v. McKamy* (1919) 40 Cal.App.267, 274 [180 P. 645].)

Furthermore, the offending circumstances need not be the fault of the licensee:

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.

(*Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 296 [4 Cal.Rptr.2d 280], citing *Givens v. Dept. of Alcoholic Bev. Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

Appellant specifically complains that the statement in Findings of Fact paragraph 12, wherein a witness “overheard Everk assert to the officers that there was no shooting” is unsupported. (FF ¶ 12.) It also claims the negative reference to Mr. Everk (highlighted below) in Conclusions of Law paragraph 24 is not supported:

24. The objectionable conditions themselves and the specific notice of objectionable conditions have been addressed above and do not need to be restated here. The Respondent failed to demonstrate concrete actions taken to increase security and monitor the presence of patrons who were dangerous and/or intoxicated. The problems outlined in the Department's letter remained largely unaddressed during the period at issue. **The Department established that Everk himself actively tried to interfere in the shooting investigation by denying that the shooting even occurred when he was interviewed by FPD.** An employee of the Licensed Premises was the assailant in the final incident proven by the Department. There was evidence that over-service contributed to at least some of the incidents dealt with by law enforcement at the Licensed Premises. The Respondent failed to offer significant evidence to show that it took the concerns of the Department seriously and developed policies and practices designed to combat the objectionable conditions outlined. (Findings of Fact, ¶¶ 1-15.)

(CL ¶ 24, emphasis added.) Appellant maintains that but for this unsupported assertion, it would have received more credit for mitigating efforts. We disagree.

In the penalty section of the decision, the ALJ addressed the findings objected to by appellant, but goes on to lay out multiple aggravating factors that influenced the decision:

The one factor in mitigation is the lack of prior discipline. Additional factors in aggravation blunt the impact of this factor. Evidence established that Everk, the Licensee, refused to cooperate in the shooting

investigation by FPD when he told the officers that no shooting had occurred. Though the Respondent claims that Everk wasn't aware of the shooting, there is ample evidence that he was aware a shooting occurred in the parking lot. His own employee yelled at people to get inside. Persons escaping the shooting rushed into the Licensed Premises. Clearly such a major danger and the influx of people fleeing a shooting would have been immediately brought to his attention. Multiple casings were found in the parking lot area. It is inconceivable that this information would not have made its way to Everk, who was inside when the shooting in the lot area occurred. Even if he did not hear the gunshots himself, someone would have told him of the occurrence prior to his conversation with law enforcement. Despite this, he then denied that a shooting happened. It is noted that Everk was aware of the potential negative implications of this shooting on his continued licensure when he made the misrepresentation to FPD.

(Decision at p. 13.) We agree with this assessment.

We also agree that substantial evidence supports a finding that appellant “permitted” the behavior which constitutes a disorderly house or use of the property in a manner contrary to public welfare and morals. As the court in *Morell* said:

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.

(*Morell, supra* at p. 515.) The premises here clearly has a problem with objectionable behavior of a continuing nature, thereby making that behavior something the licensee should reasonably anticipate and take measures to prevent. As 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 v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] (*Laube*).)

We have reviewed the entire record in this matter and find that it amply supports all four counts sustained in the decision with substantial evidence. Appellant operated

the premises as a disorderly house; it created a law enforcement problem; its employee used unlawful force against a patron; and it failed to take reasonable steps to correct objectionable conditions on the licensed premises, constituting a nuisance, within a reasonable time after receipt of notice to make those corrections. As the ALJ points out, rule 144 provides for a penalty up to revocation for a violation of any one of the sections alleged in counts 1, 2, or 4. (Decision at p. 14.) We sustain all four counts.

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:**

EVERK HOSPITALITY GROUP, INC.
LUXS
1144 E CHAMPLAIN DR, STE 108
FRESNO, CA 93720-5027

ON-SALE GENERAL EATING PLACE - LICENSE

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

FRESNO DISTRICT OFFICE

File: 47-536046

Reg: 20090067

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 26, 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 17, 2022, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: August 30, 2022

RECEIVED

AUG 30 2022

Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Everk Hospitality Group, Inc.
DBA: Luxs
1144 E. Champlain Drive, Suite 108
Fresno, California 93720-5027

Respondent

} File: 47-536046
}
} Reg.: 20090067
}
} License Type: 47
}
} Page Count: 274
} Reporters:
} Florence Colby-CSR#12433 (LS)
} Zoanne Williams-CSR#7626 (iDepo)
} Litigation Services and iDepo Reporters
}
}

On-Sale General Eating Place License

PROPOSED DECISION

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Fresno, California on October 20, 2020, and via videoconference on May 19, 2022.

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

Josh Escovedo, Attorney represented Everk Hospitality Group, Inc. (Respondent).

The Department seeks to discipline Respondent's license pursuant to four counts alleged in the Accusation¹ on the grounds that:

- (1) On or about and between July 1, 2018 and November 28, 2019, Respondent-Licensee(s) directly or by and through its agents or employees, permitted or suffered the above designated premises to be used in a manner which did create a law enforcement problem for the law enforcement officials of the Fresno Police Department, in that such officials were required to make numerous calls, investigations, arrests or patrols concerning the conduct and acts occurring in or about said premises, and which thereby created conditions contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and section 24200(a) of the Business and Professions Code.

Without limitation to the forgoing, the Department specifically alleged that the following incidents occurred at or near the Premises, necessitating officers of the

¹ The Department amended the Accusation orally to correct drafting errors and to remove allegations during the October 20, 2020, hearing. Those amendments are noted by handwritten revisions in Exhibit D-1.

Fresno Police Department to respond to calls for service, make arrests, and/or take police reports as follows:

| # | Date | Incident Number | Call Type |
|---|------------|-----------------|------------------------------------|
| 1 | 7/1/2018 | 18-043557 | Battery with Serious Bodily Injury |
| 2 | 10/7/2018 | 18-066751 | Assault on a Police Officer |
| 3 | 10/20/2019 | 19-068686 | Attempted Homicide |
| 4 | 11/28/2019 | 19-76803 | Battery |

- (2) On or about and between July 1, 2018, and November 28, 2019, Respondent-Licensee(s) kept or permitted, in conjunction with the Licensed Premises, a 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 resort to for purposes which are injurious to the public safety, health, convenience, or morals, in violation of Business and Professions Code section 25601.

Without limitation to the forgoing, the Department specifically alleged that the following incidents occurred at or near the Premises:

| # | Date | Incident Number | Call Type |
|---|------------|-----------------|------------------------------------|
| 1 | 7/1/2018 | 18-043557 | Battery with Serious Bodily Injury |
| 2 | 10/7/2018 | 18-066751 | Assault on a Police Officer |
| 3 | 10/20/2019 | 19-068686 | Attempted Homicide |
| 4 | 11/28/2019 | 19-76803 | Battery |

- (3) On or about November 28, 2019, Respondent-Licensee's agent or employee, Kevin Jeanniton, willfully and unlawfully used force or violence against Arshya Shahriari, in or about the Licensed Premises, in violation of Penal Code section 242, and
- (4) On or about and between July 1, 2018, and November 28, 2019, Respondent-Licensee(s) failed to take reasonable steps to correct objectionable conditions on the Licensed Premises, constituting a nuisance, within a reasonable time after receipt of notice to make those corrections from the Department, to wit: Department letter dated January 26, 2018, in violation of Business and Professions Code section 24200(e).

In each of the above four counts alleged in the Accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b) of the Business and Professions Code. The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b) 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 hearings held in this matter on October 20, 2020, and May 19, 2022. The matter was argued and submitted for decision.

FINDINGS OF FACT

1. The Department filed the Accusation on May 5, 2020. The Accusation was amended by interlineation on October 20, 2020. (Exhibit D-1)
2. There is no record of prior Department discipline against the Respondent's license since its issuance on August 9, 2013, to Lewis Everk, Jr. (Everk) and two partners. (Exhibit D-3). Everk and the partners incorporated the business and a fiduciary transfer of the license to this corporation occurred in September 2013. In August 2016, after a corporate stock transfer, Everk became the sole corporate stockholder and officer of the corporation. This corporation operates as Everk Hospitality Group, Inc. (Respondent).
3. The Respondent holds a Type 47 On-Sale General Eating Place License for a business known as Luxs at 1144 E. Champlain Drive, Suite 108 in Fresno, California (Licensed Premises)². The Licensed Premises is in a shopping center. During the period at issue, there were multiple operating businesses, including at least two other establishments licensed by the Department, in the shopping center that contained the Licensed Premises. The shopping center had multiple parking lots that were used by patrons of the Licensed Premises and the other businesses. The interior of the Licensed Premises had a kitchen, seating for patrons who are served food, a fixed bar, and an area for musical entertainment and dancing. Outside of the main entrance to the Licensed Premises is a small plaza with an area for patrons to congregate before entering. There is a fountain on the plaza, adjacent to the entrance, with a short retaining wall that patrons of the Licensed Premises often used for sitting.
4. In January 2018, the Department received a complaint from the Fresno Police Department (FPD) that there was a pattern of disproportionate calls for service to the Licensed Premises during the months leading up to the complaint. These calls were reported to the Department as a drain on FPD resources and included incidents involving overly intoxicated persons, disturbances in the Licensed Premises and the adjacent parking lot, fights, and weapon use or possession in and around the Licensed Premises. The reported incidents involved allegations against both patrons and employees of the Licensed Premises.
5. On January 26, 2018, the Department sent a certified letter to the Respondent at its reported business address with a summary of the concerns expressed by FPD. The Department did not provide the underlying reports supporting the assertions, but it did list, with specificity, the types of criminal activity that were leading to the calls for service. The Department also included the statutory language of Business and Professions

² At the May 19, 2022, hearing in this matter, it was disclosed that the license was in surrendered status as of that date.

Code sections 24200, 25601 and 25602 that obligated the Licensed Premises to address the objectionable conditions. The Department's letter ordered the Respondent to come into compliance within 20 days of the January 26, 2018, letter. Department Agent L. Kohman (Kohman) also called Everk on January 26, 2018, to explain the Department's concerns and arrange for hand delivery of the letter. Everk requested that Kohman deliver the letter to his manager, Blake Foster (Foster). Kohman hand delivered the letter to Foster on January 26, 2018, as requested by Everk. The Respondent acknowledged receipt of the hand delivered letter, even though the certified copy mailed by the Department was returned to the Department unclaimed. (Exhibit D-2)

6. The January 26, 2018, letter further informed the Respondent that the Department may seek disciplinary action against the license for failure to correct the described nuisance behavior related to the Licensed Premises. The letter was sent on Department letterhead from the Fresno District Office with contact information, and it was signed by Supervising Department Agent J. Montgomery. (Exhibit D-2) Despite being provided contact information during Kohman's call and in the January 26, 2018 letter, the Respondent did not contact the Department regarding the concerns raised, or for further information regarding the allegations.

7. Despite the specific objectionable conditions raised by the Department in the January 26, 2018 letter, FPD continued to be called to incidents of a similar nature that occurred in, or had a direct nexus to operation of the Licensed Premises. FPD event records between July 1, 2018, and November 28, 2019, showed at least 60 responses by FPD to the address of the Licensed Premises for a variety of service calls that required the use of FPD resources, and in some instances, emergency medical personnel³. (Exhibit D-11) The first referenced response was on July 3, 2018, and the last referenced response was on November 28, 2019. The location history did not establish the details or validity of the calls, or the relationship of the service calls to the actions of the Licensed Premises. This document established only that the FPD had responded to the area of the Licensed Premises on a particular date and a short description of the alleged incident or purpose of the response. (Exhibit D-11)

8. The Department also presented evidence of FPD incident events from four other Department licensed businesses either in the same shopping center, or in the immediate area surrounding the Licensed Premises⁴. Over the same period, Namikaze had a total of four calls for service. (Exhibit D-7) The business operating as Five had a total of 13 calls for service. (Exhibit D-8)

³ While Exhibit D-11 notes over 100 incidents associated with 1144 E. Champlain Drive during the time period at issue, only incidents with a specific reference to Luxs, that required investigative resources, are included in the tally of 60 or more incidents referenced above. Incident notations that specifically referenced a different business in the shopping center, or did not include a reference to a particular business were excluded. In addition, testimony was received that some of the incident notations were informational and did not require a law enforcement response. These incidents were excluded from the tally as well.

⁴ Unlike Exhibit D-11, neither party explored the underlying nature of the incidents reported in Exhibits D-7 through D-10. The total number of incidents was received in raw form.

Sequoia Brewing had a total of 16 calls for service. (Exhibit D-9) Campagnia Restaurant had a total of 31 calls for service. (Exhibit D-10)

9. During the hearing in this matter, the Department presented evidence of 4 incidents between July 1, 2018, and November 28, 2019, that were alleged to have occurred at or near the Licensed Premises and to have some nexus to the operation of the Licensed Premises. Each of these incidents is further addressed below in the order they are alleged in Counts 1 and 2 of the Accusation.

10. **Incident 1 (July 1, 2018)**- FPD officers responded to the residence of reporting person Starla Bartlett (Bartlett). FPD Officer R. Wells (Wells) observed that Bartlett had several injuries that required medical treatment. Emergency medical personnel were in the process of treating her at the scene when Wells arrived. Wells observed that Bartlett was bleeding profusely from a deep laceration on the side of her head. She had a bruised eye and a cut to her lip. Wells also had cuts on her legs and blood on her clothing. Bartlett reported to Wells that the fight started between her friend and two other persons and eventually spilled out to the parking lot outside of the Licensed Premises. While outside, four individuals attacked Bartlett by striking her with their fists and hitting her over the head with bottles. Bartlett reported that she did not know why these individuals attacked her. Bartlett reported that she may have lost consciousness because she had no memory between being hit by a bottle and coming to at her friend's residence. Wells spoke with security guard Stephon Riley (Riley) at Luxs who reported seeing a fight inside of the Licensed Premises that resulted in the individuals being ejected from the Licensed Premises. Riley later saw a female laying down on the ground bleeding. An FPD officer and CSI technician dispatched to the Licensed Premises location both found blood evidence and pieces of jewelry in the lot consistent with the altercation described. (Exhibits D-3 and D-4)

11. **Incident 2 (October 7, 2018)**- On October 7, 2018, at approximately 1:15 a.m., FPD Officers A. Lopez (Lopez) and A. Kinney (Kinney) were working on contract for the Licensed Premises as additional security. They observed an obviously intoxicated male, later identified as Felipe Rodriguez (Rodriguez), exit the Licensed Premises and begin a verbal altercation with a female in the parking lot area. Two men were restraining Rodriguez to prevent him from physically attacking the female as the officers walked up. As the officers approached, they could see that Rodriguez was unsteady and slurring his speech. The two individuals restraining Rodriguez identified themselves as his friend and asked the officers if it was allowable to remove him from the area and take him home. The officers agreed to this. Lopez went with the men and Kinney accompanied the female to her car in the other direction. Kinney then heard Lopez request an additional FPD unit for support because Rodriguez was getting physically aggressive. Kinney walked over to where Lopez was. Kinney saw FPD Officers Chandler (Chandler), and Hutchinson (Hutchinson) arrive as he was walking up to assist with Rodriguez. Rodriguez then broke free from his friends and began threatening to beat the officers' "asses" and inviting them to shoot him. Rodriguez was then told that he would be taken into custody for drunk and disorderly conduct. Rodriguez refused to comply. Hutchinson, Chandler and Kinney had to restrain Rodriguez while he was taken into custody. Prior to the officers successfully restraining Rodriguez, he repeatedly punched at and struck all three officers. Hutchinson injured his knee on the ground when he was knocked down during the altercation. Kinney was struck in the eye area

and Chandler injured his hand while trying to restrain Rodriguez. In addition to the officers involved with subduing Rodriguez, an FPD sergeant and crime scene technician were involved in the investigation. A report was prepared regarding potential violations of Penal Code sections 69 and 647(f). (Exhibit D-5)

12. Incident 3 (October 20, 2019)- At approximately 12:18 a.m. FPD dispatch received a call of multiple shots being fired in the area of the Licensed Premises. The report stated that people were running and jumping over walls to get away. (Exhibit D-11) Witness Stacey Voss (Voss) testified during the hearing in this matter. Voss was waiting to enter the Licensed Premises just after midnight on October 20, 2019. While waiting to enter, Voss saw a male and female physically fighting adjacent to the host stand at the entrance. Voss observed as security guards from the Licensed Premises began to break up the fight. Voss watched as the two people who were fighting and two of their companions walked away from the host stand area. They then went towards an alley adjacent to one of the shopping center's parking lots. As the departing group entered the alley area, Voss could see flashes of gunshots and she heard shots being fired. The flash and the gunshot sounds came from the area that the fighting group went to immediately after leaving the host stand area. Voss estimated the flashes came from 20-30 feet away. As the shots began to ring out, Voss heard one of the Licensed Premises' security guards yelling for people to "get the fuck inside!" Voss believed she heard around 5 shots. Voss followed his instruction and immediately went into the club. She remained inside until approximately 1:30 a.m. when she saw FPD officers who had previously arrived to investigate the incident. Voss approached them and told one of the FPD officers what she had observed. Voss was familiar with the Licensed Premises because she previously worked there. Voss was familiar with Everk and saw him speaking with FPD officers. Voss overheard Everk assert to the officers that there was no shooting. During the crime scene investigation, FPD found approximately a dozen firearm casings from expended bullets in the parking lot area of the shopping center containing the Licensed Premises. FPD later determined that an individual named Denzel Dixon was shot during the incident after he arrived at a nearby hospital with a gunshot wound. The dispute that led to the shooting arose from a quarrel between two opposing Fresno gangs. One of the gangs had been in the Licensed Premises receiving service at a VIP table. A rival gang had been turned away from the Licensed Premises by security. The dispute that led to the shooting arose from the rival gang taunting the other about being denied entry. A report was prepared regarding potential violations of Penal Code section 245(a)(2). Multiple FPD officers and crime scene investigators, including personnel who had to be pulled from other districts, were utilized to investigate the circumstances of the shooting. (Exhibits D-3, D-6 and D-11)

13. On October 22, 2019, the City of Fresno (City) sent the Licensed Premises a letter that it was in violation of multiple public nuisance sections in the Fresno City Municipal Code because the Licensed Premises' operation had contributed to the dynamics that led to the October 20, 2019 shooting incident. (Exhibit D-6) In its letter, the City also referenced 25 additional police calls for service in the last year that involved "loud music, alcohol related incidents and physical disturbances generated from [the Licensed Premises]" as part of its determination that the Licensed Premises was chronically violating the City's public nuisance ordinances. The City included a printout of calls for service logs in the letter that was sent to the Respondent. The City informed the Licensed Premises that it was assigning FPD Detective D. Kim (Kim) as a

dedicated Problem Oriented Policing (POP) detective to develop a plan with the Licensed Premises to prevent future nuisance violations. (Exhibit D-6)

14. Incident 4 (November 28, 2019)- At approximately 1:00 a.m. on November 28, 2019, FPD officers were dispatched to a reported assault at the Licensed Premises. Upon arriving, FPD officers contacted Arshya Shahriari (Shahriari) just outside of the Licensed Premises. Shahriari was wet and he had a gash on his shin. Shahriari testified at the hearing in this matter. Shahriari was a patron at the Licensed Premises that evening. Shahriari exited the Licensed Premises just prior to 1:00 a.m. on November 28, 2019, and sat outside on the retaining wall above the fountain while waiting for some friends. This fountain is adjacent to the Licensed Premises entrance. While waiting, Shahriari watched a confrontation that occurred between an individual and two of the security guards from the Licensed Premises. The confrontation became physical and Shahriari was concerned that the security guards were using more force than needed to deal with the situation. Shahriari stood up and began to use his camera to film their actions. Shahriari remained in the same location and did not walk towards the confrontation. As he was filming, Shahriari was approached by a Licensed Premises security guard who was later identified as Kevin Jeanniton (Jeanniton). Jeanniton asked Shahriari what he was doing and Shahriari responded that he was recording. Jeanniton demanded that Shahriari stop recording. Shahriari verbally refused by saying "I'll do what I fucking want to." While he continued to film, Shahriari suddenly felt a punch to the center of his chest that propelled him over the retaining wall and into the fountain below. Shahriari suffered gashes to his shin and the back of his head as a result of the fall. He also had difficulty breathing. As a result, Shahriari went to the hospital for treatment. FPD officers also spoke with Jeanniton at the scene regarding the incident. Jeanniton admitted that he tried to get Shahriari to stop filming. Jeanniton told officers that he only pushed Shahriari to prevent him from advancing forward. Jeanniton did not testify at the hearing in this matter. Jeanniton was approximately 6 foot, three inches tall and 250 pounds on November 28, 2019. Shahriari was approximately five feet, seven inches tall and 170 pounds at the time of the incident. FPD officers deferred making a charging decision on November 28, 2019, until they had an opportunity to review security footage. They were unable to find additional witnesses to the incident between Jeanniton and Shahriari because people were focused on the first altercation.

15. During testimony regarding the four incidents referenced above, FPD officers referred to the Licensed Premises as a location that had a disproportionately large response by FPD during the periods at issue. Multiple FPD officers testified that the Licensed Premises generated calls for service that were out of proportion to other on-sale licensed businesses in the shopping center and general area surrounding the Licensed Premises.

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. 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.

3. California 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.

4. California Penal Code section 69 provides in relevant part:

(a) Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment.

5. California 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.

6. California Penal Code Section 148(a)(1) provides in relevant part:

"Every person who willfully resists, delays, or obstructs any ...peace officer...in the discharge or attempt to discharge any duty of his or her office or employment...shall be punished by a fine...or imprisonment..."

7. California Penal Code Section 415 provides in relevant part:

"Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars (\$400), or both such imprisonment and fine:

(1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight."

8. California Penal Code Section 647(f) provides in relevant part:

“Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: (f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.”

9. 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.”

10. Business and Professions Code section 24200(e) provides that liability is established from a “[f]ailure to take reasonable steps to correct objectionable conditions on the licensed premises, including the immediately adjacent area that is owned, leased, or rented by the licensee, that constitute a nuisance, within a reasonable time after receipt of notice to make those corrections from the department, under Section 373a of the Penal Code. For the purpose of this subdivision only, “property or premises” as used in Section 373a of the Penal Code includes the area immediately adjacent to the licensed premises that is owned, leased, or rented by the licensee.”

11. 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.

12. 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.

13. 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.” (See also, *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106; frequent arrests of intoxicated patrons over a six-month period sufficient to sustain a disorderly house accusation.)

14. In Count 1, the Department pled sub-counts 1-4 to establish liability under Section 24200(a). Cause for suspension or revocation of Respondents’ license was established for the violation alleged in this count and the 4 sub-counts. The Department’s evidence credibly demonstrated that from July 1, 2018, through November 28, 2019, there were 4 separate incidents of objectionable behavior stemming from the operation of the Licensed Premises. The Department established that on July 1, 2018 (sub count 1), Bartlett was unlawfully battered in the parking lot of the Licensed Premises by other patrons. This battery caused a severe laceration to the side of her head in violation of Penal Code section 243(d). Contrary to the Respondent’s assertion, there was sufficient nexus to the Licensed Premises established. The victim told officers that she was assaulted in the lot after the fight started inside of the Licensed Premises. FPD found blood and jewelry that appeared to correspond to the fight occurring where the victim said it happened. Further, one of the Licensed Premises’ security guards reported to officers that he saw a bleeding woman on the ground in the parking lot consistent with the victim’s report. (Findings of Fact, ¶¶ 1-15)

15. The Department established that on October 7, 2018 (sub count 2) three officers were assaulted by an intoxicated patron in the parking lot of the Licensed Premises. The patron became extremely intoxicated while in the Licensed Premises and was in the process of creating a public disturbance when the officers were compelled to take him into custody for violations of Penal Code sections 647(f) and 415. The patron then physically assaulted the officers as they took him into custody. All three officers were struck by Rodriguez and suffered injuries as he resisted arrest in violation of Penal Code sections 69 and 148. (Findings of Fact, ¶¶ 1-15)

16. The Department established that a shooting occurred in the parking lot area of the Licensed Premises on October 20, 2019 (sub count 3). The Department did not fully establish that an attempted homicide occurred pursuant to Penal Code section 664/187 as alleged, but the evidence presented did establish that the lesser related offense of a felonious assault with a firearm pursuant to Penal Code section 245(a)(2) *did* occur. The Department also established a sufficient nexus between this shooting and the operation of the Licensed Premises. A direct witness to the shooting incident established a connection between the shooting and patrons of the Licensed Premises. This witness also established that the shooting occurred in the parking lot area used by patrons. Further, officers recovered spent shell casings in the parking lot area. The broader FPD investigation established that the shooting occurred between rival gang members, including one group that was in the Licensed Premises just prior to the shooting. (Findings of Fact, ¶¶ 1-15)

17. The Department established that on November 28, 2019, an employee of the Licensed Premises battered a patron of the Licensed Premises, without lawful justification, in violation of section 242, as alleged in sub count 4 of Counts 1 and 2 and as alleged in Count 3. Shahriani’s

testimony credibly established that the battery was unjustified because he was not a physical threat to Jeanniton or any other person. Shahriani was merely filming when Jeanniton punched him in the chest, causing him injury. Jeanniton did not testify to offer an alternative version of what occurred, in rebuttal. (Findings of Fact, ¶¶ 1-15)

18. Beyond the 4 specific incidents, there were additional documented contacts with law enforcement stemming from incidents consistent with the Licensed Premises operating as a disorderly house. This evidence was reflected in event logs that were introduced by the Department (Exhibit D-11) and the testimony of multiple officers. FPD officers testified to the need to report to and around the Licensed Premises, during its evening and early morning hours of operation, because of incidents that were impacting the public welfare stemming from intoxicated and unruly patrons of the Licensed Premises engaging in assaultive or otherwise unlawful behavior. In the final documented incident on November 28, 2019, the assaultive behavior was committed by one of the Respondent's own security guards when he punched a patron, without justification, to prevent him from documenting what appeared to be separate assaultive behavior by security guards towards another patron. (Findings of Fact, ¶¶ 1-15)

19. FPD responses to these four documented incidents required a minimum of two officers, on scene. The shooting incident required a much larger allocation of law enforcement resources. These incidents and the police responses in the event logs were an inherent negative impact on law enforcement resources for the City and often required the movement of FPD resources from other districts. (Findings of Fact, ¶¶ 1-15)

20. Returning to the incidents documented by the Department, there was evidence of patrons being overserved alcohol, in whole or in part, inside of the Licensed Premises. The intoxication of these patrons resulted in fights or unwanted and unsafe interactions with other people. The fights often resulted in injuries to involved parties. The incidents alleged resulted in significant police involvement because of the criminal or injurious nature of the actions of these individuals. Intoxication occurring at the Licensed Premises played a part in at least some of the incidents. In the incidents alleged as sub counts, paramedic or medical resources were also needed because of injuries to the involved parties. The incidents occurred in the direct presence of employees of the Licensed Premises. Given this, the Respondent was repeatedly placed on notice of problems at the Licensed Premises, even if the Department did not provide the Respondent with specific, underlying reports in its January 26, 2018, letter. It is noted that the City of Fresno also sent the Respondent a similar letter on October 22, 2019, after the October 20, 2019, shooting incident. This letter reinforced that objectionable conditions were continuing. Despite this additional warning, further unlawful conduct occurred, this time committed by an employee of the Licensed Premises against a patron. (Findings of Fact, ¶¶ 1-15)

21. Though the granular reports were not included, the Department's letter outlining its concerns described the categories of violations occurring and the statutes being violated. The Respondent was clearly on notice from the January 26, 2018, letter regarding the pattern of objectionable behavior and its duty to do something. Despite these communicated concerns, the pattern of objectionable conditions at the Licensed Premises continued, unabated. These objectionable conditions were contrary to public welfare and morals and were a significant law enforcement

problem. No evidence was offered suggesting any changes to the way the Respondent conducted its business in response to the Department's letter, or the later letter by the City of Fresno. Employees of the Licensed Premises permitted assaultive behavior by patrons and employees in or around the Licensed Premises during the period at issue. These individuals unlawfully fought with, shot at, or harassed other persons, or engaged in other unlawful behavior like public intoxication. As such, the Respondent constructively permitted the operation of the Licensed Premises as a disorderly house as alleged Count 2. Inherent in the failure to address the concerns outlined in the Department's letter was a violation of Business and Professions Code section 24200(e) as alleged in Count 4. (Findings of Fact, ¶¶ 1-15)

22. Cause for suspension or revocation of Respondents' license was established pursuant to Count 2, which alleged a violation of Business and Professions Code section 25601 in that, from July 1, 2018 through November 28, 2019, there were 4 separate incidents of objectionable behavior stemming from the operation of the Licensed Premises that established that the Respondent kept or permitted, in conjunction with the Licensed Premises, a 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 resort to for purposes which are injurious to the public safety, health, convenience, or morals. The Department alleged the identical four sub counts that were discussed above. The analysis of those sub counts and the broader evidence of FPD responses during the same time period is equally applicable here.

23. As noted above, the Respondent failed to take reasonable steps to correct objectionable conditions at the Licensed Premises, constituting a nuisance and an impact on law enforcement resources, within a reasonable time after receipt of the Department's letter dated January 26, 2018. Count 2, a disorderly house allegation pursuant to Business and Professions Code section 25601, is intertwined with the allegations in Counts 1 and 4. The conduct demonstrating a failure to take reasonable steps to correct objectionable conditions is, in part, the continuing pattern of objectionable behavior occurring in and around the Licensed Premises. The Department has shown that the Respondent failed to take reasonable steps to correct conditions that contributed to the multiple incidents that occurred between July 1, 2018, and November 28, 2019. These incidents also support that the Respondent kept or permitted a disorderly house. The evidence offered by the Respondent has failed to rebut this proof. (Findings of Fact, ¶¶ 1-15)

24. The objectionable conditions themselves and the specific notice of objectionable conditions have been addressed above and do not need to be restated here. The Respondent failed to demonstrate concrete actions taken to increase security and monitor the presence of patrons who were dangerous and/or intoxicated. The problems outlined in the Department's letter remained largely unaddressed during the period at issue. The Department established that Everk himself actively tried to interfere in the shooting investigation by denying that the shooting even occurred when he was interviewed by FPD. An employee of the Licensed Premises was the assailant in the final incident proven by the Department. There was evidence that over-service contributed to at least some of the incidents dealt with by law enforcement at the Licensed Premises. The Respondent failed to offer significant evidence to show that it took the concerns of the Department seriously and developed policies and practices designed to combat the objectionable conditions outlined. (Findings of Fact, ¶¶ 1-15)

25. Counts 1-4, as alleged in the Accusation, have been established by the Department.

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

PENALTY

The Department is seeking a revocation in this matter. The Respondent argued that the Department failed to meet its burden of proof as to any of the counts and it sought dismissal. The Respondent also argued that the Respondent's lack of prior discipline would warrant mitigation if any count were sustained.

Counts 1, 2 and 4 are essentially alternative statements of the same conduct that are punishable under different provisions of the Business and Professions Code. Count 3 is a misdemeanor violation of the Penal Code that does not involve moral turpitude. It was also alleged as a sub count supporting the allegations in Counts 1 and 2. Each of these sections identify a 30-day suspension when mitigation is warranted and longer periods of suspension through outright revocation when aggravating circumstances outweigh mitigation.

In aggravation is the pervasiveness and seriousness of the violations, even after repeated warnings were issued by the Department and City of Fresno that the Licensed Premises had become a disorderly house and a public nuisance.

The one factor in mitigation is the lack of prior discipline. Additional factors in aggravation blunt the impact of this factor. Evidence established that Everk, the Licensee, refused to cooperate in the shooting investigation by FPD when he told the officers that no shooting had occurred. Though the Respondent claims that Everk wasn't aware of the shooting, there is ample evidence that he was aware a shooting occurred in the parking lot. His own employee yelled at people to get inside. Persons escaping the shooting rushed into the Licensed Premises. Clearly such a major danger and the influx of people fleeing a shooting would have been immediately brought to his attention. Multiple casings were found in the parking lot area. It is inconceivable that this information would not have made its way to Everk, who was inside when the shooting in the lot area occurred. Even if he did not hear the gunshots himself, someone would have told him of the occurrence prior to his conversation with law enforcement. Despite this, he then denied that a shooting happened. It is noted that Everk was aware of the potential negative implications of this shooting on his continued licensure when he made the misrepresentation to FPD.

Further, there was little evidence of any effort by the Respondent to address the concerns raised by the Department or to train employees to combat the concerns raised. As noted, the final incident involved an employee of the Respondent. The battery victim appeared to observe additional security guards engaging in assaultive behavior, which is why he started filming.

The significant factors in aggravation far outweigh the sole factor in mitigation. Allowing the Respondent to exercise privileges with a type 47 on-sale eating place license would be


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inappropriate. As previously noted, Rule 144 provides for a penalty up to revocation for violations of the sections alleged in Counts 1, 2 and 4. The penalty recommended herein complies with rule 144.

ORDER

Counts 1 through 4 are sustained. The discipline in these counts is to run concurrently. The Respondents' on-sale general eating place license is revoked.

Dated: June 23, 2022


Alberto Roldan
Administrative Law Judge

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