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

AB-9955
File: 48-591560; Reg: 21091024

RODEO CLOWN, INC.,
dba Gooney's Bar & Grill
6 North Main Street
San Andreas, CA 95249,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: February 17, 2023
Telephonic

ISSUED FEBRUARY 22, 2023

Appearances: *Appellant:* Kenneth Foley, as counsel for Rodeo Clown, Inc.,

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

OPINION

Rodeo Clown, Inc., doing business as Gooney's Bar & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)[1] suspending its license for 15 days (with all 15 days stayed for a period of one year, provided no further cause for discipline arises during that time), because it kept or permitted a disorderly house, and violated Executive Orders N-33-20 and N-60-20 by selling food or drink for on-site consumption at the licensed premises.

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[1] The decision of the Department, dated September 6, 2022, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on April 26, 2018. There is no record of prior departmental discipline against the license.

On March 8, 2021, the Department instituted a two-count accusation against appellant charging:

Count 1: that between December 12, 2020 and December 16, 2020, appellant 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; and

Count 2: that between December 12, 2020 and December 16, 2020, appellant refused or willfully neglected to obey California Governor Gavin Newsom's Executive Orders N-33-20 and N-60-20, to wit: by selling food or drink for on-site consumption at the licensed premises, in violation of Government Code section 8665.

At the administrative hearing held on June 15, 2022, documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Eric Chieng and Lori Kohman. Mark Bolger, sole owner of the licensed premises and corporate officer of Rodeo Clown, Inc., testified on appellant's behalf.

Testimony established that on March 4, 2020, Governor Gavin Newsom (Newson) declared a state of emergency in the State of California due to COVID-19. (Exh. D-1, attach. 1.) On March 19, 2020, Executive Order N-33-20 directed all persons living in California to follow the COVID-19 related directives of the California Department of Public Health (CDPH), the State Public Health Officer, and local health authorities in order to reduce the spread of the virus, and to stay at home except for

essential jobs or to shop for essential needs. (*Id.*, attach. 2.) Executive Order N-63-20 was subsequently issued on May 7, 2020 (*Id.*, attach. 4), extending the COVID-19 related directives and the authority of the CDPH to issue further public health orders considering the impact of the spread of COVID-19 in the State of California. (Findings of Fact (FF) ¶¶ 4-5.)

On August 28, 2020, the CDPH issued the Blueprint for a Safer Economy (Blueprint) as guidance for the operation of businesses. (Exh. D-3, attach 6.) The Blueprint was a plan to limit the spread of COVID-19 by establishing a county-level tier system for whether businesses such as the licensed premises could operate. (FF ¶ 5.) On December 3, 2020, in response to increased spread of COVID-19, Newsom issued a regional stay-at-home order that mandated restrictions based on the state of intensive care unit (ICU) capacity in hospitals in a particular region. (*Id.*, attach 8.)

By December 2020, Calaveras County was experiencing an 11.4 percent positivity rate for infection with COVID-19, and hospital ICU capacity in the San Joaquin Valley Region that included Calaveras County had fallen below 15 percent. The county became subject to the restrictions of the regional stay-at-home order that became effective on December 6, 2020. This order remained applicable for a three-week period from the December 6, 2020 date. (Exh. D-2, attach. 2; Exh. D-3, attach. 10-12.) Because of the below-15 percent ICU capacity designation, the State Public Health Officer directive mandated that the Licensed Premises cease the indoor service of alcoholic beverages and food for consumption by patrons in the licensed premises during the period that Calaveras County remained in this designation, including the period from December 12, through December 16, 2020. (Exh. D-2, attach. 2.; FF ¶¶ 6-7.)

On December 12, 2020, the licensed premises was visited by Department Agents Chieng and Kurian for a COVID enforcement compliance check and they found that the licensed premises was operating indoors and serving patrons alcoholic beverages and food for on-site consumption in violation of CDPH orders. (FF ¶ 11.) Chieng issued a verbal warning to the manager that the licensed premises was not supposed to be serving alcoholic beverages or food for on-site consumption because of the Public Health directive. The manager was told that they were only allowed to fulfill to-go orders. (FF ¶ 12.)

On December 16, 2020, Agent Kohman visited the premises to check on compliance and determined that it was still open for on-site business. She notified the bartender of this violation and spoke to the owner, Mark Bolger, by phone. (FF ¶ 13.)

During his testimony, Bolger testified that he did not intentionally fail to comply with the order. Although he was aware of the verbal warning that was given on December 12, 2020, Bolger testified that he had received information that he considered contradictory from local health and law enforcement officials, and was told by these officials that they would not be enforcing the orders against local businesses. (FF ¶ 14.) . Bolger testified that based on these statements from local officials — and the fact that he had received no written notification that he was required to close — he believed he was permitted to continue on-site business. On that basis, he remained open.

The administrative law judge (ALJ) issued a proposed decision on July 28, 2022, sustaining both counts of the accusation and recommending that the license be suspended for 15 days for each count (with the suspensions to run concurrently), and execution of the penalty stayed for a period of one year, provided no further cause for

discipline arises during that time. The Department adopted the proposed decision in its entirety on September 1, 2022 and a certificate of decision was issued five days later.

Appellant then filed a timely appeal raising a single issue:

> Can a licensee be disciplined for a mistake of fact as to a regulation which the licensee reasonably believed to be true (that the licensee did not need to close) and which the licensee had never been notified in writing that he was in violation of by the State Licensing Department?

(AOB at p. 7.)

DISCUSSION

In its Opening Brief, appellant further maintains that the owner: "had a reasonable belief he did not have to close and the Findings that he violated Counts I and II are based upon insufficient evidence, a denial of due process, an error of law and an abuse of discretion." (AOB at p. 8.) 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)*.)

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.)

Appellant frames the issue as a "mistake of fact," which has been defined as: "an honest and reasonable belief in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act … ." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425 [51 Cal.Rptr.3d 263, 270] disapproved of on other grounds by *People v. Covarrubias* (2016) 1 Cal.5th 838 [207 Cal.Rptr.3d 228, 378 P.3d 615].) For example, if an appellant reasonably believed illegal slot machines were actually video games, the mistake of fact defense might apply. However, if an appellant claimed he did not know that slot machines were illegal, this would be a mistake of law, not fact. (See *People v. Meneses* (2008) 165 Cal.App.4th 1648, 1662 [82 Cal.Rptr.3d 100, 112] ["A mistake of law, in its strict sense, means ignorance that the penal law (of which one stands accused) prohibits one's conduct … ."].)

One of the oldest precepts of law, descended to the United States from Roman law by way of the European legal tradition, is *ignorantia legis neminem excusat*, or "ignorance of the law excuses no one."[2] (See, e.g., *Shevlin-Carpenter Co. v. Minn*. (1910) 218 U.S. 57, 68 [30 S.Ct. 663] [rejecting loggers' argument that they were

[2] An alternative phrasing, also employed by the courts, is *ignorantia juris non excusat*, or "ignorance of the law does not excuse."

ignorant of law requiring permit for removal of lumber from state land]; *Central of Ga. Ry. Co. v. Wright* (1907) 207 U.S. 127, 136 [28 S.Ct. 47] [rejecting railway shareholders' argument that they were ignorant of shares' taxability].) This general rule has, in limited circumstances, been rejected. In *Cheek v. United States*, for example, the U.S. Supreme Court observed that an exception was appropriate where the legislature expressly made willfulness an element of the crime:

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. [Citations.] Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes. [Citations.]
>
> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

(*Cheek v. United States* (1991) 498 U.S. 192, 199-200 [111 S.Ct. 604].) The Supreme Court also explained:

> The rule that "ignorance of the law will not excuse" [citation] is deep in our law, as is the principle that of all the powers of local government, the police power is "one of the least limitable." [Citation.] On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.

(*Lambert v. Cal.* (1957) 355 U.S. 225, 231 [78 S.Ct. 240] (*Lambert*) [addressing defendant's failure to register as a felon with the chief of police, as required by municipal code].)

In the context of default judgments resulting from a mistake of law, the California Supreme Court observed:

> The issue of which mistakes of law constitute excusable neglect presents a fact question; the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law. [Citation.] Although an honest mistake of law is a valid ground for relief where a problem is complex and debatable, ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief.

(*Ontario v. Superior Ct. of San Bernardino County* (1970) 2 Cal.3d 335, 346 [85 Cal.Rptr. 149]; see also *A&S Air Conditioning v. John J. Moore Co.* (1960) 184 Cal.App.2d 617, 620 [7 Cal.Rptr. 592].)

Under controlling legal authority, licensees have an affirmative duty to maintain and operate their premises in accordance with law. (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779] ["A licensee has a general, affirmative duty to maintain a lawful establishment."]; *see also Ballesteros v. Alcoholic Bev. Control Appeals Bd.* (1965) 234 Cal.App.2d 694, 700 [44 Cal.Rptr. 633] ["[A]n on-sale licensee has an affirmative duty to maintain a properly operated premises"]; *Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405] ["The holder of a liquor license has the affirmative duty to make sure that the licensed premises are not used in violation of the law"]; *Munro v. Alcoholic Bev. Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527] ["The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law"]; *Mack v. Dept.*

of Alcoholic Bev. Control (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629] ["The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license"].)

Appellant argues:

> In this case, the licensee learns through an employee that alleged agents from the Department said they should be closed. However, none of the other licensees in the area are closed and the Appellant had never received any notification in writing that they should be closed. So, the Appellant goes to two employees of the Calaveras Health Department (a state related agency) and the Calaveras County Sheriff's Department (the law enforcement agency for the County of Calaveras) and the licensee is told they don't have to close and nobody else is closing. Unfortunately, it looks like only the Appellant is charged with an accusation and there is no evidence any other licensee in the San Andreas area being charged or having to close. So, Appellant stays open and the alleged agents reappear on December 16th, 2020 and speak to the Appellant's agent, Mark Bolger, who still has received nothing in writing from the Department that he should be closed. Additionally, except for the alleged violation of the Governor's Executive Orders about being closed there isn't any other basis for a violation of the act. If there is no strict liability and Appellant reasonably relies on the local Sheriff and Health Department, the Appellant has no knowledge that being open is a violation of law. The evidence is insufficient to prove Appellant knew it should be closed. . . .
>
> The failure of the Department to advise Appellant in writing that remaining open is a violation of law is a denial of due process.

(AOB at pp. 8-9.)

Here, appellant's employee was verbally informed, on December 12, 2020, that its establishment was violating the Public Health directive and the Governor's Executive Order. Nevertheless, the premises remained open for in-person service based on appellant's alleged inquiries with local officials in the Health Department and Sheriff's Office and the owner's reliance on their statements regarding non-enforcement. The ALJ explains the problem with this defense in the decision:

> The Respondent has testified that he communicated with various local health and law enforcement officials on Monday, December 14, 2020, and

> that he was told that they would not be enforcing the CDPH directives. No local officials were called in this matter and no affidavits were submitted by the Respondent to confirm the accuracy of Bolger's testimony. While the accuracy of the Respondent's testimony is questionable, even if accurate, it would provide no defense to the Accusation. No evidence was offered to establish that the orders were unenforceable or inapplicable. The Department's evidence has established that the orders were applicable state law and in place during the dates at issue. Evidence that a local jurisdiction may have been unwilling to use its resources to enforce the orders does not make them unenforceable by the Department.

(Decision at p. 8, ¶ 11.)

Appellant cannot claim he failed to receive notice when — according to his own testimony — two days after his employee was warned, he consulted with local officials on whether or not he was required to comply with the orders. This fact supports receipt of actual notice. As the ALJ found:

> 10. [. . .] On December 12, 2020 Department agents reported to the Respondent's employee that the Licensed Premises was not complying with the prohibition of indoor service of food and drinks for on-site consumption required by the Governor's orders. A representative of the Respondent was specifically told that no indoor operations of this nature were allowed and only food and drink service to go was permitted. The details of the directives were easily reviewed by looking at the websites of the Governor's office, the CDPH or the Department if there was any confusion. Under the circumstances, it has been established that the Respondent was on actual notice of the directives and elected to not comply. (Findings of Fact, ¶¶ 1-14.)

(Decision at pp. 7-8, ¶ 10.) Accordingly, the fact that the owner unreasonably relied on local officials' advice is not a defense. As the ALJ explains, the fact "that a local jurisdiction may have been unwilling to use its resources to enforce the orders does not make them unenforceable by the Department." (*Id.* at ¶ 11.*)*

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. & Prof. Code § 25601.)

Regarding this section, the ALJ found:

> 17. [. . .] The observations of Department agents on December 12, 2020 and again on December 16, 2020 showed ongoing behavior significantly beyond an isolated incident. Bolger confirmed that the Licensed Premises remained in operation between the above dates except for one day when the Respondent's business was normally closed. The Respondent was open inside for business. Given their presence, patrons were aware they were open which is further evidence of the ongoing nature of the Respondent's actions. Further, the violation was not accidental. As of December 12, 2020, the Respondent was on actual notice of the existence of the directives and their applicability to the Licensed Premises. The Respondent was deliberately and openly operating the Licensed Premises in continuing violation of the directives that prohibited indoor operations. This pattern of behavior establishes that the Licensed Premises was kept as a disorderly house in violation of section 25601 between the dates alleged in count 1. (Findings of Fact, ¶¶ 1-14.)

(Decision at p. 9, ¶ 17.)

We have reviewed the entire record and find that the decision is supported by substantial evidence. We also find the mistake of fact defense unavailing because appellant should have known that it was required to comply with the emergency orders, and/or could have ascertained this fact by checking with the Department, the CDPH, or the Governor's office, rather than local officials.

ORDER

The decision of the Department is affirmed.[3]

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

[3] This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 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 ACCUSATION AGAINST:	STOCKTON DISTRICT OFFICE
RODEO CLOWN, INC. GOONEY'S BAR & GRILL 6 NORTH MAIN STREET SAN ANDREAS, CA 95249	File: 48-591560 Reg: 21091024
ON-SALE GENERAL PUBLIC PREMISES - LICENSE	**CERTIFICATE OF DECISION**
Respondent(s)/Licensee(s) Under the Alcoholic Beverage Control Act	

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 September 1, 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.

Sacramento, California

Dated: September 6, 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:

Rodeo Clown, Inc. DBA: Gooney's Bar & Grill 6 North Main Street San Andreas, California 95249	FILE: 48-591560 REG.: 21091024 LICENSE TYPE: 48
Respondent	PAGES: 86 REPORTER: Zoanne Williams-CSR# 7626 iDepo Reporters
On-Sale General Public Premises	**PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on June 15, 2022.

Patrice Huber, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Kenneth Foley, Attorney, represented the Respondent, Rodeo Clown, Inc. (Respondent).

The Department seeks to discipline the Respondent's license in a two count Accusation on the grounds that:

Count 1

On or about and between December 12, 2020 and December 16, 2020, 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[1] section 25601.

Count 2

On or about and between December 12, 2020 and December 16, 2020, Respondent-Licensee(s) refused or willfully neglected to obey California Governor Gavin Newsom's Executive Orders N-33-20 and N-60-20, to wit: by selling food or drink for on-site consumption at the licensed premises, in violation of Government Code section 8665.

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

In each of the above 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). The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b). (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued on June 15, 2022. The record in this matter was left open for an additional 30 days, beyond the hearing date, to afford the opportunity for the Respondent to submit documents pursuant to the judicial notice provisions of the California Evidence Code. No additional documents were submitted by the Respondent within the 30 days allotted for submission. No request for additional time was received from the Respondent. The record in this matter was closed to additional evidence on July 15, 2022.

FINDINGS OF FACT

1. The Department filed the Accusation on March 8, 2021. (Exhibit D-1)

2. The Department issued a type 48, on-sale general public premises license to the Respondent at the above-described location on April 26, 2018 (the Licensed Premises). There is no record of prior departmental discipline against the Respondent's license.

3. The Licensed Premises operates under the business name of Gooney's Bar & Grill. The Licensed Premises has operated, since its licensure, in the city of San Andreas as an on sale general public premises exercising type 48 privileges to sell alcoholic beverages. San Andreas is in Calaveras County. During periods of normal operation, alcoholic beverage and food service are available to patrons in the interior of the Licensed Premises at tables and barstools. (Exhibit D-2)

4. On March 4, 2020 Governor Gavin Newsom declared a state of emergency in California in response to the spread of COVID-19, a contagious respiratory virus that was rapidly spreading internationally, and through California, at the time of the proclamation. Though the majority of persons infected with COVID-19 had mild symptoms or were asymptomatic, a substantial percentage of infected individuals developed more severe symptoms that resulted in significant illness, hospitalization, and even death. California Department of Public Health (CDPH) officials, in calculating the rate of spread from existing data, had determined that, without intervention, the uncontrolled spread of COVID-19 could lead to widespread infection and overwhelm California's health care infrastructure. Infected persons who are asymptomatic or only experiencing mild symptoms were determined to be a significant factor in the community spread of the virus. The guidance mandated the use of face coverings over the nose and mouth, in high risk situations, as part of the strategy to prevent the spread of COVID-19 in the community. Indoor public spaces were one of the defined high risk situations that required individuals to wear a compliant face covering. (Exhibit D-3, Attachment 1-Proclamation of State of Emergency)

5. On March 19, 2020, Executive Order N-33-20 directed all persons living in California to follow the COVID-19 related directives of the CDPH, the State Public Health Officer, and local health authorities in order to reduce the spread of the virus. Because of the seriousness of the rapid spread of COVID-19, the order directed all Californians to stay at home except for essential jobs or to shop for essential needs. (Exhibit D-3, Attachment 2) Executive Order N-63-20 was subsequently issued on May 7, 2020. (Exhibit D-3, Attachment 4) It extended the COVID-19 related directives and the authority of the CDPH to issue further public health orders considering the impact of the spread of COVID-19 in the state of California.

5. As the threat from the spread of COVID-19 in the state of California evolved and more information was considered, additional CDPH directives and stay at home orders were issued to individuals and businesses. (Exhibit D-3) On August 28, 2020, the CDPH issued the Blueprint for a Safer Economy (Blueprint) as guidance for the operation of businesses. (Exhibit D-3, Attachment 6) The Blueprint was a plan to limit the spread of COVID-19 by establishing a county level tier system for whether businesses like the Licensed Premises could operate. The four tiers corresponded to levels of community transmission of COVID-19. Tier 4 was the lowest tier and meant that a county was experiencing minimal community disease transmission. Tier 3 meant that moderate transmission was occurring in the county. Tier 2 meant that there was evidence of substantial COVID-19 transmission and Tier 1 meant that there was widespread transmission. (Exhibit D-3)

6. Identified restrictions would occur when a particular county or region reached transmission thresholds that evidenced widespread community transmission of COVID-19. On December 3, 2020, in response to increased spread of COVID-19, Governor Gavin Newsom issued a regional stay at home order that mandated restrictions based on the state of intensive care unit (ICU) capacity in hospitals in a particular region. (Exhibit D-3-Attachment 8) By October 26, 2020, Calaveras County had significantly exceeded the widespread COVID-19 transmission threshold and it was designated as a Tier 1 county. From October 2020 through December 2020 COVID-19 transmission in Calaveras County continued to worsen. By December 2020 Calaveras County was experiencing an 11.4% positivity rate for infection with COVID-19. Hospital ICU capacity in the San Joaquin Valley Region that included Calaveras County had fallen below 15%. The county became subject to the restrictions of the regional stay at home order that became effective on December 6, 2020. This order remained applicable for a three-week period from the December 6, 2020 date. (Exhibit D-2-Attachment 2, Exhibit D-3-Attachments 10-12)

7. Because of the below 15% ICU capacity designation, the State Public Health Officer directive mandated that the Licensed Premises cease the indoor service of alcoholic beverages and food for consumption by patrons in the Licensed Premises during the period that Calaveras County remained in this designation. This designation applied to Calaveras County prior to December 12, 2020, and through December 16, 2020. (Exhibit D-2-Attachment 2)

8. During the hearing in this matter, the Department introduced the affidavit of Dr. Eric Tang (Dr. Tang) the Chief of the Office of Medical and Scientific Affairs at the California Department

of Public Health (CDPH). Dr. Tang's affidavit addressed the COVID-19 pandemic and medical considerations weighed by the CDPH in responding to the threat. Dr. Tang is a Board-certified medical doctor serving as the as the Science Branch Clinical Team Lead for California's COVID-19 response at CDPH. Because of his training and experience, Dr. Tang is familiar with COVID-19, its transmissibility, and the range of ways in which it manifests as an illness in persons infected with it. Dr. Tang explained that COVID-19 is a novel or new coronavirus (in terms of its presence in human beings). Because it is a novel coronavirus, human beings have not developed an innate response to infections and are therefore vulnerable to transmission and susceptible to illness from it. COVID-19 is contagious and can be spread by persons who are not showing symptoms. It is spread through respiratory droplets from exhalation from a person with an active infection. The droplets can enter an uninfected person through the air passages of another person by breathing in droplets suspended in the air. Until December 2020, there were no vaccines available to the general public to prevent COVID-19 infections and even after the U.S. Food and Drug Administration approval, vaccines were in limited during the period at issue.

8. Dr. Tang's affidavit explained that many persons who are infected with COVID-19 may be asymptomatic throughout their infection, or mildly symptomatic or pre-symptomatic during the period they are a source of transmission of the virus. While social distancing and masking reduce risk, the virus carrying aerosols infected persons exhale can spread beyond 6 feet and can linger in the air, particularly in enclosed places with poor ventilation. Dr. Tang explained that mask wearing is an important component in reducing transmission because it decreases the distribution of infectious particles, but it is not a complete protection.

9. In explaining the rationale behind the closure orders that applied to the Licensed Premises, Dr. Tang's affidavit distinguished indoor eating and drinking establishments, like the Licensed Premises, from other types of businesses because of their intrinsic risk factors in facilitating COVID-19 transmission. Eating and drinking establishments encourage closer proximity of individuals over extended periods. During eating and drinking, people remove their masks. Alcohol can lower inhibitions and lead to impaired judgement, increased risk taking and diminished adherence to safety directives.

10. Governor Newsom's proclamation of a state of emergency, the executive orders, and the CDPH guidance on closures and face mask coverings were all widely published and disseminated at the time of their issuance, including at the Governor's website and the CDPH website. (Exhibit D-3)

11. Despite the existence of the orders and the widespread publication of this information, Department Agent E. Chieng (Chieng) found that the Licensed Premises was operating indoors and serving patrons alcoholic beverages and food for on-site consumption in violation of CDPH orders on December 12, 2020. On that date, Chieng was assigned to check the COVID order compliance of licensed establishments in Calaveras County. Chieng entered the Licensed Premises during its operating hours. Chieng found five patrons in the Licensed Premises who were being served indoors by employees of the Licensed Premises. Those patrons were allowed to remain and consume their purchases inside of the Licensed Premises. Chieng entered the Licensed Premises undercover and in plain clothes.

12. After making these observations, Chieng contacted the manager inside of the Licensed Premises. Chieng identified himself and confirmed that the Licensed Premises was operating. Chieng gave a verbal warning to the manager that the Licensed Premises was not supposed to be serving alcoholic beverages or food for on-site consumption because of the order. The manager was told that they were only allowed to fulfill to-go orders. (Exhibit D-3)

13. On December 16, 2020., Department Agent L. Kohman (Kohman) went to the Licensed Premises to determine whether indoor operations were persisting, despite the order. Kohman entered the Licensed Premises in an undercover capacity in plain clothes. Kohman observed two patrons receiving on-site service in the Licensed Premises. Upon entering, Kohman observed that the Licensed Premises was open for business with at least one bartender and a cook on duty. After making these observations, Kohman spoke with the bartender and identified herself as a law enforcement officer. Kohman also spoke by telephone with Mark Bolger (Bolger) on December 16, 2020. Bolger owns the Licensed Premises and is the main corporate officer of Rodeo Clown, Inc. Bolger admitted that the Licensed Premises remained in operation between the two visits by Department agents, except for Sunday, when the business was normally closed.

14. Bolger testified regarding the operation of the Licensed Premises during the period at issue. Bolger testified that the Licensed Premises had complied with measures to prevent the transmission of COVID-19 when it closed operations between March and July 2020 when the initial emergency order was issued. When allowed to operate, Bolger also took steps to comply with health directives. Bolger testified that he did not intend to fail to comply with the order. Bolger was aware of the verbal warning that was given on December 12, 2020. Bolger testified that he had received information that he considered contradictory from local health and law enforcement officials when he was told by these officials that they would not be enforcing the orders against local businesses. Bolger did not consult with any representatives at the Department, or with the State of California, when he decided to remain open, despite the CDPH order from December 6, 2020, and the verbal warning that was given by the Department on December 12, 2020.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation or causing or permitting of a violation of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Government Code section 8550 provides that:

> "[T]he state has long recognized its responsibility to mitigate the effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or in extreme peril to life, property, and the resources of the state, and generally to protect the health and safety and preserve the lives and property of the people of the state. To ensure that

preparations within the state will be adequate to deal with such emergencies, it is hereby found and declared to be necessary:

(a) To confer upon the Governor and upon the chief executives and governing bodies of political subdivisions of this state the emergency powers provided herein; and to provide for state assistance in the organization and maintenance of the emergency programs of such political subdivisions.
(b) To provide for a state office to be known and referred to as the Office of Emergency Services, within the office of the Governor, and to prescribe the powers and duties of the director of that office.
(c) To provide for the assignment of functions to state entities to be performed during an emergency and for the coordination and direction of the emergency actions of those entities.
(d) To provide for the rendering of mutual aid by the state government and all its departments and agencies and by the political subdivisions of this state in carrying out the purposes of this chapter.
(e) To authorize the establishment of such organizations and the taking of such actions as are necessary and proper to carry out the provisions of this chapter.
It is further declared to be the purpose of this chapter and the policy of this state that all emergency services functions of this state be coordinated as far as possible with the comparable functions of its political subdivisions, of the federal government including its various departments and agencies, of other states, and of private agencies of every type, to the end that the most effective use may be made of all manpower, resources, and facilities for dealing with any emergency that may occur."

4. Government Code section 8551 provides that this chapter may be cited as the "California Emergency Services Act."

5. Government Code section 8558(b) provides, in part, that "state of emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, plant or animal infestation or disease.....

6. In this matter, the Department has established that from December 12, 2020 through December 16, 2020 the Respondent was subject to directives that had been properly issued pursuant to Governor Newsom's emergency authority under the California Emergency Services Act. The emergency authority and subsequent orders were supported by ample evidence that the spread of a dangerous and contagious virus had reached pandemic proportions, and that emergency action was needed to slow its spread in order to prevent illness, death, and the overwhelming of California's health services infrastructure. Central to these orders was the need to prevent needless illness and death. The order was specifically tailored to not be overbroad by focusing restrictions to counties and regions that had critical ICU shortages driven by the pandemic. During the period at issue, Calaveras County was part of a region with a critical shortage. While the spread of COVID-19 could not be eliminated, prompt and decisive action by

Californians pursuant to the CDPH directives could help to slow the spread of the virus. (Findings of Fact, ¶¶ 1-14)

7. Ample evidence established that the Licensed Premises was required to comply with directives from the CDPH that were designed to prevent the spread of COVID-19. During the period from December 12, 2020 through December 16, 2020, Calaveras County was in the 1st tier because there was widespread transmission of the COVID-19 virus in the county. This widespread transmission led to ICU capacity in the region falling below 15% of capacity. As a result, the Licensed Premises was prohibited from engaging in the indoor service of alcoholic beverages and food, even if it was taking other steps to reduce the transmission of the virus. Ample evidence was received in this proceeding to justify the need for these directives. The CDPH directives had been widely disseminated after their issuance. Further, the Department had an agent speak directly with one of the Respondent's employees on December 12, 2020 to reinforce the Licensed Premises' duty to comply with these important CDPH health directives. Agent Chieng confirmed the non-compliance with an in-person visit on December 12, 2020. During that visit, he observed the Licensed Premises to be engaged in indoor operations. Multiple patrons and employees were inside the Licensed Premises while it was operating. This operation continued through December 16, 2020 when a second Department investigation found that the Licensed Premises was continuing with indoor operations. (Findings of Fact, ¶¶ 1-14)

8. Government Code section 8665 provides that any person who violates any of the provisions of this chapter or who refuses or willfully neglects to obey any lawful order or regulation promulgated or issued as provided in this chapter, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not to exceed one thousand dollars ($1,000) or by imprisonment for not to exceed six months or by both such fine and imprisonment.

9. The Department has established, by a preponderance of the evidence, that on and between December 12, 2020 and December 16, 2020, the Respondent, at the Licensed Premises, refused or willfully neglected to obey California Governor Gavin Newsom's Executive Orders N-33-20 and N-60-20, by not obeying CDPH directives prohibiting indoor operations, in violation of Government Code section 8665 as alleged in count 2 of the Accusation. (Findings of Fact, ¶¶ 1-14)

10. Department agents went to the Licensed Premises on Saturday, December 12, 2020 and Wednesday, December 16, 2020. They saw that the business was open and allowing alcoholic beverage consumption and dining in the inside seating area of the Licensed Premises. Patrons were seated inside eating and/or drinking on both days. Bolger confirmed that the Licensed Premises remained open and in operation throughout this period, except for Sunday, when it would normally be closed. On December 12, 2020 Department agents reported to the Respondent's employee that the Licensed Premises was not complying with the prohibition of indoor service of food and drinks for on-site consumption required by the Governor's orders. A representative of the Respondent was specifically told that no indoor operations of this nature were allowed and only food and drink service to go was permitted. The details of the directives were easily reviewed by looking at the websites of the Governor's office, the CDPH or the Department if there was any confusion. Under the circumstances, it has been established that the

Respondent was on actual notice of the directives and elected to not comply. (Findings of Fact, ¶¶ 1-14)

11. The Respondent has testified that he communicated with various local health and law enforcement officials on Monday, December 14, 2020, and that he was told that they would not be enforcing the CDPH directives. No local officials were called in this matter and no affidavits were submitted by the Respondent to confirm the accuracy of Bolger's testimony. While the accuracy of the Respondent's testimony is questionable, even if accurate, it would provide no defense to the Accusation. No evidence was offered to establish that the orders were unenforceable or inapplicable. The Department's evidence has established that the orders were applicable state law and in place during the dates at issue. Evidence that a local jurisdiction may have been unwilling to use its resources to enforce the orders does not make them unenforceable by the Department.

12. The proclamation made by Governor Newsom and the authority to find non-compliance unlawful is enforceable by the Department. In *McCullough v. Municipal Court* (1983) 148 Cal.App.3d 693, the court found that articulating grounds for an emergency was sufficient without the need for underlying findings and that Government Code section 8665 was a lawful mechanism for the enforcement of compliance with authorized governmental authority under penalty of criminal sanction:

> "During any emergency, accident or extraordinary event, it is not uncommon that temporary conditions relating to health, to safety, streets or property might require compliance with authorized governmental authority under penalty of criminal sanction. When conditions return to normal and order restored, the non-compliance with governmental authority is not excused or abated. For example, a nuisance dangerous to health and safety may persist. Repeated prosecutions may proceed over claims of double jeopardy until the nuisance is abated. (See *Dapper v. Municipal Court* (1969) 276 Cal.App.2d 816; Pen.Code, § 373a.) The fact that the nuisance is ultimately removed does not exonerate the offender from prosecution.
> McCullough also argues that the Governor's amended declaration of emergency was defective or improper. Nothing in the emergency act requires the Governor to make findings. The Governor must state the circumstances of the emergency found to exist and that the emergency is found to be beyond local control measures (§§ 8625, 8558). *McCullough v. Municipal Court* (1983) 148 Cal.App.3d 693, 697

The violation in count 2 was properly alleged and established by the preponderance of the evidence standard needed to find a violation in this matter. (Findings of Fact, ¶¶ 1-14)

13. 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."

14. 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.

15. 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."

16. In Count 1, the Department pled a violation period of December 12, 2020 through December 16, 2020 to allege liability under section 25601. This was pled in conjunction with count 2 that alleges the violation of Government Code section 8665 on December 12, 2020 through December 16, 2020. As established in *Morell v. Department of Alcoholic Beverage Control,* a violation of this section has to rest on more than an isolated or accidental instance of violating the statute that is the basis of an offense to public welfare or morals.

17. Under the circumstances established by the evidence in this matter, liability under Section 25601 was established by the Department. The Department's evidence credibly demonstrated that the Respondent was engaged in an ongoing pattern of defying the directives from December 12, 2020 through December 16, 2020. The observations of Department agents on December 12, 2020 and again on December 16, 2020 showed ongoing behavior significantly beyond an isolated incident. Bolger confirmed that the Licensed Premises remained in operation between the above dates except for one day when the Respondent's business was normally closed. The Respondent was open inside for business. Given their presence, patrons were aware they were open which is further evidence of the ongoing nature of the Respondent's actions. Further, the violation was not accidental. As of December 12, 2020, the Respondent was on actual notice of the existence of the directives and their applicability to the Licensed Premises. The Respondent was deliberately and openly operating the Licensed Premises in continuing violation of the directives that prohibited indoor operations. This pattern of behavior establishes that the Licensed Premises was kept as a disorderly house in violation of section 25601 between the dates alleged in count 1. (Findings of Fact, ¶¶ 1-14)

18. The counts alleged in the Accusation have been established by the Department. Except as set forth in this decision, all other contentions of the parties lack merit.

PENALTY

Count 1 is the disorderly house allegation pursuant to section 25601. Rule 144[2] calls for a 30 day suspension through revocation depending on the seriousness of the violation. Rule 144 also requires the consideration of additional aggravating and mitigating circumstances in weighing whether there should be an upward or downward departure from the standard penalty schedule. Count 2 is not a violation with recommendations on the rule 144 schedule. Given its inherent role in supporting the disorderly house allegation, the penalty range for that allegation is appropriate as guidance in calculating the penalty for that violation. Counts 1-2 are also appropriately considered as a single pattern of conduct that is appropriately addressed in a concurrent penalty.

Between December 12, 2020 and December 16, 2020 the Respondent was shown to be engaged in an ongoing pattern of ignoring CDPH health directives issued pursuant to Governor Newsom's emergency authority under the California Emergency Services Act, as established in counts 1-2.

The Department sought a 15-day suspension, all stayed, in recognition of the Respondent's lack of prior discipline. It is also noted, in further mitigation, that the Respondent complied with earlier orders for extended periods that caused significant financial harm to the Respondent's business. It is acknowledged that the COVID-19 pandemic and the directives issued to slow the spread of the virus have had an outsized economic impact on businesses like the Respondent's and that they, like many other businesses, are struggling. It is noted that the Respondent did not completely dismiss the directives that were issued to fight the COVID-19 pandemic. The Respondent complied with many of the health directives to try to minimize risks to his employees and patrons. This is an additional mitigating factor. However, given the severity of the outbreak that was occurring in Calaveras County during the dates at issue, CDPH had ample justification to enforce more stringent directives such as curtailing indoor operations at the Licensed Premises. The decision to ignore parts of the directives and continue indoor operations was misguided and in violation of the law.

As previously noted, rule 144 provides for a penalty up to revocation for violations of the sections alleged. In line with the penalty guidelines of rule 144 and balancing the aggravating and mitigating factors, it is found that the mitigating factors outweigh the aggravating factors, thus justifying a downward departure from the penalty schedule. The penalty recommended herein complies with rule 144.

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

ORDER

Counts 1-2 are sustained. The Respondent's on-sale general public premises license is hereby suspended for a period of 15 days as to each count. The discipline in these counts is to run concurrently with the total aggregate penalty being a 15 day suspension, with execution of all 15 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: July 28, 2022

Alberto Roldan
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

_____

By: _____

Date: 09/01/22