

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

AB-9964

File: 40-547013; Reg: 22092469

THEODORE JAY BROWN,
dba Dead Reckoning Tavern
815 J Street
Arcata, CA 95521-6131,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Department Hearing: Alberto Roldan

Appeals Board Hearing: July 14, 2023
Sacramento, CA/Teleconference

ISSUED JULY 17, 2023

Appearances: *Appellant:* Patrik Griego, of Janssen Malloy LLP, as counsel for Theodore Jay Brown,

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

OPINION

Theodore Jay Brown, doing business as Dead Reckoning Tavern (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending his license for 15 days because he sold an alcoholic beverage to an obviously intoxicated person, in violation of Business and Professions Code² section 25602(a).

¹ The decision of the Department, dated March 14, 2023, is set forth in the appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on February 5, 2015. There is no prior record of departmental discipline against the license.

On August 23, 2022, the Department filed a single-count accusation against appellant charging that he sold an alcoholic beverage to Michael Baker ("Baker"), an obviously intoxicated person, on April 29, 2022.

At the administrative hearing held on January 10, 2023, documentary evidence was received, and testimony was presented by Department Agents Stanley Adam Harkness and Anthony Hall. Appellant and appellant's bartender, Macland Ashurst, also testified. Evidence established that Agents Harkness and Hall were working on a general enforcement assignment in the city of Arcata on April 29, 2022. Agent Harkness was standing outside of the licensed premises at approximately 9 p.m. and saw a male adult, later identified as Baker, walking towards the licensed premises.

Harkness observed Baker staggered, dragged his feet, and appeared to have trouble walking in a straight line. Harkness believed Baker was intoxicated, so he alerted Hall to watch Baker more closely. Baker went into the licensed premises and Hall positioned himself so he could watch Baker through the front window. The interior of the licensed premises had a capacity of about 50-60 patrons, and it was well lit. There were about 25 people inside and appellant was working as a bartender.

After entering, Baker stood in the center of the main room, about five feet from the edge of the bar and stared at the beer selections. Appellant was behind the bar at various locations serving patrons. While Baker stood staring at the beer menu, he appeared to noticeably sway and periodically had to catch himself from stumbling. Other

patrons moving through the area had to circulate around him. After staring at the menu and continuing to sway for approximately 15 minutes, Baker walked to an open space at the bar. At this time, Hall moved into the licensed premises and stood shoulder to shoulder with Baker.

While standing next to Baker, Hall was able to observe that Baker already smelled of alcohol and that he had red, watery eyes consistent with someone who had consumed alcohol. Baker was standing and leaned heavily on the bar. Appellant was across the bar from Baker at this time. Baker presented a payment card and ordered a Russian River Mortification which was a beer with an 11 percent alcohol by volume. Hall heard Baker's verbal order and he did not speak in a clear voice. Appellant took the order, filled a beer glass with the requested beer, and returned with the beer, a pen, and a printed receipt for Baker to sign.

Hall remarked that Baker appeared to be in "rough shape," and asked appellant if he thought he should be serving Baker. Hall also asked appellant if Baker had anyone to take care of him. Appellant responded that Baker was a regular customer and he had not seen him in this shape before. Baker usually came alone, had a drink and left. Appellant thanked Hall for pointing this out to him.

Hall observed Baker struggling to sign the receipt for approximately 90 seconds. At this time, appellant moved to other parts of the bar and interacted with other patrons. Ultimately, Baker scribbled on the receipt, moved away from the bar with his beer, and sat at a table adjacent to one of the front windows. Baker continued to consume the beer while seated.

Hall then moved from the interior of the licensed premises and positioned himself outside so that he could continue to watch Baker. Baker continued to drink his beer. While seated, Baker appeared to sway and doze off intermittently. At one point, Baker appeared to miss his mouth while attempting to drink from the glass. Appellant continued to perform barkeeper functions inside the licensed premises. At one point, appellant busied tables and briefly interacted with Baker. Appellant later communicated that he was checking Baker's intoxication. After about 20 minutes, Baker finished his beer and exited the licensed premises.

Hall observed Baker walk slowly across the street. He appeared to have difficulty walking and he was markedly unsteady on his feet. Agents Hall and Harkness immediately approached him and made contact. Baker's speech was severely slurred, and he appeared to have difficulty even comprehending their questions. Baker could not recall his address, and had red, watery eyes and the odor of alcohol emanating from his person. Hall determined that Baker was unable to care for himself safely because of his level of intoxication, and Baker was arrested pursuant to Penal Code section 647(f).

The agents saw appellant step outside of the licensed premises while they were in the process of preparing Baker for transportation. Hall contacted appellant and informed him he was going to be cited for serving a drink to Baker while he was obviously intoxicated. Appellant remarked, "We have been clean for 7 years. I guess it was going to happen at some point. Inevitable." Appellant also acknowledged that Hall had pointed out his concerns about Baker's condition.

Appellant testified at the hearing that he also knows Baker as a regular and that Baker typically came into the licensed premises on Fridays, had one drink, and then left.

Appellant did not recall seeing Baker that night prior to his drink order. Appellant served Baker's beer after the order and went to help other customers. When he returned, Baker had already moved to sit at a table. His conversation with Hall occurred at this time. Hall mentioned that Baker looked "rough," and appellant told Hall that he would check on him. Appellant spoke with Baker while Baker was seated, and Baker told appellant that he was, "okay."

Appellant's bartender, Ashurst, was working on April 29, 2022, and testified that he saw Baker that night. Ashurst knew Baker as a regular who was a reserved person who kept to himself. Ashurst saw Baker while he was standing and looking at the beer selections for several minutes. Ashurst did not see anything that would cause concern during his observations of Baker.

On February 2, 2023, the administrative law judge (ALJ) issued a proposed decision sustaining the allegation in the complaint, and recommended a 15-day suspension of the license. The Department adopted the proposed decision in its entirety on March 10, 2023 and issued a certificate of decision four days later. Appellant filed a timely appeal contending that the decision is not supported by substantial evidence and that the penalty is excessive.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends that the Department's decision is not supported by substantial evidence. (Appellant's Opening Brief (AOB) pp. 5-7.) Specifically, appellant contends that the Department considered irrelevant evidence of Baker's actions prior to entering the

licensed premises and his actions after being served one drink. (*Id.* at p. 5.) Appellant argues that “[o]nce the improper evidence is stricken, the ABC’s case is limited to observations of a patron who stood under a sign and swayed because he was looking up at an extensive menu prior to ordering a single beer.” (*Id.* at p. 7.)

Here, the Department found that there was substantial evidence that Baker was obviously intoxicated, which was or should have been known by appellant before serving him an alcoholic beverage. (Conclusions of Law ¶ 9.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] [“In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]”]; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] [“When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department.”].) “Substantial evidence” is “evidence of ponderable legal significance, which is ‘reasonable in nature, credible and of solid value.’” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

Business and Professions Code section 25602(a) states that “[e]very person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic

beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor. This statute “places a duty on the seller, before serving the intended purchaser, to use his powers of observation.” (*People v. Johnson* (1947) 81 Cal.App.2d Supp. 973, 975 [185 P.2d 105].) The test for determining whether a patron is “obviously intoxicated” is as follows:

The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are ‘plain’ and ‘easily seen or discovered. If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent. (Emphasis in original.)

(*Schaffield v. Abboud* (1993) 15 Cal. App. 4th 1133, 1140, 19 Cal. Rptr. 2d 205, 210.)

The law requires “a purveyor of alcoholic beverages to heed those symptoms of intoxication which are plain to a reasonable person having normal powers of observation.” (*Id.* at 1141.) These indicia include: “incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior.” (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal. Rptr. 611].)

Here, the Department made the following findings regarding Baker’s intoxication:

9. There was substantial evidence that Baker was obviously intoxicated and that this was, or should have been, apparent to Brown when he sold him a beer and allowed him to continue consuming it while seated in the Licensed Premises. The evidence revealed that Baker had difficulty walking up to and into the Licensed Premises. **Baker stood for an inordinate amount of time swaying and repeatedly needing to catch himself from stumbling over while making a beer selection. When Baker approached the bar, which was the first time that Brown had direct contact with him, Baker needed to grip the bar heavily, he smelled of alcohol and had, red, watery eyes. His speech was not**

clear when he made a drink order. He had difficulty navigating the simply task of signing a receipt presented by Brown to Baker. Hall expressly articulated to Brown that Baker was in “rough shape”, but Brown allowed him to sit and continue consuming the beer he had been served by Brown. Brown said he had checked on Baker’s condition while he was seated at the table and that Baker said he was “OK”. However, during the same period, Hall watched Baker swaying while seated, nodding off repeatedly, and having difficulty navigating the beer to his mouth. Baker was in such distress from alcohol intoxication when he left, shortly thereafter, that he couldn’t comprehend basic questions or even communicate his home address. (Findings of Fact ¶¶ 2-13 [emphasis added].)

Based on the above, the Department’s findings regarding Baker’s intoxication must stand. Even without the evidence of Baker’s actions prior to entering the licensed premises and after being served a beer, there is substantial evidence of Baker’s outward manifestations of intoxication that occurred inside the licensed premises and/or directly in front of appellant prior to the sale. The Department’s finding that appellant knew or should have known that Baker was obviously intoxicated is supported by substantial evidence; namely, Agent Hall’s testimony. Ultimately, appellant is asking this Board to second-guess the Department and reach a different result. Extensive legal authority prohibits this Board from doing so. (*Southland, supra*, 103 Cal.App.4th at 1094.)

II

PENALTY

Appellant contends its 15-day penalty is unreasonable, and that the Department should reconsider it on the grounds that appellant “has operated the licensed premises at issue since 2015” and has never been cited. (AOB, at p. 7.) In other words, appellant believes its penalty is excessive.

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d

785, 789 [97 Cal.Rptr. 183].) However, the Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) An administrative agency abuses its discretion when it "exceeds the bounds of reason." (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, "[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. The standard penalty for a first-time violation of section 25602(a) is 15 days, which is exactly the penalty appellant received here. (Cal. Code Regs., tit. 4, § 144.) Nevertheless, rule 144 allows the Department to deviate from the standard penalty when, "*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (*Ibid.*, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by the licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at the subject premises without prior discipline or problems, positive action by the licensee to correct the problem, documented training of the licensee and the

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

Here, appellant takes issue with the fact that the Department did not deviate from the standard 15-day suspension. (AOB, at p. 7.) The Department cited appellant's direct involvement in the violation as a factor in aggravation, which offset the mitigation of having no violations for over seven years. (Decision, at pp. 7-8.) The Board cannot say that the Department abused its discretion.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 15-day suspension for a section 25602(a) violation, which is what appellant received. Rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The Department's balancing of aggravation and mitigation evidence was reasonable and not an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.³

SHARLYNE PALACIO, ACTING CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.* 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:**

THEODORE JAY BROWN
DEAD RECKONING TAVERN
815 J STREET
ARCATA, CA 95521-6131

ON-SALE BEER - LICENSE

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

EUREKA DISTRICT OFFICE

File: 40-547013

Reg: 22092469

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 March 10, 2023. 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 April 24, 2023, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: March 14, 2023



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Theodore Jay Brown
DBA: Dead Reckoning Tavern
815 J Street
Arcata, CA 95521-6131

Respondent

On-Sale Beer License

} File: 40-547013
}
} Registration: 22092469
}
} License Type: 40
}
} Word Count: 18,595
}
} REPORTER:
} Tracy Terkeurst-CSR # 8180
} Kennedy Reporters
}

PROPOSED DECISION

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on January 10, 2023.

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

Patrik Griego, Attorney, represented the respondent, Theodore Jay Brown (Respondent).

In the Accusation, the Department seeks to discipline Respondent's license on the grounds that,

- On or about April 29, 2022, Respondent-Licensee, Theodore Brown, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: beer, to Michael Baker, an obviously intoxicated person, in violation of California Business and Professions Code¹ section 25602(a). (Exhibit D-1)

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)

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

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on January 10, 2023.

FINDINGS OF FACT

1. The Department filed the Accusation on August 23, 2022.
2. The Department issued a type 40, on-sale beer license to the Respondent at the above-described location on February 5, 2015 (the Licensed Premises).
3. There is no record of prior Department discipline against the Respondent's license.
4. On April 29, 2022, Department Agent S. Harkness (Harkness) was working with Department Agent A. Hall (Hall) on a general enforcement assignment in the city of Arcata. Harkness had 15 years of training and experience with the Department, Ferndale Police Department and Eureka Police Department. Harkness had controlled study experience with alcohol intoxication and had investigated many alcohol and drug intoxication cases during his career. Harkness had interacted on many occasions with individuals who were intoxicated from alcohol consumption. Because of this training and experience, Harkness was able to recognize the outward manifestations of a person who was intoxicated. Hall had been a Department agent for just over a year as of April 29, 2022. Hall also had controlled study experience with the effects of alcohol intoxication and had investigated multiple alcohol and drug intoxication cases since he became an agent. Hall also interacted on multiple occasions with individuals who were intoxicated from alcohol consumption. Prior to his time as a Department agent, Hall had worked as a general manager at a night club that served alcoholic beverages. Because of this training and experience, Hall was also able to recognize and evaluate the outward manifestations of a person who was intoxicated. (Exhibit D-2)
5. Harkness was standing outside of the Licensed Premises at approximately 9 p.m. on April 29, 2022. Harkness saw a male adult, later identified as Michael Baker, walking towards the Licensed Premises. Harkness observed that Baker staggered, dragged his feet, and appeared to have trouble walking in a straight line. Harkness believed the individual might be intoxicated, so he alerted Hall to watch Baker more closely. Baker went into the Licensed Premises around this time, and Hall positioned himself so he could watch Baker through the front window. The interior had a capacity of about 50-60 people, and it was well lit. Hall had previously been inside of the Licensed Premises and had observed there were approximately 25 patrons inside. Theodore Brown (Brown) the licensee, was working as a bartender at this time. (Exhibit D-2)

6. After entering, Baker stood in the center of the main room, about five feet from the edge of the bar, and stared at the beer selections. Brown was at various locations behind the "L" shaped bar serving patrons at this time. Adjacent to the bar was a large, handwritten display of the various beers on tap. It was on a wall above a doorway and extended to just below the high ceiling. The beer selections changed regularly, so the display had chalkboard rows and columns. The menu could be updated by erasing the board when beers ran out and writing in the updated selections. As a result, the written menu changed regularly. (Exhibit L-1) While Baker stood staring at the beer menu, he appeared to noticeably sway and periodically had to catch himself from stumbling. Other patrons moving through the area had to circulate around him. Hall watched Baker stare at the menu and continue to sway for approximately 15 minutes. Baker then turned to the right and walked to an open space at the bar. At this time, Hall entered the Licensed Premises and moved to a spot at the bar where he was shoulder to shoulder with Baker. (Exhibit D-2)

7. While standing next to Baker, Hall was able to observe that Baker already smelled of alcohol and that he had red, watery eyes consistent with someone who had consumed alcohol. Baker was standing and leaned heavily on the bar. Brown was across the bar from Baker at this time. Baker presented a payment card and ordered a Russian River Mortification which was a beer with an 11% alcohol by volume. Hall heard Baker's verbal order and he did not speak in a clear voice. Brown took the order, filled a beer glass with the requested beer, and returned with the beer, a pen, and a printed receipt for Baker to sign. Brown placed these items on the bar in front of Baker. Hall remarked that Baker appeared to be in "rough shape", and he asked Brown if he thought he should be serving Baker. Hall also asked Brown if Baker had anyone to take care of him. Brown responded that Baker was a regular customer and he had not seen him in this shape before. Baker usually came alone, had a drink and left. Brown thanked Hall for pointing this out to him. (Exhibit D-2)

8. After Brown delivered the drink and receipt to Baker, Hall observed that Baker appeared to struggle with signing the receipt for approximately 90 seconds. During the time Baker struggled with the receipt, Brown moved to different locations behind the bar while interacting with other patrons. Ultimately, Baker scribbled on the receipt, moved away from the bar with his beer, and sat at a table adjacent to one of the front windows. Baker continued consuming the beer while seated. (Exhibit D-2)

9. Hall moved from the interior of the Licensed Premises and positioned himself outside so that he could continue to watch Baker. Baker continued to drink his beer. While seated, he appeared to sway and doze off intermittently. At one point, he appeared to miss his mouth while attempting to drink from the glass. Brown continued to perform barkeeper functions inside of the Licensed Premises. During one period while Baker was seated, Hall observed Brown bussing tables in the area and saw him briefly interact with Baker. Brown later communicated to Hall that he was checking Baker's intoxication

level. Baker continued to drink during the time he was seated. After approximately 20 minutes, Baker appeared to finish his beer. Baker then stood up and exited the Licensed Premises. (Exhibit D-2)

10. Hall observed Baker to slowly walk across the street in front of the Licensed Premises. He appeared to have difficulty walking and he was markedly unsteady on his feet. Hall and Harkness immediately approached him and made contact. Baker's speech was severely slurred, and he appeared to have difficulty even comprehending their questions. Baker could not recall his address. He continued to have red, watery eyes and the agents could smell the odor of alcohol emanating from his person. Hall determined that Baker was unable to care for himself safely because of his level of intoxication. Baker was arrested pursuant to Penal Code section 647(f). Because he was so intoxicated, he was a danger to himself and others. (Exhibit D-2)

11. The Department agents saw Brown step outside of the Licensed Premises while they were in the process of preparing Baker for transportation. Hall contacted Brown and informed him he was going to be cited for serving a drink to Baker while he was obviously intoxicated. Brown remarked, "We have been clean for 7 years. I guess it was going to happen at some point. Inevitable." Brown also acknowledged that Hall had pointed out his concerns about Baker's condition to Brown. (Exhibit D-2)

12. Brown testified in this matter. He has been the owner of the Licensed Premises since 2015 and he is actively involved in its operation. He was working with one other bartender by the name of Macland Ashurst (Ashurst) that evening. He testified to knowing Baker as a regular and that he typically came into the Licensed Premises on Fridays, had one drink, and then left. Brown did not recall seeing Baker prior to his drink order on April 29, 2022. Brown served his beer after the order and went to help other customers. When he returned, Baker had already moved to sit at a table. His conversation with Hall occurred at this time. Hall mentioned that he thought Baker was in rough shape. Brown told Hall he would check on him. Brown spoke with Baker while Baker was seated at the table drinking his beer. Baker claimed he was "OK" after Brown asked.

13. Brown testified that the Licensed Premises is focused on selling craft beers and it is not the type of place that the issue of obviously intoxicated customers comes up often. Brown has refused service to patrons and has taken away drinks in the past. Ashurst testified to seeing Baker on April 29, 2022. He knew him as a regular. Ashurst's experience with Baker was that he was a reserved person who kept to himself. Ashurst saw Baker while he was standing and looking at the beer selections for several minutes. Ashurst did not see anything that would cause concern during his observations of Baker.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation or causing or permitting of a violation of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25602(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor ².
4. As noted in *Harkness v. Alcoholic Bev. etc. Appeals Bd.* 118 Cal.App.3d 30, 35–36 (1981):

“Courts have long recognized that the outward manifestations of intoxication are well known and easily recognized. In *Coulter v. Superior Court* (1978) 21 Cal.3d 144, 155, the court said: “Defendants have argued that the term 'obviously intoxicated' is too broad and subjective to serve as a satisfactory measure for imposition of civil liability. However, the phrase is contained in section 25602, a criminal statute, and the courts have experienced no discernible difficulty in applying it. (See *Samaras v. Dept. Alcoholic Bev. Control* (1960) 180 Cal.App.2d 842, 844; *People v. Smith* (1949) 94 Cal.App.2d Supp. 975; *People v. Johnson* (1947) 81 Cal.App.2d Supp. 973, 975-976). As described in *Johnson*, “The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are plain and easily seen or discovered. If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.”

² In this matter, the Department pled the Accusation only referencing the “obviously intoxicated person” language of section 25602(a) and left out references to the “habitual or common drunkard” language in 25602(a). This is not a relevant distinction as the disjunctive portions of the statute establish alternative bases for liability. (Note: This footnote has been amended from the proposed decision as the original footnote did not correctly state the law regarding the “habitual or common drunkard” portion of the statute. See, *BM Petro, Inc.*, Precedential Decision 21-01-E. This technical correction is made pursuant to Government Code section 11517(c)(2)(C).)

5. In regard to opinion testimony of intoxication, the *Harkness* court further noted: “Because the manifestations of intoxication are so well known, nonexpert witnesses may offer opinion testimony based upon their observations as to a person's intoxication. (*People v. Conley* (1966) 64 Cal.2d 310, 325)” *Harkness v. Alcoholic Bev. etc. Appeals Bd.* (1981) 118 Cal.App.3d 30, 35–36

6. As noted above, “[t]he use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are ‘plain’ and ‘easily seen or discovered.’ If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.”³

7. The factors which the courts have relied upon in establishing whether or not a person is obviously intoxicated include incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior.⁴ It is not necessary for all of the signs described to be present in order to find that a person is obviously intoxicated, but there must be sufficient indications “to cause a reasonable person to believe that the one with whom he or she is dealing is intoxicated.”⁵

8. Cause for suspension or revocation of the Respondent’s license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that, on April 29, 2022, respondent-licensee Theodore Brown, at the Licensed Premises, sold an alcoholic beverage, to wit: beer, to Michael Baker, an obviously intoxicated person, in violation of section 25602(a) as alleged in the Accusation. (Findings of Fact ¶¶ 2-13)

9. There was substantial evidence that Baker was obviously intoxicated and that this was, or should have been, apparent to Brown when he sold him a beer and allowed him to continue consuming it while seated in the Licensed Premises. The evidence revealed that Baker had difficulty walking up to and into the Licensed Premises. Baker stood for an inordinate amount of time swaying and repeatedly needing to catch himself from stumbling over while making a beer selection. When Baker approached the bar, which was the first time that Brown had direct contact with him, Baker needed to grip the bar heavily, he smelled of alcohol and had, red, watery eyes. His speech was not clear when

³ *People v. Johnson*, 81 Cal. App. 2d Supp. 973, 975-76 (1947) (emphasis in original). See also *Schaffield v. Abboud*, 15 Cal. App. 4th 1133, 1141 (1993).

⁴ *Jones v. Toyota Motor Company, Ltd.*, 198 Cal. App. 3d 364, 370 (1988).

⁵ *Schaffield*, 15 Cal. App. 4th at 1140-41.

he made a drink order. He had difficulty navigating the simple task of signing a receipt presented by Brown to Baker. Hall expressly articulated to Brown that Baker was in “rough shape”, but Brown allowed him to sit and continue consuming the beer he had been served by Brown. Brown said he had checked on Baker’s condition while he was seated at the table and that Baker said he was “OK”. However, during the same period, Hall watched Baker swaying while seated, nodding off repeatedly, and having difficulty navigating the beer to his mouth. Baker was in such distress from alcohol intoxication when he left, shortly thereafter, that he couldn’t comprehend basic questions or even communicate his home address. (Findings of Fact ¶¶ 2-13)

10. The physical symptoms and outward appearance of Baker were manifest for Brown to observe when he came into the Licensed Premises on April 29, 2022. Baker stood, swaying and unsteady for a 15-minute period in the middle of the Licensed Premises *prior* to approaching Brown to purchase a beer. It is at odds with the established testimony that Brown and Ashurst would not have noticed, at some point during the 15 minutes he stood there, that Baker was manifesting outward symptoms of being obviously intoxicated. Hall testified credibly to this. Hall’s testimony also credibly established that Baker then leaned heavily on the bar, smelled of alcohol, had red, watery eyes, and his speech was slurred, when he first contacted Brown to buy a beer. Baker struggled with the simple task of filling out his receipt after he was served. Baker then continued to show outward manifestations of being obviously intoxicated during the period he sat with and consumed the beer he purchased. These outward manifestations included him swaying, nodding off, and missing his mouth while trying to drink. (Findings of Fact ¶¶ 2-13)

11. While Brown seems sincere in his denial of being actually aware of how intoxicated Baker was, the evidence presented at the hearing established that Brown should have known that Baker was obviously intoxicated, and that Baker should not have been sold or allowed to consume any alcoholic beverages when he came into the Licensed Premises on April 29, 2022. Brown’s disregard of what should have been obvious continued, even after Hall explicitly expressed his concern about Baker’s potential intoxication.

12. The Accusation is sustained. 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 sought a penalty of 15 days. Under rule 144⁶, the standard penalty for a violation of section 25602(a), absent aggravation and mitigation, is a 15-day suspension. In aggravation is the Licensee-Respondent’s direct involvement in the violation. In

⁶ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

Theodore Jay Brown
DBA: Dead Reckoning Tavern
File: 40-547013
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mitigation is the Respondent's lack of prior discipline over approximately seven years of licensure. The penalty recommended herein complies with rule 144. On balance, the aggravating and mitigating factors offset. The presumptive penalty is appropriate in this matter.

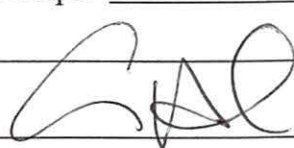
ORDER

The Accusation is sustained. The Respondent's type 40, on-sale beer license is suspended for 15 days.

Dated: February 2, 2023



Alberto Roldan
Administrative Law Judge

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<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>03/10/23</u>