

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

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

Blinking Owl Distillery, LLC
Dbas: Blinking Owl Distillery
802 East Washington Avenue
Santa Ana, California 92701-3845

Licensee(s).

File No.: 06/74-555195

Reg. No.: 19088697

**Precedential Decision
No.: 19-07-E**

**DESIGNATION OF DECISION AS PRECEDENTIAL UNDER
GOVERNMENT CODE SECTION 11426.60**

Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates as precedential the decision, dated June 27, 2019, in the above-referenced action.

This decision is designated precedential effective December 11, 2019.

Sacramento, California

Dated: December 11, 2019

Jacob A. Appelsmith
Director

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OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

Blinking Owl Distillery, LLC	}	File: 06/74-555195
Dbas: Blinking Owl Distillery	}	
802 East Washington Avenue	}	Reg.: 19088697
Santa Ana, California 92701-3845	}	
	}	License Types: 06/74
Respondent	}	
	}	Word Count: 13,724
	}	
	}	Reporter:
	}	Miranda Perez
	}	Kennedy Court Reporters
	}	
<u>Still/Craft Distiller License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on June 12, 2019.

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

Thomas Zeigler, Attorney, represented Respondent, Blinking Owl Distillery, LLC.

The Department seeks to discipline the Respondent's license(s) on the grounds that, on October 4, 2018, the Respondent-Licensee, by and through its officer(s), agent(s), or employee(s), at said premises, exceeded its license privileges by furnishing more than one and one-half ounces of distilled spirits to a consumer, in violation of Business and Professions Code sections 23300 and 23363.1(c)(1)¹. (Exhibit 1A.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on June 12, 2019.

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

FINDINGS OF FACT

1. The Department filed an accusation on April 8, 2019. The Department thereafter filed a First Amended Accusation on May 10, 2019. At the hearing, the Department amended the First Amended Accusation, without objection by Respondent, to remove the numerical digits and markings listed as part of the file number, "04-/"
2. The Department issued a type 6, still license, and type 74, craft distiller license to the Respondent for the above-described location on August 17, 2016 (the Licensed Premises).
3. The Respondent has been the subject of the following discipline:

<u>Dates of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
July 27, 2017, and November 30, 2017	18086884	BP §23363.1(c)(1)	POIC in lieu of 15-day suspension

The foregoing disciplinary matter is final. (Exhibit 1B.)

(February 15, 2018)

4. On February 15, 2018, at approximately 6:00 p.m., Department Trade Enforcement Agent Gray entered the Licensed Premises in a plain clothes capacity to ensure the premises was following the tasting privilege regulation of serving one-and-one-half (1.5) ounces of distilled spirits per day per person. Agent Gray observed the interior of the Licensed Premises had one main room with a fixed bar, behind which was displayed distilled spirits through a clear glass. Behind the fixed bar was a small seating area with a few tables and chairs.
5. Agent Gray walked straight to the fixed bar, behind which stood a female bartender, who identified herself to the agent as Jenny. Jenny informed Agent Gray he would only be able to order one drink or the equivalent of 1.5 ounces of distilled spirits because since he was not part of a private event or private function she could not sell him more than the 1.5 ounces of distilled spirits. Agent Gray said that would be fine. Jenny told agent Gray that that night he'll have only one drink, but that the next time he came to the Licensed Premises if he called ahead of time, prior to arriving, and asked to be placed on a list, when he arrived, the fact he was on the list would allow him to drink more than 1.5 ounces of distilled spirits and he would be given a wristband to signify that.
6. While Agent Gray spoke to Jenny he observed two unidentified males seated at the bar with the agent, wearing wristbands and drinking. Agent Gray pointed out the two

males and asked Jenny, since they had wristbands were they part of a private party. Jenny said they were part of a private party. At 6:20 p.m. Agent Gray left the premises.

(October 4, 2018)

7. On October 4, 2018, Agent Gray looked at the Respondent's website. He noticed the website had two sections, one section related to tasting room hours and a second section related to making reservations for private events/functions at the Licensed Premises. The website stated, "You must book your private events before you arrive at the distillery. We have designated areas specifically to host our private events. We cannot legally serve you more than 1.5 oz unless you are part of a pre-arranged private event/function. Sorry no exceptions. SCHEDULE YOUR PRIVATE EVENT: email...call..." (Exhibit 2 – website print-outs.)

8. At 6:15 p.m. Agent Gray called the Blinking Owl Distillery's telephone number listed on the Respondent's website. A female answered the phone and identified herself as Hanna. Agent Gray informed Hanna he wanted to go to the Blinking Owl Distillery that night. Hanna said he could come, asked his name and the number of people in his party. Agent Gray gave Hanna the name "Eric," and told her there would be two people attending. Hanna asked him what time he would arrive, to which Agent Gray told her within the hour. Hanna said that would be fine and the phone call ended. Hanna did not ask Agent Gray for any other information to verify his identity when he arrived.

9. At approximately 6:50 p.m., Agents Gray and Groff, entered the Licensed Premises in a plain clothes capacity, and walked straight to the fixed bar, behind which stood a female bartender who identified herself as Hanna. Agent Gray told Hanna that he had called ahead of time, and Hanna asked if his name was "Eric," to which Agent Gray said that it was. Hanna retrieved two wristbands, confirmed Agent Gray had one other person with him, and placed a wristband each on the right wrist of the agents. (Exhibit 8 – color photograph of the wristband Hanna gave to Agent Gray.) Hanna explained to Agent Gray that since he called ahead the agents now have a wristband which identify them as a private party and will be allowed to drink as much as they wanted. Hanna did not ask for any other verifying information other than the agent's name and never asked the purpose of his visit. Hanna gave the agents drink menus.

10. Agent Gray did not see food service at the Licensed Premises. He asked Hanna if they had a kitchen, to which Hanna replied, "No, not yet."

11. While seated at the bar, Agent Gray observed a group of four females enter the Licensed Premises, walk up to the fixed bar and speak to Hanna. Hanna asked if the

females had made a reservation prior to entering and one of the females replied they had and that the name was Jen. Hanna gave each of the four females a wristband, which were placed on their wrists. One of the females pointed at a table and asked Hanna if they could sit at the table. The table was in the same main room of the Licensed Premises behind the fixed bar. Hanna acquiesced, and the four females sat at the table.

12. Agent Gray looked over the drink menu, which listed the ingredients of each drink. (Exhibit 5.) He saw a drink named, "OC Orange Mule," with the listed ingredients including OC Orange Vodka. Agent Gray placed an order with Hanna for the OC Orange Mule cocktail, which he watched Hanna make. The agent observed Hanna retrieve and use from behind the bar a bottle labeled "Vodka," to make his drink. Hanna served the agent the OC Orange Mule cocktail, which Agent Gray drank. To Agent Gray it tasted and smelled like distilled spirits, specifically vodka. Agent Gray saw a recipe card listing the ingredients for the OC Orange Mule, and on the flip side of the card was a photograph of the said drink. (Exhibits 3A and 3B.) The recipe indicated the OC Orange Mule was made with 1.5 ounces of OC Orange Vodka, $\frac{1}{4}$ ounce freshly squeezed lime juice, 3 ounces ginger beer, and garnished with fresh mint and orange peel. Agent Gray asked Hanna if she made his drink the same way as the recipe called. Hanna said it was slightly different in that instead of using a garnish of orange peel she used a lime wedge, but other than that everything else was the same, including the 1.5 ounces of vodka.

13. Agent Gray observed a group of three females enter the Licensed Premises. Hanna asked the females if they had called ahead or had a reservation, to which they indicated they did not call ahead. Hanna informed the females that as they were not part of a private party/event they were only allowed to have one drink per person. They were not given wristbands. The group of three females sat at the fixed bar, with one of the females seated adjacent to Agent Gray.

14. While Agent Gray was inside the Licensed Premises he did not see any separation of the people who were part of private parties from those who were not.

15. Agents Gray and Groff both ordered from Hanna a drink from the menu called, "Up All Night." (Exhibit 5.) The listed ingredients included cold brew coffee and OC Orange Vodka. Agent Gray watched as Hanna made the drinks. Hanna placed in a single container several shots of vodka from a bottle she retrieved from behind the fixed bar, mixed the drink and separated it out into two glasses, which she served to the agents. Agent Gray tasted his Up All Night cocktail. He could taste and smell the vodka and the strong taste of the coffee. Hanna asked Agent Gray if he liked the drink. He replied that he did, but said he couldn't taste the vodka and asked how much vodka she had put in the drink. Hanna said there was about 1.5 ounces of vodka in each drink which she made for the agents. Agent Gray received a receipt for the drinks the agents ordered, and for which he paid. (Exhibit 4.) Thereafter the agents left the premises.

16. Agent Gray contacted Mrs. Robin Christenson and Mr. Brian Christenson, two stockholders for the Blinking Owl Distillery, LLC. Agent Gray scheduled a meeting with Mr. and Mrs. Christenson and instructed them to bring to the meeting their copy of two of the documents which Agent Plotnik had provided to them while issuing a verbal warning on September 19, 2017, relating to section 23363.1(c)(1) violations observed at the Licensed Premises by undercover agents (Exhibit B); namely, the Department Industry Advisory relating to the Craft Distillers Act of 2015 (Exhibit 6), and the Department “Craft Distiller’s License (Type-74) Frequently Asked Questions” (Exhibit 7). The latter document contains a section which describes tasting privileges, under question number one, “Can mixers made by other people be used in tastes of distilled spirits?” That section explains, in part, “With respect to tastings conducted at the distillery, this provision was amended in two ways: (1) the limitation on six ¼ oz. tastes was changed to allow for a total of 1.5 oz. of distilled spirits per person per day.” Both the said Department Industry Advisory and the Department “Craft Distiller’s License (Type-74) Frequently Asked Questions” are available to the public and can be found on the Department’s website. Mr. and Mrs. Christenson brought both sets of documents as requested to their meeting with Agent Gray.

Respondent’s Witness

17. Robin Christenson appeared and testified at the hearing. Mrs. Christenson is married to Brian Christen, and referred to herself as a co-owner with her husband of the Blinking Owl Distillery, LLC.

18. Mrs. Christenson said the 2017 violation (Exhibit 1B) arose due to patrons coming into the Licensed Premises, “then leaving and calling and then coming back and it becoming a private event.” Mrs. Christenson acknowledged during her testimony that it was true, as stated in the Investigation Report Number 17-11-063, that on November 30, 2017, she approached two undercover agents in the Licensed Premises and “reminded [them] to call ahead to be put on the ‘guest list’ but said [they] could stay for additional drinks anyway.” (Exhibit B – ABC-333.) After the 2017 violation Mrs. Christenson spoke with Agent Plotnik. Agent Plotnik had informed Mrs. Christenson “that a private event needed to [*sic*] be bona fide event that was pre-arranged and included a guest list.” (Exhibit B².) Mrs. Christenson understood from their conversation that a private event “needed to be pre-arranged.” Thereafter, the Respondent implemented “pre-arrangement of private parties,” in which they had patrons call prior to arriving at the Licensed Premises, provide their name and number of persons in their party, and when the patrons arrived they were given wristbands to distinguish them as private parties. Those with wristbands received the benefit of a “private event” and were

² Exhibit B was admitted into evidence without objection.

determined to be a “pre-arranged party” and thus “were able to partake in more than 1.5 ounces of alcohol or additional spirits or wine or beer.”

19. Mrs. Christenson acknowledged that the second page of the Blinking Owl Distillery website, as printed out in Exhibit 2, states under the heading, “REMINDER:” that “We have designated areas specifically to host our private events.” After the current matter, relating to the accusation at hand, Mrs. Christenson e-mailed the Department in an attempt to determine the parameters of sections 23363.1(c)(1) and 23508(a). (Exhibits B, C and D.)

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

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 23300 provides that “no person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division.”

4. Section 23363.1 provides in part that, “(a) A distilled spirits manufacturer’s license or a craft distiller’s license authorizes the licensee to conduct tastings of distilled spirits produced or bottled by, or produced or bottled for, the licensee, on or off the licensee’s premises.” Section 23363.1 also provides in part that, “(c) Tastings on the licensee’s premises shall be subject to the following conditions: (1) The total volume of tastings of distilled spirits shall not exceed one and one-half ounces per individual per day.”

5. Section 23508 provides, “(a) A licensed craft distiller may also have upon its licensed premises all beers, wines, and distilled spirits, regardless of source, for sale or service only to guests during private events or private functions not open to the general public. Alcoholic beverage products sold at the premises that are not manufactured or produced and bottled by, or manufactured or produced and packaged for, the licensed craft distiller shall be purchased by the licensed craft distiller only from a licensed wholesaler. (b) A licensed craft distiller may sell all beers, wines, brandies, or distilled spirits to consumers for consumption on the premises in a bona fide eating place as defined in Section 23038,

which is located on the licensed premises or on premises owned by the licensee that are contiguous licensed premises and which is operated by and for the licensee, provided that any alcoholic beverage products not manufactured or produced by the licensee must be purchased from a licensed wholesaler. Beer, wine, and brandy may be used in the preparation of food and beverages in the bona fide public eating place for consumption on the premises. (c) Notwithstanding any other provision of this division, in the event that the licensee no longer qualifies as a craft distiller due to the amount of distilled spirits reported pursuant to Section 23502, the licensee may continue to hold the privileges granted by this section.”

6. 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 October 4, 2018, the Respondent-Licensee, by and through its officer(s), agent(s), or employee(s), at said premises, exceeded its license privileges by furnishing more than one and one-half ounces of distilled spirits to a consumer, in violation of Business and Professions Code sections 23300 and 23363.1(c)(1). (Count1.) (Findings of Fact ¶¶ 4 through 19.)

7. The Respondent argued that the law in this matter was “gray” and unclear in relation to the exception to section 23363.1 found in section 23508(a). Specifically, the Respondent claimed it did not understand what is meant by “only to guests during private events or private functions not open to the general public.” The Respondent claimed it has to operate “in the gray area” because it has a small premise and since it is entitled to have both public and private events at the same, it asked just how would it accomplish that in its small premises. The Respondent argued that with its tasting room capacity of 38 persons, “exercising its right to have concurrent public and private events, and comply with the ABC’s current interpretation of the statute is problematic.”³

8. This argument is rejected. In looking to the plain and common sense meaning of the legislature’s chosen language of the statute,⁴ the language of the statute is clear. The problem with Respondent’s argument is it continues to ignore the straight forward, plain,

³ Exhibit A – Admitted as Respondent’s Hearing Brief, p. 3, lines 21-24.

⁴ “In looking to the plain meaning of statutory language to interpret the statute, courts look to the words of the statute themselves; the Legislature’s chosen language is the most reliable indicator of its intent. We give the words of the statute ‘a plain and commonsense meaning’ unless the statute specifically defines the words to give them a special meaning.” (*MacIsaac v Waste Management Collection And Recycling, Inc.* (2005) 134 Cal.App.4th 1076, citing *Flannery v. Prentice* (2001) 26 Cal.4th 572, 577, 110 Cal.Rptr.2d 809, 28 P.3d 860 (*Flannery*); *Halbert’s Lumber, supra*, 6 Cal.App.4th at p. 1238, 8 Cal.Rptr.2d 298.) “If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction.” (*MacIsaac, supra* at 1083 citing *California School Employees Assn., supra*, 8 Cal.4th at p. 340, 33 Cal.Rptr.2d 109, 878 P.2d 1321; *Delaney, supra*, 50 Cal.3d at p. 798, 268 Cal.Rptr. 753, 789 P.2d 934.) In such a case, there is nothing for the court to interpret or construe. (*MacIsaac, supra* at 1083 citing *Halbert’s Lumber, supra*, 6 Cal.App.4th at p. 1239, 8 Cal.Rptr.2d 298.)

common sense, key words of the law, including, but not limited to, “*only to guests during private events or private functions not open to the general public.*” (Emphasis added.)

9. Just as the Respondent chose to ignore key words of the statute, the Respondent continued to argue and defend its actions by focusing on only a few of Agent Plotnik’s words of advice from the prior discipline, such as “pre-arranged” and “guest list,” thereby focusing on a reservation system. The Respondent, however, failed to focus on key words of Agent Plotnik’s advice, specifically “that a *private event* needed to be [a] *bona fide* [private] event.”⁵ The key focus should have been on “*bona fide*” private event, and more importantly on the plain language of the statute itself, that, “A licensed craft distiller may also have upon its licensed premises all beers, wines, and distilled spirits, regardless of source, for sale or service *only to guests during private events or private functions not open to the general public.*” (Emphasis added.)

10. The Respondent was keenly aware that it was required to keep “*private events or private functions not open to the general public.*” The Respondent’s own website indicated as much, “we have *designated areas specifically* to host our *private events,*”⁶ acknowledging their need to restrict an area of its premises and restrict access to it. Respondent attempted an argument that “the use of wristband[s], especially in a small confined tasting room, clearly puts a ‘Scarlet Letter’ on those individuals causing them to stand out, or ‘make a distinction between’ [] them and the members of the general public.”⁷ This argument fails because the Respondent permitted persons from the general public in the tasting room/Licensed Premises while other persons wearing wristbands were “deemed” private parties, with no separation among them.

11. Despite prior Department warnings and discipline, the Respondent continued to attempt to keep its small tasting room open to the general public, during alleged private events. As the Department aptly pointed out, the Respondent was using “a reservation system to end-run the ABC Act’s limitation...to expand its operating privileges. There was nothing private about Agent Gray’s visit. The fact that he called ahead did nothing to create a private event or function, and he certainly was not attending anything that was not open to the general public. Agent Gray walked into the premises and drank two cocktails at the fixed bar. The premises was not closed to the general public.”⁸ “A wristband does not create a private event or function by any definition...There was nothing stopping members of the public from walking up to the fixed bar and drinking next to Agent Gray. Indeed, the bartender’s own statement that all Agent Gray needed to do was call ahead to be able to drink more alcohol show’s that Respondent’s intentions were to use its manufacturing license as a subterfuge to run a retail distilled spirits

⁵ Exhibit B, page 6 of 7, 6th line down from the top of the page. (Emphasis added.)

⁶ Exhibit 2, page 2. (Emphasis added.)

⁷ Exhibit A page 7, lines 6 to 8.

⁸ Exhibit 1C, page 7, lines 6 to 12.

operation.” In fact, part of Respondent’s “reservation” policy describes a retail licensed premises operation, where parties call ahead to make reservations and at some time thereafter those persons from the general public enter the on-sale retail licensed premises to consume multiple alcoholic beverages, where there is no separation for private functions or events.

PENALTY

The Department requested the Respondent’s license be suspended for a period of 25 days, noting the Respondent had received a prior verbal warning regarding a similar violation, had a prior similar disciplinary violation, for which it paid a fine, and was provided the Industry Advisory relating to the Craft Distillers Act of 2015. The Department argued the statute is very clear and the Respondent clearly knew what was required of it; in fact its own website showed its understanding of what a private event or function was and that they were required “to restrict some kind of area and restrict access to it.” The Department pointed to Agent Plotnik’s report (Exhibit B), which indicated that after Agent Plotnick warned Mrs. Christenson, at the very next undercover visit to the Licensed Premises one of Respondent’s bartenders told undercover agents, after serving them their initial distilled spirits cocktails, that while she is not supposed to serve them a second drink she would do it anyway, reminding the agents to call ahead to be placed on the “guest list.” The Department recapped, “the premises understands what they’re trying to do, and they’re just trying to circumvent that as much as possible;” “Respondent’s intentions were to use its manufacturing license as a subterfuge to run a retail distilled spirits operation.”⁹

The Respondent, in its closing, did not recommend a penalty in the event the accusation was sustained. The Respondent in its brief acknowledged “the basic concept of a penalty in any situation is to encourage the violator not to make the same mistake again.”¹⁰ Apparently, the initial verbal warning and subsequent 15-day suspension was not sufficient to encourage the Respondent not to violate the laws and limitations placed upon its license and repeat the same violations. The fact the Respondent received prior warning and discipline and continued to circumvent and shirk its clear responsibilities is disconcerting.

Rule 144 Penalty Guidelines recommend a 5-day suspension up to revocation for violations of exceeding license privileges under sections 24200(a), 23300 and 23355. The undersigned has considered Respondent’s short licensure and all aggravating and mitigating factors. The penalty recommended herein complies with rule 144.¹¹

⁹ Exhibit 1C, Department’s Hearing Brief, page 7, lines 19 to 20.

¹⁰ Exhibit A, page 7, lines 27 to 28.

¹¹ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

The accusation is sustained. The Respondent's craft distiller's license is hereby suspended for a period of 25 days.

Dated: June 27, 2019

D. Huebel
Administrative Law Judge

<input type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____

By: _____
Date: _____