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

AB-9441
File: 42-371457 Reg: 13079712

RIGOBERTO RAMIREZ,
dba Tarasco Bar
543 North Avalon Boulevard, Wilmington, CA 90744,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 5, 2015
Los Angeles, CA
ISSUED FEBRUARY 23, 2015

Rigoberto Ramirez, doing business as Tarasco Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking his license for permitting drink solicitation activity, a violation of Business and Professions Code section 24200.5, subdivision (b), and section 25657, subdivisions (a) and (b); and for his employee accepting a drink on the licensed premises, which had been purchased or sold there and intended for the employee's consumption, a violation of section 143 of title 4 of the California Code of Regulations (rule 143).

Appearances include appellant Rigoberto Ramirez, through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated May 9, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on May 29, 2001. On December 30, 2013, the Department filed a 15-count accusation against appellant charging that, on four separate dates between October 18, 2012 and April 26, 2013, appellant permitted individuals to engage in drink solicitation activity on the licensed premises, in violation of Business and Professions Code sections 24200.5(b)[2] and 25657(a) and (b).[3] Also, the accusation charged that on October 18, 2012, appellant's employee, Norma C. Rodriguez Ramirez, accepted a drink that had been purchased or sold on the licensed premises and intended for her consumption, a

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[2]Section 24200.5(b) states, in relevant part:

. . .the department shall revoke a license upon any of the following grounds:

[¶ . . .¶]

(b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks on the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy.

[3]Section 25657 provides:

It is unlawful:

(a) For any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.

(b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.

violation of rule 143.[4]

At the administrative hearing held on April 8, 2014, documentary evidence was received and testimony concerning the violation charged was presented by Sergeant Lifernando Garcia of the Los Angeles Police Department (LAPD); and by Officers Francisco Lopez, Ryan Rycroft, and Jesus Camacho, also of the LAPD. Appellant presented no witnesses.

Testimony at the hearing established that on four separate occasions — October 18, November 1, November 16, 2012, and April 26, 2013 — the licensed premises was visited by undercover officers with the LAPD.

Counts 1-5:

On the evening of October 18, 2012, Officer Lopez and Sergeant Garcia went to the licensed premises undercover to investigate drink solicitation activity. They sat at the fixed bar and ordered a Modelo and a Victoria beer from the bartender, who was subsequently identified as Norma Rodriguez. Rodriguez served them the beers and charged them $8.00 for both. The officers were later approached by a person identifying herself as Leticia. Leticia talked to the officers briefly and then asked Garcia

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[4]Rule 143 provides:

> No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee.
>
> It is not the intent or purpose of this rule to prohibit the long-established practice of a licensee or a bartender accepting an incidental drink from a patron.

to invite her to a beer. Garcia agreed, and Leticia ordered a Bud Light beer from Ramirez. While Ramirez was retrieving the beer, Garcia placed a $20 bill on the bar counter in front of him. Ramirez served a 12-ounce can of Bud Light beer to Leticia and picked up the $20 bill that was in front of Garcia. Ramirez went to the cash register and returned with change. She placed $10 in change in front of Garcia and $7 (one $5 bill and two $1 bills) in front of Leticia. Leticia, in Ramirez's presence, picked up the $7 and placed it in her purse. Leticia then consumed her beer.

After consuming the first beer, Leticia asked Sergeant Garcia to invite her to another. Garcia agreed. Leticia ordered a Bud Light beer from Ramirez, and Garcia placed a $20 bill on the bar in front of him. Ramirez picked up the $20 bill and went to the cash register. When she returned, Ramirez served a 12-ounce can of Bud Light beer to Leticia, and placed $10 in change in front of Garcia and $7 in front of Leticia. Leticia, again in Ramirez's presence, picked up the $7 and placed it in her purse. Leticia then consumed her beer. Throughout the evening, Leticia solicited a beer from Garcia three more times, and Garcia agreed to purchase the beers each time. The three subsequent solicitations were conducted in the same manner as the first two.

Also on October 18, 2012, Leticia, in Ramirez's presence, asked Sergeant Garcia to buy a beer for Ramirez, the bartender. Garcia agreed. Ramirez picked up a $20 bill from the bar that was in front of Garcia, went to the cash register, and made a notation on something next to the register. Ramirez placed $10 in change in front of Garcia and then opened a 12-ounce can of Bud Light beer and consumed it.

That same evening, Officer Lopez was approached by an individual who identified herself as Norma. Norma asked Lopez to invite her to a beer, and Lopez agreed. Norma ordered a Miller Lite beer from Ramirez. Ramirez served Norma a 12-

ounce can of Miller Lite beer, and Lopez handed Ramirez a $20 bill. Ramirez took the $20 bill to the register. When she returned, Ramirez placed $10 in front of Lopez and handed $7 to Norma. Norma placed the $7 in her purse and then consumed her beer.

After consuming the first beer, Norma asked Officer Lopez to invite her to a second. Lopez agreed. Norma ordered a Miller Lite beer from Ramirez, and Lopez handed a $20 bill to Ramirez. Ramirez served Norma a 12-ounce can of Miller Lite beer, handed $7 to Norma, and placed $10 in front of Lopez. Norma placed the $7 in her purse and consumed her beer while in Ramirez's presence. Norma subsequently solicited two more beers throughout the evening, and the solicitations, service, and payments occurred in the same manner as the first two.

Counts 6-7:

On November 1, 2012, Sergeant Garcia entered the licensed premises alone, posing as a customer. He sat at the fixed bar and ordered a Victoria beer from Ramirez who was again working as bartender. Ramirez served Garcia the beer, for which he was charged $4.

After a short time, Ramirez asked Sergeant Garcia to invite her to a beer. Garcia agreed and placed a $20 bill on the bar. Ramirez picked up the $20 bill, obtained a 12-ounce can of Bud Light beer, and placed $10 in change in front of Garcia. Ramirez put $7 into her purse that was next to the cash register and then consumed her beer.

Bartender Ramirez then asked Sergeant Garcia to buy her another beer. Garcia agreed and placed a $10 bill on the bar in front of him. Ramirez picked up the $10 bill and went to the cash register. She placed $7 in her purse, which was next to the register, and served herself a 12-ounce can of Bud Light beer. Ramirez then consumed her beer. Later that evening, Ramirez solicited a third beer from Garcia, and

Garcia agreed to buy it. The payment and service for the third beer were the same as those for the second.

Counts 8-11:

Sergeant Garcia returned to the licensed premises on November 16, 2012, this time accompanied by Officers Lopez, Rycroft, and Hererra.[5] The officers ordered beers from and were served by a bartender called Jackie, later identified as Luz Presichi (hereinafter Presichi).

After a short while, Norma Ramirez, who was not working as bartender on this occasion, entered the premises. She sat next to Sergeant Garcia and asked him to buy her a beer. Garcia agreed. Ramirez ordered a Bud Light beer from Presichi. Garcia placed a $20 bill in front of him at the bar and ordered a Victoria beer for himself. Presichi picked up the $20 bill and walked to the cash register. Upon her return, Presichi served the beers and placed $13 in change on the bar. Ramirez, in Presichi's presence, picked up $7 from the $13 and placed it in her purse. Ramirez then consumed her beer.

After consuming the first beer, Ramirez asked Sergeant Garcia to invite her to another. Garcia agreed, and Ramirez ordered a Bud Light beer from Presichi. Garcia placed a $20 bill on the bar, and Presichi picked up the $20 bill and went to the cash register. She returned and placed a 12-ounce can of Bud Light beer in front of Ramirez; she also placed $17 on the bar. Ramirez picked up $7 and placed it in her purse in Presichi's presence. Ramirez solicited two more beers from Garcia on this occasion, and the third and fourth solicitations occurred in a manner identical to the

[5]The record is unclear as to Officer Herrera's first name as Herrera did not testify at the administrative hearing and none of the witnesses provided it.

second. Notably, appellant himself was present at the licensed premises on November 16, 2012, and was behind the bar, approximately 15 to 18 feet away from Garcia. Also of note, the Department dismissed count 11 of the accusation during the administrative hearing.[6]

Counts 12-15:

The conduct giving rise to counts 12 through 15 occurred on April 26, 2013. On that date, Officers Camacho and Herrera went to appellant's establishment undercover. The officers sat at a table where they observed an individual working as a waitress, serving drinks to customers, and clearing tables. The individual was later identified as Jackie Vasquez (hereinafter Vasquez). The officers ordered a Corona beer and a Dos Equis beer from Vasquez, and Vasquez returned to the table with the beers. Vasquez then asked Camacho if he would buy her a beer. Camacho agreed and gave Vasquez a $20 bill. Vasquez went to the bar and obtained a 12-ounce Bud Light beer from appellant, who was working behind the bar with Presichi. Vasquez placed $2 in change in front of Camacho and put $7 in her purse.[7]

Officer Camacho was subsequently approached by an individual identified as Alejandra. Alejandra asked Camacho if he would buy her a beer. Camacho agreed and handed Alejandra a $10 bill. Alejandra went to the fixed bar and obtained a 12-ounce can of Bud Light beer from appellant. She returned to the table and placed $7 in her purse without providing Camacho any change. Alejandra then consumed her beer.

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[6]Count 11 charged that, on November 16, 2012, appellant's employee, Presichi, violated rule 143.

[7]The ALJ concluded that the officers were charged $4 each for the Corona and Dos Equis, and $3 for Vasquez's Bud Light. (See Findings of Fact ¶ 21.)

Later on April 26, 2013, Officer Camacho sat at the fixed bar and ordered a beer for himself from Presichi. Alejandra, in Presichi's presence, approached Camacho and asked him to buy her another beer. Alejandra ordered a beer from Presichi, and Presichi served Alejandra a 12-ounce Bud Light beer. Camacho handed Presichi a $10 bill, and Presichi went to the cash register and returned. She began to place $7 in front of Alejandra, but, at the last second, placed it in front of Officer Camacho instead. Presichi told Camacho to give the money to Alejandra. Camacho asked Alejandra, "What do I give you, $6?" Alejandra replied, "No. I get $7 and the bar keeps $3."

Presichi then took a phone call on the premises phone. After the call, Presichi told Alejandra that the call was from the bar up the street, there were cops in that bar, and the cops were probably coming to the licensed premises. Presichi then talked to appellant who was also still behind the bar. Appellant went around and talked to each of the women present. After he spoke with Vasquez, she walked up to Officer Camacho and placed $7 in front of him. Vasquez told Camacho that she did not have any change earlier.

After the hearing, the Department issued its decision which determined that, following the dismissal of count 11, the 14 remaining violations charged were proved and no defense was established.

In recommending a penalty, the Department presented evidence, which was admitted over appellant's objection, of a prior disciplinary action against the licensee for violations of the same or similar solicitation provisions at issue in this case.[8] The action (hereinafter referred to as "the 2010 case") was grounded in investigations that took

[8]See Reg. No. 11074649, July 21, 2011.

place in February and March of 2010. The formal accusation for the 2010 case was filed on March 24, 2011. On July 20, 2011, appellant signed a stipulation and waiver to resolve the matter. The decision in the 2010 case became final on July 21, 2011, and resulted in a penalty of a three-year stayed revocation with a 25-day suspension.

In the present case, the ALJ observed that, at the time of the violations listed in the accusation here — which spanned from October 2012 to April 2013 — appellant had already signed the stipulation and waiver for the 2010 case, served the 25-day suspension, and was in the middle of his stayed revocation. The ALJ noted a responsible licensee would have taken corrective measures to ensure that similar solicitation violations did not recur, but that appellant, who was on the premises during two of the officers' visits during this investigation, was not actively involved in stopping or preventing the solicitation of alcoholic beverages. In fact, the ALJ found appellant only engaged in the one-on-one conversations with the solicitors after he was alerted that police officers would be coming. Thus, the ALJ concluded that appellant is not interested in complying with the law and only cares about not being caught. As such, the ALJ proposed outright revocation of appellant's license.

Appellant filed a timely appeal contending the following: (1) the Department's decision is not supported by substantial evidence; (2) appellant's disciplinary history should not have been admitted for penalty aggravation purposes; and (3) the penalty of outright revocation of appellant's license is excessive and unduly harsh.

DISCUSSION

I

Appellant first contends that the Department's decision is not supported by substantial evidence.

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, 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. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) "Substantial evidence" is relevant evidence which reasonable minds would accept as support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

With regard to counts 1 through 4, appellant contends that there was no evidence that bartender Ramirez overheard any of the five solicitations of Sergeant Garcia by Leticia, or the four solicitations of Officer Lopez by Norma, or that Ramirez ever saw Leticia take any commission. (App.Br. at pp. 9-10.) Also, appellant contends that count 5 cannot be sustained because the rule expressly allows for a bartender to accept an incidental drink from a patron. (*Id*. at p. 10.)

Appellant's contentions with regard to counts 1 through 5[9] are simply without merit. The record establishes that on nine separate occasions on October 18, 2012 — five involving Leticia and four involving Norma — Ramirez collected payment from one of the undercover officers, made change, and upon return placed some money in front of the officer who tendered payment and paid $7 commission over to the respective solicitor. (See RT at pp. 15-27; 66-74.) Moreover, Ramirez herself participated in the solicitation activity when Leticia, in Ramirez's presence, asked Sergeant Garcia to buy Ramirez a beer. Thereafter, Garcia paid Ramirez with a $20 bill, and Ramirez went to the cash register, made change, made a notation on something near the register, gave Garcia $10 in change, and served herself a beer. (RT at pp. 27-28.)

Viewing the events of October 18, 2012 as a whole, there is substantial direct and circumstantial evidence in the record that Ramirez knew of and participated in the drink solicitation activity that evening. Also, appellant's attempt to label Ramirez's solicited beer as an "incidental drink" from a patron — thereby absolving appellant of liability under rule 143 — is easily rejected because it ignores the fact that Garcia was apparently charged $10 for the beer, which coincidentally is the exact inflated price[10] the officers were charged for each of the nine other solicited beers that evening, while they were only charged $4 for the beers they purchased for themselves. Altogether

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[9]Count 1 charged that Ramirez permitted Leticia to solicit drinks in violation of section 24200.5(b). Count 2 charged that appellant permitted Leticia to loiter for the purpose of soliciting drinks in violation of section 25657(b). Count 3 charged that Ramirez permitted Norma to solicit drinks in violation of section 24200.5(b). Count 4 charged that appellant permitted Norma to loiter for the purpose of soliciting drinks in violation of section 25657(b). Finally, count 5 charged that Ramirez accepted a drink in violation of rule 143. (Exhibit 1.)

[10]$3 for the can of Bud Light beer plus $7 in commission.

there is substantial evidence in the record to support the Department's decision to sustain counts 1 through 5.

With regard to counts 6 and 7,[11] appellant contends there is no evidence that bartender Ramirez was either permitted to solicit drinks or employed for the purpose of drink solicitation. (App.Br. at pp. 11-12.) Absent such evidence, appellant claims, counts 6 and 7 should not have been sustained.

Appellant's argument on this point is simply incorrect. It is well-settled law that a licensee has an affirmative duty to ensure the licensed premises is not used in violation of the law and that the knowledge and acts of the employees are imputed to the licensee. (*Mack v. Dept. of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149, 153-154 [2 Cal.Rptr. 629]; *Munro v. Alcoholic Bev. Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527]; *Oconco, Inc*. (2000) AB-7365 at pp. 3-4.) Here, the record establishes that on November 1, 2012, Norma Ramirez, appellant's bartender, solicited three beers from Sergeant Garcia, and on each occasion took a $7 commission. (See RT at pp. 29-32.) Because Ramirez was appellant's employee, these solicitations are imputed to appellant, and the Department's decision to sustain these counts was therefore proper.

Appellant next contends that counts 8 through 10[12] should not have been

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[11]Counts 6 and 7 charged that appellant permitted Ramirez to, and employed Ramirez for the purpose of, soliciting drinks in violation of sections 24200.5(b) and 25657(a), respectively. (Exhibit 1.)

[12]Counts 8 and 9 charged that appellant permitted Ramirez to, and employed Ramirez for the purpose of, soliciting drinks in violation of sections 24200.5(b) and 25657(a), respectively. Count 10 charged that appellant permitted Ramirez to loiter on the premises for the purpose of soliciting drinks in violation of section 25657(b). (Exhibit 1.) Again, count 11 was dismissed by the Department. (See RT at p. 120.)

sustained because there is no evidence in the record that appellant's bartender, Presichi, overheard any of the solicitations. Appellant's contention once again rings hollow. Testimony established that, on November 16, 2012, Norma Ramirez, who was not on duty as a bartender that evening, solicited multiple beers from Sergeant Garcia. Each time, Garcia paid Presichi with a $20 bill, and Presichi placed the change on the bar and stood right in front of Garcia and Ramirez while Ramirez removed her $7 commission from the change. (See RT at pp. 33-38.) This repeated activity provides substantial evidence of a scheme for Norma to solicit beers on November 16, 2012 in exchange for commission, as well as Presichi's awareness of said scheme. As such, contrary to appellant's contention, the charges in counts 8 through 10 are supported by substantial evidence.

Appellant finally contends that counts 12 through 15[13] cannot be sustained because "there was not substantial evidence that anyone overheard any of the solicitations to any officer by [Vasquez] or Alejandra." (App.Br. at p. 17.) Once again, appellant attempts to divert attention from the fact that his employees knew of, facilitated, and even participated in the illegal solicitation scheme. First with regard to Vasquez, the evidence established that she was working as a waitress for appellant on April 26, 2013, and that she withheld a $7 commission after she successfully solicited a beer from Officer Camacho. (See Findings of Fact ¶ 21; RT at pp. 84-93.) As such, this solicitation is properly imputed to appellant. (See *Mack*, *supra*, 178 Cal.App.2d at

[13]Counts 12 and 13 charged that appellant permitted Vasquez to, and employed Vasquez for the purpose of, soliciting drinks in violation of sections 24200.5(b) and 25657(a), respectively. Count 14 charged that appellant's employee, Presichi, permitted Alejandra to solicit drinks on April 26, 2013 in violation of section 24200.5(b). Count 15 charged that appellant knowingly permitted Alejandra to loiter for the purpose of soliciting drinks in violation of section 25657(b). (Exhibit 1.)

pp. 153-154; *Munro*, *supra*, 181 Cal.App.2d at p. 164.) Moreover, after Presichi received the call alerting her to the impending police presence, she notified appellant who, in turn, notified each of the women in the bar, including Vasquez. Only after her conversation with appellant did Vasquez attempt to return the commission she initially withheld. (See RT at pp. 103-107.) Thus there is substantial evidence in the record to support that appellant and his employees were well aware of Vasquez's solicitation.

As to Alejandra's solicitations on April 26, 2013, after Officer Camacho paid Presichi for the beer Alejandra solicited from him, Presichi was about to return the change to Alejandra, but instead gave it to Camacho. (Findings of Fact ¶ 23.) She then told Camacho that he could give the money to Alejandra. (*Ibid*.) Additionally, Presichi was standing in front of Camacho and Alejandra when Alejandra confirmed how much commission she was owed. (*Ibid*.; RT at pp. 98-103.) Finally, as the Department observes, although it was not noted in the Proposed Decision, shortly after Presichi received the warning call, she tried to determine whether Camacho was a police officer by attempting to kiss him on the lips. (See RT at p. 106.) Presichi determined Camacho could not be a cop because of how close he allowed her to get, and told Alejandra that it was all right for her to solicit Camacho. (See *id*. at pp. 106-107.) Altogether, substantial evidence established that appellant and his agents or employees knew of and permitted the solicitation scheme.

II

Appellant next contends that the Department abused its discretion by admitting the prior disciplinary case against appellant for purposes of aggravation. Appellant "argues that as a blanket rule the Department should always be precluded from using a prior violation which it obtains under questionable practices." (App.Br. at p. 17.)

In support of his argument, appellant cites two previous decisions of this Board, *Sotelo* (2014) AB-9338 and *Cervantes* (2014) AB-9380. Curiously absent from appellant's brief, however, is any discussion as to how either of these cases support appellant's position. Also curious is the fact that, as the Department notes, in both *Sotelo* and *Cervantes*, the Board found the appellants' arguments on this issue to be without merit. (Dept.Br. at p. 13.)

In *Sotelo*, for instance, the appellants, notably represented by appellant's counsel in this case, argued that the licensees were defrauded into signing the stipulation and waiver because the Department failed to inform them of a pending investigation. (*Sotelo*, *supra*, at p. 10.) In rejecting the argument, the Board observed that the appellants "cite[d] no authority indicating that the Department's knowledge of the present violations is in any way relevant. (*Ibid*.) Indeed, the Board found "[t]he Department's knowledge of the present violations is almost certainly irrelevant in light of the fact that appellants were on notice of repeated solicitation activity and failed to take measures to prevent it." (*Ibid*.)

> In rejecting a similar argument in *Cervantes*, the Board observed that the "[a]ppellants . . . presented no evidence to show the Department knew of the pending investigation at the time of the stipulation and waiver, let alone that it deliberately withheld that information in order to exact a more onerous penalty. Appellants also presented no evidence or argument that they sacrificed a meritorious defense when they signed the [previous] stipulation and waiver."

(*Cervantes*, *supra*, at pp. 18-19.) Additionally, just as in *Sotelo*, we determined that the prior accusation actually put the appellants on notice of illegal solicitation activity on the licensed premises when the events underlying the violations at issue took place. (See *Cervantes*, *supra*, at p. 20.) Thus, we found, the ALJ had not abused his discretion in considering the prior disciplinary matter in proposing the penalty. (*Ibid*.)

The same considerations which prompted the Board to reject an argument similar to appellant's in *Sotelo* and *Cervantes* are present in this case. First, although appellant claims the prior disciplinary matter was obtained under "questionable practices," appellant fails to mention which of the Department's practices appellant deems "questionable." Further, appellant has failed to offer any evidence that the Department knew of the pending investigation when appellant signed the stipulation and waiver in July of 2011. Finally, even if the Department did know of the impending investigation, this fact alone is irrelevant and would not help appellant's case. The prior disciplinary matter was closed on July 21, 2011. Appellant was therefore unquestionably on notice of illegal solicitation activity at his establishment by October 2012, when the events underlying the instant accusation began. As the ALJ observed, rather than take any measures to prevent the illegal activity, the record reflects that appellant took steps to cover it up. In light of appellant's blatant disregard for his responsibility as a licensee, we cannot say that the ALJ abused his discretion in proposing the revocation of appellant's license.

III

Appellant contends that the penalty of revocation of his license is unduly harsh.

The 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]) but 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].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty

imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 sets forth the Department's penalty guidelines and provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. (Cal. Code Regs., tit. 4, § 144.) Among the aggravating factors listed in the rule is the licensee's disciplinary history. (See *ibid*.)

Additionally, the rule itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

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

In the instant matter, the ALJ made the following findings with regard to mitigation:

> The Department recommends that the license be revoked, primarily based upon the prior disciplinary matter that involved the exact same types of violations, that being drink solicitations. (See Exhibit 2).
>
> At the time of the violations listed in this accusation, Respondent Rigoberto Ramirez had already signed a stipulation and waiver for the

> Exhibit 2 violations, served a twenty-five day suspension, and was in the middle of a three year stayed revocation. What would a responsible licensee do in that situation?
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> A responsible licensee would have taken corrective measures to insure that these solicitation violations did not occur again. That is not what Respondent did here. Although he was present on two of the visits, he was certainly not actively involved in the stopping or preventing solicitation of alcoholic beverages.
>
> The only instance of notable activity by Respondent was when they [*sic*] received a phone call from a bar down the street warning them of police officers. Respondent then had a one on one conversation with each of the females. That is when Vasquez returned $7 to Officer Camacho.
>
> It is clear that Respondent is not interested in complying with the law. Respondent is only interested in not getting caught. Those are the qualities of an irresponsible licensee.
>
> Respondent has operated his business contrary to the public welfare and morals. The Department must not let it continue. There is no evidence that would cause anyone to believe that the illegal activity will stop if Respondent is allowed to continue to operate.
>
> The penalty recommended here is consistent with Rule 144.

(Penalty Considerations.)

The ALJ was correct in that the Penalty Schedule of rule 144 recommends a default penalty of revocation for a first-time violation of either subdivision (b) of Business and Professions Code section 24200.5, or subdivision (a) of section 25657. The Penalty Schedule further recommends 30 days' suspension to revocation for violating subdivision (b) of section 25657, and 15 days' suspension for violating rule 143. Thus, given appellant's disciplinary history, and because substantial evidence supports the Department's decision to sustain the remaining counts in this case, the penalty of outright revocation is well within the limits of the rule — particularly since appellant was already serving a stayed revocation for similar conduct. Because the Board whole heartedly agrees with the ALJ's reasoning and conclusions concerning the

penalty, we cannot say it was an abuse of discretion.

ORDER

The decision of the Department is affirmed.[14]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[14]This final decision 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 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.