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

AB-9674
File: 41-510050; Reg: 17085418

LAS LANGOSTAS CORPORATION,
dba Mariscos Casa Corona
14540 Vanowen Street, Van Nuys, CA 91405-3940,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 6, 2018
Ontario, CA

ISSUED SEPTEMBER 18, 2018

Appearances: *Appellant:*, Armando H. Chavira, as counsel for Las Langostas Corporation,

Respondent: Jennifer M. Casey, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Las Langostas Corporation, doing business as Mariscos Casa Corona, appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking its license and, concurrently, suspending its license for 30 days (with 10 days conditionally stayed for three years, provided no further cause for discipline arises within that time period) because its employees permitted drink solicitation activity, in violation of Business and

[1]The decision of the Department, dated November 15, 2017, is set forth in the appendix.

Professions Code section 24200.5, subdivision (b)[2] and section 25657, subdivision (a);[3] it permitted individuals to loiter for the purpose of drink solicitation, in violation of Business and Professions Code section 25657, subdivision (b);[4] and it violated conditions on its license in violation of Business and Professions Code section 23804.[5]

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

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

[3]**Section 25657(a**) states:

> 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.

[4]**Section 25657(b)** provides:

> It is unlawful:
>
> (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.

[5]**Section 23804** provides:

> A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on November 4, 2011. There is one instance of previous discipline on the license: a 20-day suspension and a concurrent three-year stayed revocation for allowing drink solicitation activities in the premises, violating conditions on the license, and allowing the sale of a controlled substance on the premises, in 2015. (Exh. 3.)

The original petition for conditional license, signed on April 28, 2011, included 13 conditions, three of which are at issue in this matter. To wit:

> 7. No pool or billiard tables may be maintained on the premises.
>
> 9. There shall be no live entertainment permitted on the premises at any time.
>
> 13. Alcoholic beverages must be sold only in single servings. Pitchers and buckets of beer are prohibited.

(Exh. 6.)

On March 15, 2017, the Department instituted a 17-count accusation against appellant (exh. 1), charging that, in March and April of 2016, appellant's employees permitted drink solicitation activity, it permitted individuals to loiter in the premises for the purpose of drink solicitation, and it violated conditions on its license.

At the administrative hearing held on August 2, 2017, documentary evidence was received and testimony concerning the violations charged was presented by three Department of Alcoholic Beverage Control Agents: Oscar Zapata, Alberto Lopez, and Danny Vergara. Appellant presented no witnesses.

Testimony established the following:

Counts 1 - 2:

On March 14, 2016, Agent Zapata entered the licensed premises alone and sat

down at the bar. He ordered a Corona beer from the bartender, Rosa Isela Ayona-Agustiniano. She served the beer to him and charged him $5, which he paid.

Subsequently, Maria Esperanza Flores entered the premises. Agent Zapata recognized her from a 2015 investigation which resulted in the previous discipline on the license. Flores approached Zapata, they chatted, and she asked him to buy her a beer. He agreed. (Count 2.)

Flores ordered a beer from the bartender, Rosa, and she served it to her. Zapata asked how much the beer was and Rosa told him $10. He paid with a $20 bill. Rosa took the money to the register then returned with $10 in change for Zapata and placed $5 on the counter. Flores slid the $5 under a napkin. (Count 1.)

The bartender called Flores over and the two of them spoke with a third woman. Flores then returned to her seat, but a short time later she exited the premises — leaving the $5 behind. Zapata exited as well because he believed the women recognized him as a law enforcement officer.

Counts 3 - 8:

On March 29, 2016, Agent Lopez entered the licensed premises and sat down at the bar. He ordered a beer from Flores, who was acting as bartender. She served the beer to him and charged him $5, which he paid.

Subsequently, Lopez was joined by Agent Vergara. Vergara ordered a bucket of beers (three bottles of Bud Light and three bottles of Corona) from Flores. She served the beer to him and charged him $30, which he paid. (Count 3.)

Lopez and Vergara went to a second room in the premises containing two pool tables. They played pool for awhile at one of the tables, then returned to the bar.

(Count 4.)

Flores asked Vergara if he would buy her a beer. He agreed, and she obtained a can of Miller Lite beer. He asked how much it cost and she said $10. He paid with a $20 bill and obtained $10 in change. (Count 6.)

Marcela entered the licensed premises and sat at the bar. Flores approached her and told her to sit with Lopez and Vergara, which she did. Flores asked Lopez if he would buy Marcela a beer. (Count 5 - subsequently dismissed.) He agreed, and she ordered a Tecate Light beer. Flores served the beer to Marcela. Agent Lopez paid with a $20 bill. Flores went to the register then returned and gave $10 in change to Lopez and $7 to Marcela.

Flores asked Lopez if he would buy her a beer. He agreed and she obtained a beer. He handed her $20 and received $10 in change. (Count 7.)

Subsequently, Flores asked Lopez if he would buy Marcela another beer. He asked Marcela if she wanted one and she agreed. Flores served Marcela a can of Tecate Light beer. Lopez asked how much it was and Flores told him $10, which he paid. Flores rang it up then placed $7 in front of Marcela which she placed in her purse. Agent Lopez ordered a Tecate Light from Flores. Flores obtained two beers and served them to Lopez and Marcela. He paid with three $5 bills. Flores rang it up and returned with $7 which she placed in front of Marcela. (Count 8.)

Lopez and Vergara exited the bar.

Count 9:

On April 1, 2016, Agents Lopez and Vergara returned to the licensed premises. They each ordered a beer, which they were served. While they drank their beers, they

listened to three men playing musical instruments. They listened to the music, then left the bar. (Count 9.)

Counts 10 - 14:

On April 5, 2016, Agents Lopez and Vergara entered the licensed premises and Vergara ordered a bucket of beers from the bartender, Flores. She served him a bucket containing six bottles of Corona beer. (Count 10.)

Flores asked Vergara if he would buy her a beer. He agreed, and she obtained a can of Miller Lite beer. He handed her $40 to pay for the bucket of beers and her beer. He received no change. (Count 12.)

Marcela entered the licensed premises and sat at the bar. Flores asked her to sit with Lopez and Vergara and she agreed. Flores asked Lopez if she should give Marcela a beer. He asked her if she wanted a beer and she said she did. Flores obtained a can of Tecate Light beer and served it to Marcela. Lopez paid with a $20 bill. Flores gave him $10 in change and placed $7 in front of Marcela. Marcela placed it in her wallet. (Count 11 - subsequently dismissed.)

Flores obtained a second beer for herself, without soliciting it from either agent. Later, she obtained a third beer. She held it up and raised her eyebrows as if asking a question. Vergara, believing she was asking him to buy her a beer, nodded yes. He paid with a $20 bill and received no change.

Flores asked Lopez if she should give Marcela another beer. He asked if she wanted one and she said she did. Flores obtained a can of Tecate Light and served it to Marcela. Lopez paid with a $20 bill. He received $10 in change and Flores placed $7 in front of Marcela. She placed it in her wallet. (Count 13.)

Flores asked Lopez if he would buy her another beer. He agreed, and also asked Marcela if she wanted a beer. She said she did. Flores obtained a can of Miller Lite beer for herself and a can of Tecate Light for Marcela. Lopez paid with a $20 bill. Flores rang up the sale and gave $7 to Marcela. (Count 14.)

The agents both exited shortly thereafter.

Counts 15 - 17:

On April 8, 2016, Agents Lopez and Vergara returned to the licensed premises and sat at the bar. They remained there for a while, then left. Returning later that day, they were approached by Flores who was acting as a waitress. She asked them where they would like to sit, and they sat down at a table.

Flores asked what they wanted to drink and Vergara ordered a bucket of beers. Flores served them a bucket containing six bottles of Corona beer and charged them $30. (Count 15.) Flores also brought a can of Miller Light beer for herself. Vergara paid with two $20 bills, and received no change. (Counts 16-17 - subsequently dismissed.)

Following the hearing, on September 14, 2017, the administrative law judge (ALJ) issued a proposed decision, sustaining counts 1, 2, 6, 7, 8, 12, 13, and 14,[6] and recommended that the license be revoked for those violations. Concurrently, the ALJ sustained counts 3, 4, 9, 10, and 15,[7] and recommended that the license be

[6]These counts were for violations of Business and Professions Code sections 24200.5(b), and 25657(a) and (b) — employing individuals for drink solicitation purposes, and permitting individuals to loiter in the premises for the purpose of drink solicitation.

[7]These counts were for violations of Business and Professions Code section 23804 — violation of conditions on the license.

suspended for 30 days for those violations (with 10 days stayed — conditioned on the discipline-free operation of the premises for three years). Counts 5, 11, 16, and 17 were dismissed.

On October 23, 2017, the Department adopted the proposed decision in its entirety, and on November 15, 2017, the Department issued its Certificate of Decision.

Appellant then filed a timely appeal raising the following issues: (1) the counts sustained in the decision are not supported by substantial evidence, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the counts sustained in the decision are not supported by substantial evidence. Specifically, appellant contends there is insufficient evidence to support counts 1, 2, 6, 7, 8, 12, and 13 of the accusation. (AOB at pp. 9-14.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra*, at 114.)

Count 1. Appellant contends there is insufficient evidence that Rosa heard Maria Flores solicit Agent Zapata on March 14, 2016, because Rosa had to be called over to take the order and therefore would not have heard the exchange between Flores and Zapata. (AOB at p. 9.) However, the ALJ found that substantial evidence supported this charge of the accusation, and that Rosa *was* aware of and participated in the solicitation scheme — as evidenced by the fact that she placed a $5 commission

on the bar counter in front of Flores after serving her the drink. (Conclusions of Law, ¶ 8.) We agree. Rosa would not have paid Flores a commission unless she were part of the scheme to permit Flores to solicit drinks. This count is sustained.

Count 2. Appellant contends there is insufficient evidence that Flores was loitering inside the premises on March 14, 2016, because "there was no evidence of 'loitering' which requires conduct of loafing or walking around aimlessly." (AOB at p. 10.) Appellant cites no authority for this position. On the contrary, the evidence supports the finding that Flores was at the premises for the purpose of soliciting alcoholic beverages. At no time was she seen performing waitress or bartending duties, nor paying for her own drinks. Instead, she received a commission for the beer she solicited from Zapata. The payment of a commission supports the finding that Flores loitered for the purpose of soliciting alcoholic beverages. (*Garcia v. Munro* (1958) 161 Cal.App.2d 425, 429 [326 P.2d 894] ["If there was evidence that the licensees paid her a commission for drinks solicited, that might be some indication that she was employed 'to loiter' to solicit drinks."].) This count is sustained.

Count 6. Appellant contends there is no evidence that Flores was employed for the purpose of soliciting drinks on March 29, 2016 because she was acting as a bartender on that occasion, rather than being employed *for the purpose of* soliciting. Furthermore, appellant contends "the fact that she asked the investigator to buy beers could have been an aberrant act on her part." (AOB at p. 11.) Appellant completely ignores the evidence in the record, that Flores solicited Agent Lopez to buy beers for Marcela, then paid Marcela a commission. (Findings of Fact, ¶¶ 13 and 15.) This count is supported by substantial evidence and is sustained.

Count 7. Appellant contends there was no agreement between appellant and Flores to pay her a commission, and further contends there is no evidence she actually received a commission. (AOB at pp. 11-12.) These assertions contradict the testimony of Agent Vergara, who testified that the beers solicited from him by Flores cost $10, while beers he purchased for himself cost $5. (RT at pp. 87-89.) Agent Lopez testified to the same cost discrepancy. (RT at pp. 43-44.) Substantial evidence of a solicitation scheme supports this charge of the accusation; it is sustained.

Count 8. Appellant contends there is no evidence that Flores solicited alcoholic beverages on behalf of Marcela, and that the arguments under count 6 should apply here (AOB at p. 12) even though Marcela is not mentioned in count 8.

To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or authority for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing court. (Atchley v. City of Fresno (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) There is no basis for reversal of this count; it is sustained.

Count 12. Appellant contends there is no evidence Flores was employed for the purpose of soliciting drinks and states "the lack of proof of an agreement means there was not substantial evidence to support *Count* 7." (AOB at p. 13.) As noted in the previous paragraph, this contention requires no discussion since it fails to address the facts of the actual count. Even if appellant's reference to the wrong count is overlooked, and we assume it meant to say count 12 rather than count 7, appellant's argument ignores substantial evidence supporting Findings of Fact, paragraphs 21 and

24, wherein Flores encouraged Agent Lopez to buy Marcela a beer, then Flores paid Marcela a commission. This count is sustained.

Count 13. Appellant contends there is no evidence that a commission, percentage, salary, or profit-sharing scheme connected to the sale of alcoholic beverages was in place to support count 13 — again contending "the lack of proof of an agreement means there was not substantial evidence to support Count 7." As noted in reference to counts 8 and 12, *supra*, we are entitled to disregard the argument for failure to address the facts of the actual count. Count 13 alleges that on April 5, 2016, Flores solicited both Agents Vergara and Lopez for drinks and was paid a commission. (Conclusions of Law, ¶ 12.) No evidence of a specific agreement between appellant and its employee is required to support this count, and appellant has offered no authority for its position that one is required. On the contrary, it is well settled in ABC case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280].) This count is sustained.

We are satisfied, based on the entire record, that counts 1, 2, 6, 7, 8, 12, and 13 are all supported by substantial evidence.

II

Appellant contends the penalty of revocation is unduly harsh and excessive. It contends that the prior disciplinary action against the license was not charged as aggravation, and that therefore the instant matter should be charged with a penalty consistent with a first-time offense. Finally, it argues that the proposed decision does not designate a specific penalty for each count, so that if any counts are overturned by

the Board, the penalty should be reduced. (AOB at pp. 14-16.)

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]), 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].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.](*Brown v. Gordon*, 240 Cal. App. 2d 659, 666-667 (1966) [49 Cal. Rptr. 901].) 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 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000,et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq*.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or

mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid*.)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
>
> 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 decision, the ALJ devotes a separate section to the issue of penalty and factors which might lessen or increase the penalty recommended by rule 144:

> The Department requested that the Respondent’s license be revoked. In support of this recommendation, the Department argued that the Respondent had been disciplined for the same type of violations in the past and, moreover, the same person was still soliciting drinks. The Respondent argued that, if the accusation were sustained, a lesser

> penalty was appropriate since the penalty imposed the first time was rather low—a significant increase in the penalty (short of revocation) would be sufficient to protect public welfare and morals and satisfy the need for progressive discipline. Accordingly, the Respondent suggested that a stayed revocation, coupled with a significant suspension, was appropriate.
>
> Section 24200.5(b) mandates revocation for a violation of its provisions, although this has been construed to include some form of stayed revocation. Pursuant to rule 144,[fn.] the penalty for a violation of section 25657(a) or section 25657(b) is revocation (which also includes stayed revocation). Finally, the penalty for a condition violation is a 15-day suspension with 5 days stayed for one year.
>
> In the present case, an aggravated penalty is warranted. First, the Respondent was previously disciplined for permitting illegal drink solicitation. Second, the solicitations at issue here were made by one of the Repondent's employees—the same employee who had been soliciting drinks in the prior case. Finally, the Respondent had previously been disciplined for violating the conditions attached to her license.
>
> The penalty recommended herein complies with rule 144.

(Decision at pp. 9-10.)

Appellant argues that the ALJ erred by considering aggravation, since "the Department did not charge the prior disciplinary case as an aggravation in the instance accusation." (AOB at p. 15.) In the accusation, the wording is as follows:

> For purposes of imposition of penalty, if any arising from this accusation, it is further alleged the respondent-licensee(s) has/have suffered the following disciplinary history:
>
> | DATE | VIOLATION | PENALTY | REG.NO. |
> |---|---|---|---|
> | 6/9/15 | BP 24200.5(b), 25657(a), 25657(b), 23804, HS 11352 | Revocation stayed 3 years & 20 day suspension | 15082566 |

(Exh. 1, at p. 7.)

In the decision, the ALJ takes note of the prior discipline, and states: "[t]he foregoing disciplinary matter is final. (Exhibit 3.) They were not pled for the purposes of aggravation." (Findings of Fact, ¶ 3.) However, we are not aware of any

requirement — and appellant has cited no authority for this proposition — that the accusation must specifically include the word "aggravation" before the ALJ is permitted to utilize the prior disciplinary matter for that purpose. For what other purpose would the words "for purposes of imposition of penalty" be included in the accusation if not for aggravation? We believe appellant's assertion that "[s]ince no aggravation was charged by the Department the accusation should be treated as a first-time offense for purposes of a penalty imposition" (AOB at p. 15) is disingenuous. This is appellant's second disciplinary action in two years, not its first offense, and no justification was established for treating it as anything but a second offense.

In the present case, the ALJ sustained:

- three counts of section 24200.5(b) violations — counts 1, 7, and 13;
- one count of violating section 25657(b) — count 2;
- four counts of section 25657(a) violations — counts 6, 8, 12, and 14;
- five counts of section 23804 violations — counts 3, 4, 9, 10, and 15.

Rule 144 authorizes revocation for a *single* violation of section 24200.5(b) and permits an aggravated penalty if there is prior discipline. Here, the evidence showed that appellant's prior disciplinary matter was not only for violations of the same four code sections as in the instant matter, but that the exact same two employees were involved in both the previous discipline and this one. This is the very definition of the "continuing course or pattern of conduct" listed as one of the reasons in rule 144 for imposing an aggravated penalty — being charged for the second time in two years with violation of the same code sections by the same employees. Aggravation was clearly warranted here.

Most unbelievably, appellant argued at the administrative hearing that the

continuing violations at the licensed premises were somehow the Department's fault, for imposing a relatively light punishment in the previous matter — a 57-count accusation which resulted in a 20-day suspension and revocation stayed for three years. During closing arguments at the administrative hearing, counsel for the appellant opined:

> And again, I'm asking the Department to look at itself. And when dealing with a 57-count violation and a 20-day suspension, I think the Department didn't go far enough to educate this particular licensee, because when you give a 20-day suspension for 57-count drink solicitation, narcotics and condition violations, it apparently didn't drive home the point of how the Department actually views these violations, especially the narcotics violation.
>
> So I think that I've never seen a penalty so low as a 20-day suspension for a 57-count drink solicitation and drug sales allegation. And I think that the licensee was inadvertently misled to think that they weren't serious.
>
> [¶ . . . ¶]
>
> So I think that taking the licensee's license when the Department did a crappy job of reinforcing the seriousness of the prior count, that there was some sort of disconnect where the licensee didn't understand the gravity of the present activities . . .
>
> [¶ . . . ¶]
>
> And I think that if the mission statement of the Department is to in part educate its license holders, it didn't do a very good job on that prior matter, and certainly didn't drive home the point that maybe it should have driven. And to that extent I think maybe the Department shares blame for the continued activities of this particular premises. . . .

(RT at pp. 110-111.) The absurd argument that somehow the Department's failure to impose a harsh penalty in the first disciplinary matter is to blame for appellant's failure to realize they had to stop violating the law is both breathtaking and utterly unpersuasive.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see

whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. Even though the penalty of revocation may be harsh, as the Court in *Rice* stated:

> [T]he propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse. [Citations.] **The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or court to substitute its own judgment therein** [citation].

(*Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285], emphasis added.) The Board is simply not empowered to reach a contrary conclusion from that of the Department if the underlying decision is reasonable.

We find the penalty imposed here entirely reasonable based on the record in this case and the guidelines of rule 144.

ORDER

The decision of the Department is affirmed.[8]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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