

FACTS AND PROCEDURAL HISTORY

Appellant's on sale beer and wine public premises license was issued on February 22, 2008. There are three prior instances of departmental discipline against the license. In the most recent disciplinary matter (appealed to this Board as AB-9617), the Board issued a decision on October 19, 2017, affirming a decision of the Department revoking appellant's license — with the revocation conditionally stayed for a period of three years, dependent upon discipline-free operation during that period. The accusation in the instant matter occurred during that stay period.

On August 6, 2019, the Department instituted a 12-count accusation against appellant charging that on five separate occasions — June 15, 2018, June 29, 2018, June 30, 2018, November 10, 2018, and November 16, 2018 — appellant permitted individuals to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under a commission, percentage, salary or other profit-sharing plan, scheme or conspiracy, in violation of Business and Professions Code Section 24200.5(b).² It further alleged that appellant's agents or employees permitted other employees to solicit upon the licensed premises, the purchase or sale of a drink

² **Section 24200.5(b)** provides, 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.

(Bus. & Prof. Code §24200.5(b).)

intended for their consumption, in violation of California Code of Regulations, Title 4, Division 1, Section 143.³ And, the accusation alleged that on two occasions, appellant employed individuals upon the licensed on-sale premises for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or paid such persons a percentage or commission for procuring or encouraging the purchase or sale of alcoholic beverages on the premises, in violation of Business and Professions Code Section 25657(a).⁴ (Exh. 1.)

At the administrative hearing held on October 1, 2019, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Edgardo Vega. Appellant presented no witnesses.

³ **Rule 143** provides, in relevant part:

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.

(Cal. Code Regs., tit. 4, § 143.)

⁴ **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.

(Bus. & Prof. Code § 25657(a).)

Testimony established the following:

Counts 1 & 2:

On June 15, 2018, Agents Vega and Zavala entered the licensed premises in an undercover capacity and sat at the bar. They ordered and were served Bud Light beers by appellant's manager, Adan Hernandez Ruelas (Ruelas), for which they paid \$4 each.

The agents took their beers to a table. Subsequently, they were asked by a waitress, Marilene Sepulveda (Sepulveda), if they wanted another round. They said yes, and ordered two Bud Light beers. They were served the beers, paid with a \$20 bill, and received \$12 in change.

Agent Vega chatted with Sepulveda, and she asked him to buy her a beer. He agreed, and she obtained an Old Milwaukee Best, a non-alcoholic beer. He paid her with a \$20 bill, which she placed in her purse. She gave him \$10 in change and consumed some of her beer.

Sepulveda went to wait on another table. When she returned, she asked the agents if they wanted another round. They ordered and were served Bud Light beers. Agent Zavala paid with a \$20 bill. Sepulveda put the money in her purse and gave him \$12 in change.

After talking with the agents for awhile, Sepulveda asked Vega to buy her another beer. He agreed, and she obtained an Old Milwaukee Best from the bar. Vega paid her with a \$20 bill which she placed in her purse. She gave him \$10 in change and consumed some of her beer. The agents then exited the premises.

Counts 3 & 4:

On June 29, 2018, Agents Vega and Zavala returned to the licensed premises in an undercover capacity and went to the bar where they ordered and were served Bud Light beers by Ruelas, for which they paid \$4 each. They took the beers and sat at a table. They were approached by Sepulveda, who was working as a waitress. She asked if they wanted to order another round. They said yes, and ordered two more Bud Light beers. Agent Zavala paid her with a \$20 bill. She put the money in her purse and gave him \$12 in change.

After a brief conversation, Sepulveda asked Agent Vega if he would buy her a beer. He agreed, and she obtained an Old Milwaukee Best from the bar. Agent Vega paid her with a \$20 bill, which she placed in her purse. He received \$10 in change. She took several sips of her beer then returned to her waitress duties. The agents subsequently exited the premises.

Counts 5 & 6:

On June 30, 2018, Agents Vega and Zavala returned to the premises in an undercover capacity. They ordered Bud Light beers from Ruelas at the bar, for which they paid \$4 each, then went to a table to sit down. Sepulveda asked Agent Vega to buy her a beer and he agreed. She obtained a Bud Light beer from the bar. Agent Vega paid her with a \$20 bill, which she placed in her purse. He received \$10 in change. They talked, and Sepulveda drank some of her beer before continuing with her waitress duties.

Later, Sepulveda returned to their table and asked if they wanted another round. They said yes, and ordered two more Bud Light beers. Agent Vega paid her with a \$20 bill, which she placed in her purse. He received \$12 in change.

Subsequently, Sepulveda asked if Agent Vega would buy her another beer and he agreed. She obtained an Old Milwaukee Best from the bar. Agent Vega paid her with a \$20 bill, which she placed in her purse. He received \$10 in change. Sepulveda took several sips of her beer. The agents later exited the premises.

No Counts:

On October 26, 2018, the agents went back to the premises in an undercover capacity and ordered two Bud Light beers from the bartender, Rocio Ramirez-Segoviano (Ramirez-Segoviano), for which they paid \$4 each. Agent Zavala later ordered a non-alcoholic beer, Milwaukee Best, for which he paid \$4. The agents talked to a waitress named Abigail, then later exited the premises.

Counts 7 - 9:

On November 10, 2018, Agents Vega and Zavala returned to the premises in an undercover capacity and went to the bar where Agent Vega ordered a Bud Light beer from Ramirez-Segoviano. He paid \$4 for the beer and they went to sit at a table.

They conversed with waitress Abigail. She asked them if they wanted another round and they ordered two Bud Light beers. Agent Zavala paid Abigail \$4 each for the beers.

Abigail asked Agent Vega to buy her a beer and he agreed. She asked for payment in advance and said it was \$10. Agent Vega gave her a \$20 bill and she took it to Ramirez-Segoviano at the bar. After a brief exchange, Ramirez-Segoviano held up 4 fingers, Abigail nodded, then received change from Ramirez-Segoviano. Abigail put some of the money in her purse and gave \$10 to Agent Vega. Abigail was served a Budweiser 55 by Ramirez-Segoviano which she brought back to the table and began to

consume. She later resumed her waitress duties and the agents exited the premises.

Counts 10 - 12:

On November 16, 2018, Agents Vega and Zavala returned to the premises in an undercover capacity and went to the bar. Both Ruelas and Ramirez-Segoviano were behind the bar, as was licensee Maria Guardado. They ordered and were served Bud Light beers for which they paid \$4 each. They observed Sepulveda working as a waitress.

Later, Sepulveda approached the agents and asked if they would buy her a beer. Agent Vega said yes, and Sepulveda ordered a Budweiser 55 from Ramirez-Segoviano.

Agent Vega gave her a \$20 bill, which she placed in her purse, and he received \$10 in change. Bartender Ramirez-Segoviano observed the money exchange from a distance of about 5 feet. Sepulveda consumed her beer, and the agents subsequently exited the premises.

The administrative law judge (ALJ) issued a proposed decision on December 9, 2019, sustaining all twelve counts of the accusation and recommending that the license be revoked. The Department adopted the proposed decision in its entirety on February 5, 2020 and a certificate of decision was issued on February 20, 2020.

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

DISCUSSION

I

ISSUES CONCERNING SUBSTANTIAL EVIDENCE

Appellant contends the decision is not supported by substantial evidence. She maintains substantial evidence is lacking to support the charge that individuals engaged in the alleged drink solicitation activity were employees of the premises; and, she contends substantial evidence is lacking to establish that she “permitted” the alleged drink solicitation activity. (AOB at p. 4.)

Appellant cites no legal authority for her position that the decision is not supported by substantial evidence, that substantial evidence is lacking to support the charge that individuals engaged in drink solicitation activity were employees of the premises, or that she “permitted” the drink solicitation activity. Furthermore, she fails to reference citations to the record in claiming error. We are presented only with opinion.

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 support for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing authority. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) Nevertheless, we will address appellant’s general arguments.

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, 112 [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, 212 Cal.App.2d at p. 114.*)

The Board has heard and rejected the “not an employee” argument many times and has found again and again that the employment status of individuals engaged in prohibited activity is of no consequence where, as here, the thrust of the rule or law is to protect public welfare and morals. (See *Funtastic, Inc.* (1998) AB-6920; *Clubary* (2011) AB-9098.) If a licensee could escape all liability for the actions of individuals in her premises simply by labeling them “independent contractors” or “self employed,” we have no doubt it would become the go-to defense in a multitude of cases and lead to absurd results.

In the instant case, the individuals who appear to be acting as waitresses — taking orders, serving drinks, collecting money, and clearing tables — are appellant’s agents. Even if appellant argues they are not employees, and do not have employment contracts, they have the implied authority to act on appellant’s behalf, and their conduct gives the impression that they are empowered to act on the principal’s interest. This implied authority, arising out of their actions, makes them appellant’s agents, regardless of their employment status.

Furthermore, decisions of both this Board and higher courts have consistently found that a licensee may be held liable for the actions of his agents or employees.

The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].)

It is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Indeed, earlier in *Laube*, the court observed that the ALJ's factual findings — notably not subject to review on appeal — include:

[T]he element of the licensee's knowledge of illegal and improper activity on his or her premises; this knowledge may be either actual knowledge or constructive knowledge imputed to the licensee from the knowledge of his or her employees.

(*Laube, supra*, 2 Cal.App.4th at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev.*

Control (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123].) The *Laube* court noted:

A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh, supra*, 2 Cal.App.4th 364, 367.) Importantly, as the court of appeals observed in *McFaddin*:

It is not necessary for a licensee to knowingly allow its premises to be used in a prohibited manner in order to be found to have permitted its use. . . . Further, the word "permit" implies no affirmative act. It involves no intent. It is mere passivity, *abstaining from preventative action*.

(*McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1389-1390 [257 Cal.Rptr. 8], internal quotations omitted, emphasis in original.)

The policy reasons for this general rule (that licensees are vicariously liable for — and responsible for preventing — foreseeable misconduct by individuals in the licensed premise) are evident. Without it, a licensee could escape discipline simply by

maintaining a practiced state of ignorance. It would defy reason and the mandate of the State Constitution (which authorizes the Department to suspend or revoke a license when continuation of the license would be contrary to public welfare or morals) to interpret the law in a manner that rewards licensees for distancing themselves from the operation of their premises or allows licensees to escape responsibility for reasonably foreseeable activity in their premises.

In the instant case, appellant was on notice from previous disciplinary action against the license that drink solicitation activity was prohibited, and that a subsequent violation during the period of stayed revocation would result in the complete revocation of her license. Appellant knew, or should have known, that actions which resulted in previous discipline should be prevented. In short, the possibility of drink solicitation activity was foreseeable. Failure to take preventative action in such a case is the very definition of "permitting" the forbidden activity.

Substantial evidence in the record established that the individuals named in the accusation were observed greeting and serving customers, collecting money, clearing tables, and generally performing waitress duties. Simply because it's *possible* that these individuals were self-employed (and not employees) does not give us the authority to make independent findings to reach this conclusion.

The ALJ reached the following conclusions on whether substantial evidence supports the charges in the accusation:

7. With respect to counts 1, 2, 3, 4, 5, and 6, the evidence established that Marilene Sepulveda was working as a waitress at the Licensed Premises on June 15, 2018, June 29, 2018, and June 30, 2018. On each

of those dates, she solicited a non-alcoholic beer from Agent E. Vega. The price of the non-alcoholic beer when purchased by another agent was \$4, but each time Sepulveda solicited one she charged Agent Vega \$10, a \$6 surcharge. Neither section 24200.5(b) nor rule 143 require that the drink solicited be alcoholic. Sepulveda consumed each of the non-alcoholic beers she solicited, at least in part. (Findings of Fact ¶¶ 4-17.)

8. With respect to counts 7, 8 and 9, the evidence established that, on November 10, 2018, Abigail, who was working as a waitress, solicited a beer from Agent Vega. Each time the agents ordered a beer they were charged \$4. Abigail's beer, however, included a \$6 surcharge and cost a total of \$10. Abigail took some of the money Agent Vega had given to her and placed it in her purse in front of Rocio Ramirez-Segoviano. (Findings of Fact ¶¶ 18-21.)

9. With respect to counts 10, 11, and 12, on November 16, 2018, Sepulveda, once again working as a waitress, solicited a beer from Agent Vega. She obtained a beer and charged Agent Vega \$10, representing a \$6 surcharge over the regular price of a beer. (Findings of Fact ¶¶ 22-23.)

(Conclusions of Law, ¶¶ 7-9.) We concur with this assessment. Substantial evidence exists in the record to establish that the individuals in appellant's premises engaged in drink solicitation activity and accepted drinks for their own consumption. Accordingly, we have no choice but to affirm all counts of the accusation.

II

ISSUE CONCERNING PENALTY

Appellant contends the penalty of revocation is excessive — on the basis of her contention that the Department's evidence in this case is weak — and that it was an abuse of discretion not to consider a lesser penalty. (AOB at pp. 13-14.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) “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* (1966) 240 Cal.App.2d 659, 666-667 [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. (Cal. Code Regs., tit. 4, § 144.)

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.

(Cal. Code Regs., tit. 4, § 144.)

In the decision, the ALJ addresses the issue of penalty:

PENALTY

The Department recommended that the Respondent's license be revoked. As aggravation, the Department noted that the violations at issue were committed by employees while the Respondent's license was under a stayed revocation for the same type of violations. The Respondent did not recommend a penalty if the accusation were sustained.

Section 24200.5(b) mandates revocation for a violation of its provisions, although this has been construed to include some form of stayed revocation. Rule 144 provides that the penalty for a violation of section 25657(a) is revocation (which also includes stayed revocation) and that the penalty for a violation of rule 143 is a 15-day suspension.

The Department is correct - aggravation is warranted under the circumstances. The penalty recommended herein complies with rule 144.

(Decision at pp. 6-7.)

As we have said time and again, 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. The *extent* to which the Department considers mitigating or

aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion. Appellants have not established that the Department abused its discretion in this matter.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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.

APPENDIX

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

IN THE MATTER OF THE APPEAL BY:

MARIA SOFIA GUARDADO
DBA: NENAS CANTINA
11746-48 E 166TH ST
ARTESIA, CA 90701-1723

LB/LAKEWOOD DISTRICT OFFICE

File: 42-461630

Reg: 19089123

AB: 9865

ON-SALE BEER AND WINE - PUBLIC
PREMISES - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on May 15, 2020, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

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

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

MARIA SOFIA GUARDADO
NENA'S CANTINA
11746-48 166TH ST
ARTESIA, CA 90701-1723

ON-SALE BEER AND WINE PUBLIC PREMISES -
LICENSE

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

LAKWOOD DISTRICT OFFICE

File: 42-461630

Reg: 19089123

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on February 5, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after April 1, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: February 20, 2020

RECEIVED

FEB 20 2020

Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

MS

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Maria Sofia Guardado	}	File: 42-461630
dba Nena's Cantina	}	
11746-48 166 th St.	}	Reg.: 19089123
Artesia, California 90701-1723	}	
	}	License Type: 42
Respondent	}	
	}	Word Count: 19,000
	}	
	}	Reporter:
	}	Ed Serrano
	}	Kennedy Court Reporters
	}	
<u>On-Sale Beer and Wine Public Premises License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on October 1, 2019.

Alanna K. Ormiston, Attorney, represented the Department of Alcoholic Beverage Control.

Armando H. Chavira, attorney-at-law, represented respondent Maria Sofia Guardado, who was present.

The Department seeks to discipline the Respondent's license on the grounds that:

- (1) on five separate dates, she employed or permitted two different women to solicit or encourage others to buy them drinks in the licensed premises under a commission, percentage, salary, or other profit sharing scheme in violation of California Business and Professions Code section 24200.5(b);¹
- (2) on two separate dates, she employed two different women for the purpose of procuring or encouraging the purchase or sale of an alcoholic beverage, or paid them a percentage or commission for procuring or encouraging the purchase or sale of an alcoholic beverage, in the licensed premises in violation of section 25657(a); and
- (3) on five separate dates, she permitted two different women to solicit the purchase or sale of any drink inside the licensed premises, or to accept any drink

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

purchased or sold there, a portion of which was intended for the consumption or use of such employee, in violation of rule 143.²

As is typically the case with b-girl violations, these counts overlap to some degree. (Exhibit 1.)

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 October 1, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on August 6, 2019.
2. The Department issued a type 42, on-sale beer and wine public premises license to the Respondent for the above-described location on February 22, 2008 (the Licensed Premises).
3. The Respondent's license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
6/11/2008	08068958	BP §25607	10-day susp.
7/25/2011	11075480	BP §25658(a)	15-day susp.
3/28/2016	11075480	BP §§24200.5(b) 25657(a), 25752, & 23402	Rev. stayed w/30-day susp.

The foregoing disciplinary matters are final. (Exhibits 2-4.)

June 15, 2018 (Counts 1-2)

4. On June 15, 2018, Agent E. Vega and Agent S. Zavala entered the Licensed Premises and sat at the bar counter. Adan Ruelas, the manager, was working behind the counter. They ordered and were served two Bud Light beers, for which they were charged \$4 each. They picked up the beers and moved to a table.
5. A waitress, Marilene Sepulveda, approached and asked if they wanted another round. They said that they did and ordered two Bud Light beers. Sepulveda served the beers to them. Agent Vega paid with a \$20 bill and received \$12 in change.

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

6. Agent Vega began talking to Sepulveda. During the conversation, she asked him to buy her a beer. He agreed. Sepulveda went to the bar counter and returned with a non-alcoholic beer. He paid her with a \$20 bill. She placed the money in her purse and gave him \$10 in change. Sepulveda consumed some of her drink.

7. Sepulveda left and interacted with another patron. When she returned, she asked them if they wanted another round. They ordered two more Bud Light beers, which she served to them. Agent Zavala paid with a \$20 bill. Sepulveda placed the money in her purse and gave Agent Zavala \$12 in change.

8. After speaking together for a little bit, Sepulveda asked Agent Vega if he would buy her another beer. He said that he would. Sepulveda went to the bar counter and returned with a non-alcoholic beer. Agent Vega paid by handing her a \$20 bill. She placed the money in her purse and gave him \$10 in change. Sepulveda began consuming her drink. The agents subsequently exited the Licensed Premises.

June 29, 2018
(Counts 3-4)

9. On June 29, 2019, Agent Vega and Agent Zavala returned to the Licensed Premises. They went to the bar counter and ordered two Bud Light beers from Ruelas. They paid \$4 each, then sat down at a table.

10. Sepulveda, who was working as a waitress, approached and asked if they wanted another round. They said that they did and ordered two Bud Light beers. Sepulveda served the beers to them and Agent Zavala paid with a \$20 bill. Sepulveda placed the money in her purse and gave him \$10 in change. She then began to consume her drink.

11. After a brief conversation, Sepulveda asked Agent Vega to buy her a beer. He agreed. Sepulveda went to the counter and obtained a non-alcoholic beer. Sepulveda returned to the table and Agent Vega paid her with a \$20 bill. Sepulveda placed the money inside her purse and gave him \$10 in change. She began to consume the drink.

12. Sepulveda left to take care of other patrons. Some time later, the agents exited.

June 30, 2018
(Counts 5-6)

13. On June 30, 2018, the agents returned to the Licensed Premises. They ordered two Bud Light beers from Ruelas at the bar counter. After paying \$4 each, they sat down at a table.

14. Sepulveda, who was working as a waitress, approached and asked Agent Vega if he would buy her a beer. He said that he would. Sepulveda went to the bar counter and obtained a Bud Light beer, which she brought back to the table. Agent Vega paid her with a \$20 bill, which she put in her purse. She gave him \$10 in change, then began consuming her beer.

15. Sepulveda left to take care of other patrons, then returned and asked if they wanted another round. They said that they did and she served them two beers. Agent Vega paid with a \$20 bill, which she put in her purse. She then gave him \$12 in change.

16. Sepulveda subsequently asked him if he would buy her another beer. Agent Vega said that he would. Sepulveda went to the bar counter and returned with a non-alcoholic beer. Agent Vega paid Sepulveda with a \$20 bill, which she placed in her purse. She gave him \$10 in change and began to consume her drink.

October 26, 2018

17. On October 26, 2018, the agents returned to the Licensed Premises. They ordered two Bud Light beers from the bartender, Rocio Ramirez-Segoviano. She served the beers to them and they paid \$4 each. Agent Zavala subsequently ordered a non-alcoholic beer, for which he was charged \$4.

November 10, 2018 (Counts 7-9)

18. On November 10, 2018, Agents Vega and Zavala returned to the Licensed Premises. Ruela and Ramirez-Segoviano were working behind the counter as bartenders. Agent Vega ordered a Bud Light beer, for which he was charged \$4.

19. The agents sat down at a table. A waitress identified only as Abigail approached and asked if they wanted another round. They said that they did and ordered two Bud Light beers. Abigail obtained two beers, which she served to them. Agent Zavala paid \$4 for each of the beers.

20. Abigail remained at the table and asked Agent Vega if he would buy her a beer. She told him that it would cost \$10 and asked for the money up front. Agent Vega handed her a \$20 bill. Abigail went to the bar counter and spoke to Ramirez-Segoviano. They had a brief exchange, during which Ramirez-Segoviano held up four fingers. Abigail nodded and they split the money. Abigail took some of the money and put it in her purse. Ramirez-Segoviano handed Abigail a Budweiser Select 55 beer, which she brought back to the table. She gave Agent Vega \$10 in change and began to consume her beer.

21. Abigail subsequently left to take care of other patrons. The agents exited sometime after that.

**November 16, 2018
(Counts 10-12)**

22. On November 16, 2018, the agents returned to the Licensed Premises. Ruelas and Ramirez-Segoviano were working behind the bar counter. Agent Vega and Agent Zavala ordered two bottles of Bud Light beer. They paid \$4 each.

23. While at the bar counter, Sepulveda, who was working as a waitress, approached and asked Agent Vega to buy her a beer. He said that he would and she ordered a Budweiser Select 55 from Ramirez-Segoviano, who served it to her. Agent Vega paid Sepulveda with a \$20 bill. She placed the money in her purse and gave him \$10 in change. Ramirez-Segoviano was approximately five feet away at the time. Sepulveda consumed her beer.

24. 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 24200.5(b) provides that the Department shall revoke a license "[i]f 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."

4. Section 25657(a) provides that it is unlawful "[f]or 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."

5. Rule 143 prohibits a licensee's employees from soliciting, in 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. Rule 143 further prohibits a licensee's employees from accepting, in the licensed premises, any drink purchased or sold there, any part of which is for, or intended for, the consumption or use of any employee.

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) for the violations of section 24200.5(b), section 25657(a), and rule 143 alleged in the accusation. (Findings of Fact ¶¶ 4-23.)

7. With respect to counts 1, 2, 3, 4, 5, and 6, the evidence established that Marilene Sepulveda was working as a waitress at the Licensed Premises on June 15, 2018, June 29, 2018, and June 30, 2018. On each of those dates, she solicited a non-alcoholic beer from Agent E. Vega. The price of the non-alcoholic beer when purchased by another agent was \$4, but each time Sepulveda solicited one she charged Agent Vega \$10, a \$6 surcharge. Neither section 24200.5(b) nor rule 143 require that the drink solicited be alcoholic. Sepulveda consumed each of the non-alcoholic beers she solicited, at least in part. (Findings of Fact ¶¶ 4-17.)

8. With respect to counts 7, 8 and 9, the evidence established that, on November 10, 2018, Abigail, who was working as a waitress, solicited a beer from Agent Vega. Each time the agents ordered a beer they were charged \$4. Abigail's beer, however, included a \$6 surcharge and cost a total of \$10. Abigail took some of the money Agent Vega had given to her and placed it in her purse in front of Rocio Ramirez-Segoviano. (Findings of Fact ¶¶ 18-21.)

9. With respect to counts 10, 11, and 12, on November 16, 2018, Sepulveda, once again working as a waitress, solicited a beer from Agent Vega. She obtained a beer and charged Agent Vega \$10, representing a \$6 surcharge over the regular price of a beer. Ramirez-Segoviano was in a position to see this transaction. (Findings of Fact ¶¶ 22-23.)

PENALTY

The Department recommended that the Respondent's license be revoked. As aggravation, the Department noted that the violations at issue were committed by employees while the Respondent's license was under a stayed revocation for the same type of violations. The Respondent did not recommend a penalty if the accusation were sustained.

Section 24200.5(b) mandates revocation for a violation of its provisions, although this has been construed to include some form of stayed revocation. Rule 144 provides that

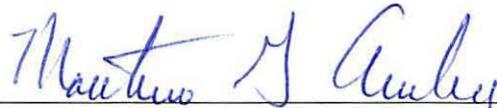
the penalty for a violation of section 25657(a) is revocation (which also includes stayed revocation) and that the penalty for a violation of rule 143 is a 15-day suspension.

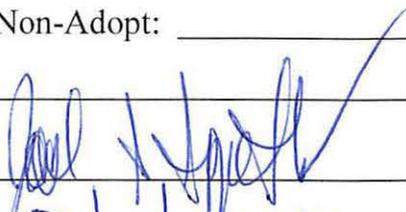
The Department is correct—aggravation is warranted under the circumstances. The penalty recommended herein complies with rule 144.

ORDER

The Respondent's on-sale beer and wine public premises license is hereby revoked.

Dated: December 9, 2019


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>2/5/2020</u>