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

AB-9491
File: 42-526709 Reg: 14080576

IRMA FAJARDO,
dba Barrel House
16005-007 Amar Road, Valinda, CA 91744-2204,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 3, 2015
Los Angeles, CA

ISSUED SEPTEMBER 28, 2015

Appearances: Armando Chavira for appellant Irma Fajardo and Kerry K. Winters for the Department of Alcoholic Beverage Control.

OPINION

Irma Fajardo, doing business as Barrel House (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license, with revocation conditionally stayed for a period of three years provided no cause for disciplinary action occur within that time, and concurrently suspended her license for 30 days for permitting solicitation activity in violation of Business and Professions Code

[1]The decision of the Department, dated February 10, 2015, is set forth in the appendix.

sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b); for permitting a patron to leave the premises with an open container, in violation of Business and Professions Code sections 23300 and 23355; for possession on the premises of an illegal slot machine or gambling device, in violation of Penal Code sections 330b, 330.1, and 330.4; and for possession on the premises of a distilled spirit for which a license had not been issued, in violation of Business and Professions Code section 25607.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on December 21, 2012. The license included the following conditions:

> 01 No employee or agent shall be permitted to accept money or any other thing of value from a customer for the purpose of sitting or otherwise spending time with customers while in the premises, nor shall the licensee(s) provide or permit, or make available either gratuitous or for compensation, male or female persons who act as escorts, companions, or guests of and for the customers.
>
> 02 No employee or agent shall solicit or accept any alcoholic or non-alcoholic beverage from any customer while in the premises.

(Petition for Conditional License, ¶¶ 1-2.)

Prior to this action, appellant's license had no disciplinary record.

On May 29, 2014, the Department instituted an eighteen-count accusation against appellant. On November 5, 2014, the Department filed an amended accusation modifying certain language and adding a nineteenth count. The amended accusation alleged that appellant employed certain individuals upon the licensed premises for the purpose of soliciting alcoholic beverages, in violation of Business and Professions Code section 25657, subdivision (a) (counts 1, 5, 9, and 14); that appellant employed or knowingly permitted certain individuals to loiter for the purpose of soliciting alcoholic beverages, in violation of section 25657, subdivision (b) (counts 10 and 15); that

appellant permitted certain individuals to solicit alcoholic beverages, in violation of section 24200.5, subdivision (b) (counts 2, 7, 8, and 13); that appellant violated a license condition prohibiting employees from accepting alcoholic beverages, in violation of section 23804 (counts 4, 12, and 17); that appellant violated a license condition prohibiting employees from accepting money in exchange for sitting with or otherwise spending time with customers, in violation of section 23804 (counts 11 and 16); that appellant possessed upon the licensed premises an illegal slot machine or gambling device, in violation of Penal Code section 330b, 330.1, and 330.4 (count 18); and finally, that appellant possessed upon the premises distilled spirits for which a license had not been issued, in violation of section 25607 (count 19).

At the administrative hearing held on November 12, 2014, documentary evidence was received and testimony concerning the violation charged was presented by Agents Randal Milloy, Melanie Mathos, and Salvador Zavala of the Department of Alcoholic Beverage Control; by Supervising Agents Enrique Alcala and Frank J. Robles; by Margarita Lopez, appellant's waitress; and by appellant Irma Fajardo.

Testimony established that the events underlying the accusation took place on four separate dates between October and December of 2013.

Counts 1 through 4

On October 25, 2013, Supervising Agent Enrique Alcala and Supervising Agent-in-Charge Frank Robles entered the Licensed Premises. They sat at the bar counter and ordered two beers from the bartender, Olga. Olga served them the beers and charged them a total of $10 (i.e., $5 per beer). Alcala handed a $20 bill to Olga, who took the money to appellant. Appellant handed Olga some change, which she gave to Alcala.

Supervising Agent Alcala noticed a bottle of margarita mix behind the bar counter across from him. Alcala asked Olga to mix him a margarita. She agreed and asked him to buy her a beer. He agreed, and Olga served him a margarita and served herself a beer. Alcala paid with a $50 bill. Olga took the money to appellant, who gave her some change. Olga gave Alcala $35 in change. Alcala asked how much the margarita cost; Olga replied that it cost $5. (Counts 1, 2, and 4.)

Olga finished her beer and asked Supervising Agent Alcala to buy her another one. He agreed. Alcala handed a $20 bill to Olga, who took it to appellant and obtained some change. Olga gave $10 of the change to Alcala. She also obtained a beer for herself, which she began to consume.

When last call was announced, Supervising Agent-in-Charge Robles ordered a margarita from Olga. She charged him $5. When appellant announced that the licensed premises was closing, Robles stated that he had not finished his margarita yet. Appellant gave Robles a Styrofoam cup and said that he could take the drink with him. Robles poured the margarita into the cup and exited the licensed premises with it. (Count 3.) Supervising Agent Alcala also exited the licensed premises.

Both appellant and Lopez testified that they never heard anyone solicit drinks inside the licensed premises. Additionally, appellant denied giving Supervising Agent-in-Charge Robles a Styrofoam cup or letting him leave the premises with an alcoholic beverage.

Counts 5 through 12

On November 22, 2013, Supervising Agent Alcala returned to the licensed premises at approximately 6:40 p.m. He entered and ordered a beer from the bartender, Margarita Lopez. She served him a beer and charged him. He remained

inside for a short while, then exited.

Later that night, Supervising Agent Alcala re-entered the licensed premises, this time accompanied by Agents Zavala and Vega. They each ordered a beer, for which they were charged a total of $15.

A woman whom Supervising Agent Alcala had noticed when he first entered the licensed premises came over and introduced herself as Samia. After a brief conversation, Agent Zavala, Agent Vega, and Samia moved to a different section of the bar counter and sat down.

Supervising Agent Alcala asked Lopez if Olga was working. Lopez pointed to Olga and said that she was dancing. When Olga finished dancing, she walked behind the bar counter and began serving customers. Olga asked Alcala to buy her a beer. He agreed and ordered a beer for himself. Olga obtained both beers. Alcala paid for the beers with a $20 bill. Olga took the money to appellant and obtained some change. She gave $10 of the change to Alcala. (Counts 5, 6, 7, 11, and 12.)

Lopez approached Agent Zavala, Agent Vega, and Samia. Samia asked Agent Zavala if he would buy her a beer. He agreed. Lopez obtained a 7-ounce bottle of beer. Zavala handed a $10 bill to Lopez, who took the money to appellant. She returned with a stack of $1 bills, which she placed near Samia. Samia picked up the money and placed it in her purse. Samia stated that her beer cost $10 and asked if that was OK. Zavala said that it was. (Counts 8, 9, and 10.)

Agent Zavala placed his beer next to Samia's and asked why it was so much smaller. Samia replied that it was because she could not drink too much. Samia finished her beer and asked Zavala to buy her another. They had trouble getting Lopez's attention at first; when they succeeded, Samia spoke to Lopez in Spanish.

Lopez obtained a 7-ounce bottle of beer and served it to Samia. Zavala handed a $10 bill to Lopez, who took it to appellant. Lopez returned with a number of $1 bills, which she placed on the counter in front of Samia. Samia picked up the money and placed it in her purse.

Samia noticed that Agents Zavala and Vega had finished their beers. Samia and Vega spoke to each other in Spanish, after which Samia walked behind the bar counter and obtained two 12-ounce beers. She served the beers to the two agents. Vega paid with a $10 bill. The agents then exited the licensed premises.

Again, appellant and Lopez testified that they had never heard anyone solicit drinks inside the licensed premises. They also testified that they did not know anyone named Samia.

Counts 13 through 17

On December 14, 2013, Agents Zavala and Vega returned to the licensed premises. They ordered two beers from Lopez, which she served to them.

The two agents were approached by Vanessa Guzman, who struck up a conversation with them. After a short while, Guzman asked Zavala if he would buy her a beer. He agreed. Guzman asked Zavala for $10, which he gave to her. Guzman walked behind the counter and gave the money to appellant. Appellant gave Guzman a 7-ounce bottle of beer. Guzman returned to the agents' location and sat down. Appellant came over with some $1 bills and set them down in front of Guzman. (Counts 14, 15, 16, and 17.)

Guzman and Agent Vega had a conversation in Spanish. Vega handed a $20 bill to Guzman, who walked behind the counter and gave it to appellant. Appellant gave Guzman one 7-ounce bottle of beer and two 12-ounce bottles of beer. Guzman gave

the two 12-ounce bottles to the agents, but kept the 7-ounce bottle for herself.

Guzman subsequently solicited a beer from Agent Vega in Spanish. Vega paid by handing a $10 bill to Guzman. On direct examination, Zavala testified that Guzman walked behind the counter and gave the money to appellant. Guzman returned with a 7-ounce bottle of beer. Appellant came over and placed a stack of $1 bills in front of Guzman, who picked it up and placed it in her purse. On cross-examination, Zavala testified that Guzman paid Lopez, who obtained and served the beer to her. Lopez then took the money to appellant and obtained some change. Lopez returned the change to Guzman.

As above, appellant and Lopez testified that they never heard anyone solicit drinks inside the licensed premises. They also testified that they did not know anyone named Vanessa Guzman.

Counts 18 and 19

On December 20, 2013, various agents returned to the licensed premises. Some entered undercover, while others waited outside as back up. At some point, the back-up agents, including Agent Milloy and Agent Mathos, entered the licensed premises.

Agent Milloy cleared the restrooms, then checked behind the bar counter. Underneath the bar counter he located a 750-milliliter bottle of Heritage triple sec — a distilled spirit containing 15% alcohol by volume. The bottle was seized and booked into evidence. (Count 19.)

Appellant testified that she did not know where the bottle of triple sec came from. She testified that she uses wine-based alternatives for mixed drinks (such as margaritas). She testified that she uses the La Quinta brand of wine-based triple sec.

After Agent Mathos secured the kitchen area, she noticed a video machine near the restrooms. The video machine was plugged in and operational. Based on her training and experience, Agent Mathos believed the video machine to be an illegal gaming machine. Accordingly, the video machine was seized and booked into evidence. A photograph of the machine was taken while it was inside the evidence room.

The next business day, Agent Zavala plugged in the video machine. The screen displayed "Lucky 8 Lines." He put $1 into the machine and received four credits. He bet all four credits. The screen displayed three spinning reels of the type used by slot machines. When the reels stopped spinning, he noticed that he had won two credits on one of the eight pay lines. No skill was involved — the game was a pure game of chance. Zavala opened up the machine and retrieved his $1 bet. Another $198 were inside the machine as well. (Count 18.)

Appellant testified that the video machine was inside the licensed premises when she took over, and that the previous owner told her that someone would come and pick it up, but that no one ever did. She testified that the machine was under a cover and was not plugged in. She claimed not to know anything about the machine.

After the hearing, the Department issued its decision which determined that counts 1, 2, 3, 5, 6, 7, 8, 10, 12, 13, 15, 18, and 19 had been proven and no defense was established. Count 4 was dismissed because there was no evidence Olga was paid to sit or spend time with Supervising Agent Alcala — only that a $5 surcharge was imposed on the purchase of her beer. Count 9 was dismissed because the evidence did not establish Samia was employed by appellant, though she did walk behind the bar to serve beers to Agents Zavala and Vega. Count 11 was dismissed because, as

above, there was no evidence Olga was paid to sit or spend time with Supervising Agent Alcala. Counts 14, 16, and 17 were dismissed because although Guzman, like Samia, went behind the bar to pay appellant, the evidence did not establish that she was employed by appellant.

For counts 1, 2, 5, 6, 7, 8, 10, 13, and 15 — all of which involved solicitation activity — the Department imposed a penalty of revocation, conditionally stayed for three years provided no cause for discipline arises during that time period, along with a 30-day suspension. For count 3 — permitting a patron to leave the premises with an open container, in violation of sections 23300 and 23355 — the Department imposed a penalty of 5 days' suspension. No penalty was imposed for count 12, as it arose from the same facts as counts 5, 6, and 7, and partly duplicated them. For count 18 — possession on the premises of an illegal gambling device, in violation of Penal Code sections 330b, 330.1, and 330.4 — the Department imposed a penalty of 15 days' suspension. Finally, for count 19 — possession on the premises of distilled spirits for which a license had not been issued, in violation of section 25607 — the Department imposed a penalty of 10 days' suspension. All suspensions were to run concurrently.

Appellant filed a timely appeal raising the following issues: (1) there was not substantial evidence to support a finding as to counts 1 through 4; (2) there was not substantial evidence to support a finding as to counts 5 through 8, 10, and 12; (3) there was not substantial evidence to support a finding as to counts 13 and 15; and (4) there was not substantial evidence to support a finding as to counts 18 and 19.

DISCUSSION

I

Appellant contends that counts 1 through 4 are not supported by substantial

evidence. With regard to counts 1, 2, and 4, appellant argues that Agent Alcala's memory of the underlying events was unreliable, and that the report was not written by Alcala, but by Agent Zavala, who was not present on the date in question. (App.Br. at p. 7.) Moreover, appellant insists that Olga's back was turned to Agent Alcala throughout the transactions at issue, and that he therefore could not have seen appellant giving Olga change. (App.Br. at pp. 7-8.) Appellant also argues that Alcala should have verified the price of Olga's beer, as he did with his margarita. (App.Br. at p. 8.) Finally, appellant contends that Olga's conduct during the transaction was outside her employment duties, and therefore no liability should attach to appellant. (*Ibid.*)

With regard to count 3, appellant contends that there was no evidence the drink in Alcala's Styrofoam cup contained alcohol. (*Ibid.*) Appellant objects to Alcala's "smell test," insisting that it is subjective and, again, that Alcala's testimony is unreliable. (App.Br. at p. 9.) Appellant argues that, absent a laboratory test for alcohol, there is only hearsay evidence that the drink was alcoholic. (App.Br. at p. 8.) Finally, appellant argues that sections 23300 and 23355 apply only to "patrons," not investigators. (App.Br. at p. 9.)

As an initial matter, count 4 was dismissed below and will not be addressed here. (See Conclusions of Law ¶ 17.)

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 § 23804; *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].)

Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of abuse of discretion.

Counts 1 and 2 both alleged solicitation activity. Count 1 alleged that Olga's conduct on October 25, 2013 violated Business and Professions Code section 25657, subdivision (a). That provision states, in relevant part:

> 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.

Count 2 alleged Olga's conduct on the same date violated section 24200.5, subdivision (b). That provision states, in relevant part:

> Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:
>
> [¶ . . . ¶]
>
> (b) If the licensee has employed or permitted any person 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.

The ALJ made the following relevant findings of fact:

> 5. On October 25, 2013, Supv. Agent Enrique Alcala and Supv. Agent-in-Charge Frank Robles entered the Licensed Premises. They sat down at the bar counter and ordered two beers from the bartender, Olga. Olga served them the beers and charged them a total of $10 (i.e., $5 per beer). Supv. Agent Alcala handed a $20 bill to Olga, who took the money to the Respondent. The Respondent handed Olga some change, which she gave to Supv. Agent Alcala.
>
> 6. Supv. Agent Alcala noticed a bottle of margarita mix behind the bar counter across from him. Supv. Agent Alcala asked Olga to mix him a margarita. She agreed and asked him to buy her a beer. He agreed and Olga served him a margarita and served herself a beer. Supv. Agent Alcala paid with a $50 bill. Olga took the money to the Respondent, who gave her some change. Olga gave Supv. Agent Alcala $35 in change. Supv. Agent Alcala asked how much the margarita cost; Olga replied that it was $5.
>
> 7. Olga finished her beer and asked Supv. Agent Alcala to buy her another one. He agreed. Supv. Agent Alcala handed a $20 bill to Olga, who took it to the Respondent and obtained some change. Olga gave $10 of the change to Supv. Agent Alcala. She also obtained a beer for herself, which she began to consume.

(Findings of Fact ¶¶ 5-7.) Based on these factual findings, the ALJ reached the following conclusion of law:

> 17. On October 25, 2013, Olga was working as a bartender at the Licensed Premises. While on duty, she solicited two beers from Supv. Agent Alcala. A $5 surcharge was imposed on each of the beers, thereby establishing the violations of sections 24200.5(b) and 25657(a) alleged in

counts 1 and 2.

(Conclusions of Law ¶ 17.)

Appellant responds first with an attack on Alcala's credibility. She argues that more than a year has passed, and that Agent Alcala could not remember whether Olga was wearing a skirt or pants. (App.Br. at p. 7.) Appellant contends that Alcala is therefore unable to accurately recall the events in question. (*Ibid.*) Moreover, appellant points out that Agent Zavala wrote the report for October 25, 2013, not Agent Alcala. (*Ibid.*)

Appellant presents only one argument to directly counter Alcala's version of events, however. She alleges that the structure of the bar is such that Alcala could not possibly have seen money change hands between appellant and Olga, and that the music was too loud for him to have overheard any conversation between them. (App.Br. at pp. 7-8.)

Agent Alcala admitted that he could not hear appellant and Olga conversing over the music. (RT at p. 59.) Alcala did testify that he could not see the entire register:

> [MR. CHAVIRA]
> Q Could you see the register from where you were sitting?
>
> A I don't know if I could see the whole thing with the licensee standing in front of it retrieving money and placing the money in there.

(RT at p. 58.) Alcala did testify regarding the exchange of cash, however, and indicated that he did indeed see the money change hands:

> [MR. CHAVIRA]
> Q Okay. Now, do you have any way of knowing how much change Olga received from the licensee at the register?
>
> A I saw the licensee hand her money, and she walked straight back to me. I did not see her put anything away. I did not see her stop

> at another location like to get her purse or halfway down the bar or retrieve anything or keep anything. She handed me — what I saw, handed from her.

(RT at pp. 60-61.)

Appellant would have this Board infer from the alleged layout of the premises that there is no way Alcala could be testifying truthfully. A visual representation of the layout of the premises is not in evidence. Although appellant testified regarding the layout, her testimony on this point is, at best, muddled, and certainly inadequate for this Board to reach conclusions undermining the ALJ's inferences and findings. (RT at pp. 197-200.) Given that there is no evidence or testimony directly contradicting Alcala's version of events, the ALJ's decision to credit Alcala's testimony was not an abuse of discretion. Alcala's testimony is sufficient to support the findings.

Appellant next contends that Agent Alcala should have verified the price of the beer simply by asking. Alcala testified that he paid for his margarita and Olga's beer with a $50 bill, and that Olga gave him $35 in change. (RT at p. 45.) Alcala then asked Olga how much his margarita cost, and she told him it cost $5. (RT at p. 46.) It is reasonable to infer that the beer cost $10. Alcala was not required to ask directly what the cost of the beer was in order to support a factual finding that the beer included a $5 surcharge. (See Findings of Fact ¶ 17.)

Finally, appellant alleges that she was unaware of Olga's conduct in asking Agent Alcala to purchase a drink for her, and that no liability should therefore attach. (App.Br. at p. 8.) Alcala's testimony, however, establishes that appellant gave Olga some quantity of change, that Olga returned the money she received from appellant to Alcala, and that the change totaled $35. (RT at pp. 45-46.) Appellant's knowledge can also be inferred from the second transaction, during which, Alcala testified, Olga asked

him to buy her a beer, and Alcala agreed. (RT at p. 45.) During that transaction, Alcala paid with a $20 bill, after which Olga "took the money over to the licensee. She appeared to make change and headed back to Olga, and Olga walked back to me and gave me $10 in change." (RT at pp. 46-47.) This is enough, without appellant overhearing the solicitation, to infer that appellant had actual knowledge of the solicitation scheme.

Moreover, even if Olga had kept the surcharge without appellant's complicity, counts 1 and 2 would stand. As this Board recently noted in *Ramirez*, "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." (*Ramirez* (2015) AB-9441, at p. 12, citing *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]; see also *Onconco, Inc.* (2000) AB-7365, at pp. 3-4.)

The court in *Santa Ana*, cited by appellant, noted that generally, "[w]rongful acts by employees giving rise to a suspension need not be within the scope of employment." (*Santa Ana Food Market, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1999) 76 Cal.App.4th 570, 574 [90 Cal.Rptr.2d 523].) The court did acknowledge that "these rules have exceptions, and the ABC's discretion is not without bounds." (*Ibid.*) The *Santa Ana* court concluded that "[i]n exercising its discretion, the concept of 'good cause' prohibits the ABC from acting arbitrarily or capriciously." (*Ibid.*) The court discussed cases in which an exception was made to the general rules of imputed or constructive knowledge, including *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3

Cal.Rptr.2d 779], cited by appellant. In these exceptions, either the licensee took strong preventative measures (see *McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8]) or had no reason to expect that such a violation might occur (see *Laube*, *supra*).

No exception to the doctrines of imputed or constructive knowledge applies here. Appellant was present in the premises when Olga solicited drinks from Agent Alcala. (See RT at pp. 45-47.) Appellant made change for Olga. (*Ibid.*) Appellant clearly reaped a profit from the sale of additional beers solicited by Olga. Moreover, Olga drank her beers in the premises (RT at pp. 46-47), a fact which appellant could not possibly have missed if she was adequately supervising her waitstaff, and which ought to have alerted appellant to the possibility that those beers were solicited. Appellant cannot feign the absolute ignorance necessary to justify an exception to the general rule.

In any event, we need not apply the doctrines of imputed or constructive knowledge to these counts, since testimony from Agent Alcala indicates that appellant was aware of and complicit in the solicitation scheme. Counts 1 and 2 are therefore affirmed.

Count 3 alleged appellant exceeded her license privileges by permitting a patron to leave the premises with an open container of an alcoholic beverage for consumption off the premises, in violation of sections 23300 and 23355. Section 23300 states:

> No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division.

Section 23355 states:

> Except as otherwise provided in this division and subject to the provision of Section 22 of Article XX of the Constitution, the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no other at the premises for which issued during the year for which issued.

Regarding count 3, the ALJ made the following relevant finding of fact:

> 8. When last call was announced, Supv. Agent-in-Charge Robles ordered a margarita from Olga. She charged him $5. When the Respondent announced that the Licensed Premises was closing, Supv. Agent-in-Charge Robles stated that he had not finished his margarita yet. The Respondent gave him a Styrofoam cup and said that he could take the drink with him. He poured the margarita into the cup and exited the Licensed Premises with it. Supv. Agent Alcala also exited the Licensed Premises.

(Findings of Fact ¶ 8.) Based on these findings, the ALJ reached the following conclusion of law:

> 21. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that on October 25, 2013, the Respondent permitted Supv. Agent-in-Charge Frank Robles to leave the Licensed Premises with an open container of alcohol to be consumed off the Licensed Premises in violation of sections 23300 and 23355 (count 3).

(Conclusions of Law ¶ 21.)

Appellant makes two arguments for reversing count 3. Appellant first contends that there is no evidence that the beverage in the Styrofoam cup was alcoholic. Appellant argues that "[t]here was no laboratory tests conducted although the evidence was taken by Alcala outside the location, and there was every opportunity to test for alcoholic content." (App.Br. at p. 8.) Appellant relies on the "best evidence" rule as support for the claim that a laboratory test was required, but does not cite any particular provision of the Evidence Code. (See App.Br. at p. 9.)

On direct examination, the following exchange took place:

[MS. WINTERS]

Q At some point in the evening did they announce last call at the bar?

A Yes.

Q And did you order anything at that point?

A I did.

Q What did you order?

A A margarita.

[¶ . . . ¶]

Q Did you taste [the drink]?

A Yes.

Q And when you tasted it, did it taste like alcohol?

A It did.

(RT at p. 153.) On cross, Robles testified:

[MR. CHAVIRA]
Q And based on your taste, you weren't able to tell what alcoholic content was contained in the drink; is that correct?

A Correct.

(RT at p. 62.) Based on Agent Robles' testimony, it was reasonable to infer that, based on Robles' taste test, the beverage contained alcohol, though he was unable to discern the particular alcoholic content. It is undisputed that allowing a patron to carry an alcoholic beverage — of any proof — outside the licensed premises exceeds the appellant's license privileges.

Moreover, at the time Robles testified that the beverage tasted like alcohol, appellant lodged no objection under the so-called "best evidence" rule or any other evidentiary provision. (See RT at p. 153.) Even if she had, the best evidence rule would not apply here. As the California supreme court noted in *People v. Lucas*, "The

former best evidence rule . . . codified in Evidence Code former section 1500, provided, in pertinent part, that 'no evidence other than the writing itself is admissible to prove the content of a writing.'" (*People v. Lucas* (2014) 60 Cal.4th 153, 265 [177 Cal.Rptr.3d 378].) Not only has the best evidence rule been repealed, it was intended only to limit the admissibility of duplicate documents where the original was readily available. It did not and does not provide grounds for requiring the Department to conduct a laboratory test on Robles' margarita in order to prove its alcoholic content. Robles' testimony that he tasted alcohol in the margarita is sufficient; it is not, as appellant contends, hearsay evidence, but rather reflects Robles' firsthand sensory observations.

Appellant further argues that section 23300 applies only to "patrons," not investigators. (App.Br. at p. 10.) Appellant writes, "Since the statutes which govern the Department are strictly applied to it the word 'patron' means other than an investigator performing investigative duties." (App.Br. at p. 9.) Appellant supplies no statutory or judicial justification for that interpretation. The Business and Profession Code does not supply a definition of "patron" at all, let alone one excluding investigators. Merriam-Webster Dictionary, however, defines "patron" as "a person who buys the goods or uses the services of a business, library, etc." (Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/patron> [as of August 21, 2015].) It is undisputed that Department agents paid for drinks from appellant's licensed business. Any attempt to exclude investigators from the meaning of the word "patrons" lacks reason or merit. Count 3 is therefore affirmed.

II

Appellant contends that counts 5 through 8, 10, and 12 are not supported by substantial evidence. Regarding counts 5, 6, and 7, appellant argues that Agent Alcala

was unable to overhear conversation between appellant and Lopez; that he was unable to see money change hands between appellant and Lopez; that he never asked Olga the price of her beer; and that Alcala had no way of knowing whether appellant overheard Olga's solicitation. (App.Br. at pp. 11-12.) Appellant insists that Alcala's testimony alone cannot support a solicitation violation, and relies on Government Code section 11513, subdivision (d) — a provision limiting the use of hearsay evidence in administrative proceedings. (App.Br. at p. 12.)

Regarding counts 8 and 10, appellant contends that there is no evidence that bartender Lopez overheard Samia's first solicitation of Agent Zavala. (App.Br. at pp. 12-13.) Appellant argues further that Lopez did not observe Samia take the money, and that the mere placement of change cannot determine Lopez's knowledge of the solicitation activity, because Samia was seated next to Zavala. (App.Br. at p. 13.) According to appellant, there is no evidence that Lopez overheard the solicitation, that Lopez paid a commission directly to Samia, or that Lopez saw Samia take the money, and therefore the evidence cannot support a solicitation violation.

As above, this Board will not exercise its independent judgment on the evidence, but will accept all reasonable inferences and resolve any evidentiary conflicts in favor of the Department's decision. (See Part I, *supra*.)

Regarding counts 5, 6, and 7, the ALJ made the following relevant findings of fact:

> 9. Supv. Agent Alcala returned to the Licensed Premises on November 22, 2013 at approximately 6:40 p.m. He entered and ordered a beer from the bartender, Margarita Lopez. She served a beer to him and charged him. He remained inside for a short while, then exited.
>
> 10. Later that night, Supv. Agent Alcala re-entered the Licensed Premises, this time accompanied by Agent Salvador Zavala and Agent

> Vega. They each ordered a beer, for which they were charged a total of $15.
>
> 11. A woman whom Supv. Agent Alcala had noticed when he first entered the Licensed Premises came over and introduced herself as Samia. After a brief conversation, Agent Zavala, Agent Vega, and Samia moved to a different section of the bar counter and sat down.
>
> 12. Supv. Agent Alcala asked Lopez if Olga was working. Lopez pointed to Olga and said that she was dancing. When Olga finished dancing, she walked behind the bar counter and began serving customers. Olga asked Supv. Agent Alcala to buy her a beer. He agreed and ordered a beer for himself. Olga obtained both beers. Supv. Agent Alcala paid for the beers with a $20 bill. Olga took the money to the Respondent and obtained some change. She gave $10 of the change to Supv. Agent Alcala.

(Findings of Fact ¶¶ 9-15.) Based on these factual findings, the ALJ reached the following conclusion of law:

> 18. On November 22, 2014 [*sic*], Olga was working as a bartender at the Licensed Premises. While on duty, she solicited a beer from Supv. Agent Alcala. A $5 surcharge was imposed on the purchase of this beer, thereby establishing the violations of sections 24200.5(b), 25657(a), and 25657(b) alleged in counts 5, 6, and 7.

(Conclusions of Law ¶ 18.)[2] This conclusion, taken alone, is rather baffling. After all, according to Findings of Fact ¶ 12, Agent Alcala ordered *two* beers — one for himself, and one for Olga — then paid with a $20 bill and received $10 in change. This implies both Alcala's beer and Olga's cost $5, and a surcharge was *not* imposed, as stated in Conclusion of Law ¶ 18. This suggests that the evidence was *not* sufficient to establish violations of the sections described.

A review of Agent Alcala's testimony shows that the flaw is in the findings of fact:

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[2]On several occasions throughout his conclusions of law, the ALJ states that the events at issue took place in 2014. This is incorrect; the evidence establishes that they took place in 2013. Given that the dates are otherwise accurate and no miscarriage of justice has taken place, we will overlook this as a harmless typographical error. (See Cal. Const., art. VI, § 13; Cal Code Civ. Proc. § 475.)

[MS. WINTERS]
Q And what happened next?

A After the song finished, Olga walked behind the bar fixture, greeted me, and we engaged in conversation.

Q And what happened next?

A Shortly thereafter she asked me if I would buy her a beer.

[Objection; overruled.]

BY MS. WINTERS:
Q And what did you say or do.

A I agreed.

Q And what happened next?

A She retrieved herself a 12-ounce bottle of Bud Light, and I paid her with a $20 bill.

Q And what did she do with the money?

A She walked over to the licensee, the licensee made change, handed her some change, and then she walked back over to me and gave me only $10 in change.

(RT at pp. 53-54.) Agent Alcala's testimony matches Conclusion of Law ¶ 18: Olga solicited a drink, Alcala did *not* order a drink for himself, and Olga's drink alone cost $10 — implying a $5 surcharge.

The discrepancy in Findings of Fact ¶ 12 is likely nothing more than an editorial error. Nevertheless, the fact remains that the evidence — namely, Alcala's testimony — does not support the relevant findings of fact, and the findings of fact do not support the relevant conclusions of law. An error of this magnitude affects the substance of the decision. Counts 5, 6, and 7 are therefore reversed. (See Bus. & Prof. Code § 23084, subd. (c) and (d).)

In Conclusions of Law, paragraph 18, the ALJ goes on to find a violation of

license condition 2, as alleged in count 12:

> Once again, there was no evidence that Olga was paid to sit or spend time with Supv. Agent Alcala. Accordingly, the condition violation alleged in count 11 was not established. The condition violation alleged in count 12, on the other hand, was established — Olga first solicited, then accepted, a drink from Supv. Agent Alcala.

(Conclusions of Law ¶ 18.)

Count 12 intersects with the factual findings above. Indeed, appellant's only attack on count 12 is that it duplicates counts 5, 6, and 7.

Appellant's second license condition reads as follows: "No employee or agent shall solicit *or accept* any alcoholic or non-alcoholic beverage from any customer while in the premises." (Petition for Conditional License, Exhibit 4, ¶ 2, emphasis added.) Based on the language of the condition, evidence of a surcharge on a solicited — or simply *accepted* — beer is not necessary to prove a violation. Thus, if the Department had established counts 5, 6, and 7, it would necessarily have established count 12 as well. The inverse, however, is not true — the failure to establish counts 5, 6, and 7 does not necessarily indicate a failure to prove the allegations in count 12.

The relevant findings of fact — though erroneous as to whether Olga retained a surcharge for her beer — are consistent with testimonial evidence indicating that Olga requested and accepted a drink paid for by Agent Alcala. This constitutes a violation of license condition 2, regardless of whether a surcharge was imposed. Count 12 is therefore affirmed based on Olga's conduct.

Notably, the ALJ declined to impose a penalty for count 12: "Count 12 is sustained. Since this condition violation arises from the same facts as counts 5, 6, and 7 (and duplicates them in part), no penalty is imposed at this time." (Penalty.) Given that counts 5, 6, and 7 are reversed, but count 12 is sustained, we will remand the

decision to the Department for reconsideration of the penalty. For clarity, however, we fully expect that this remand will leave appellant, penalty-wise, in the same or better position than she finds herself now. The dismissal of three counts should not provide an opportunity for the Department to *increase* the penalty.

Regarding counts 8 and 10, the ALJ reached the following relevant findings of fact:

> 13. Lopez approached Agent Zavala, Agent Vega, and Samia. Samia asked Agent Zavala if he would buy her a beer. He agreed. Lopez obtained a 7-ounce bottle of beer. Agent Zavala handed a $10 bill to Lopez, who took the money to the Respondent. She returned with a stack of $1 bills, which she placed near Samia. Samia picked up the money and place [*sic*] it in her purse. Samia stated that her beer cost $10 and asked if that was OK. Agent Zavala said that it was.
>
> 14. Agent Zavala placed his beer next to Samia's and asked why it was so much smaller. Samia replied that it was because she could not drink too much. Samia finished her beer and asked Agent Zavala to buy her another. They had trouble getting Lopez's attention at first; when they succeeded, Samia spoke to Lopez in Spanish. Lopez obtained a 7-ounce bottle of beer and served it to Samia. Agent Zavala handed a $10 bill to Lopez, who took it to the Respondent. Lopez returned with a number of $1 bills, which she placed on the counter in front of Samia. Samia picked up the money and put it in her purse.
>
> 15. Samia noticed that Agents Zavala and Vega had finished their beers. Samia and Agent Vega spoke to each other in Spanish, after which Samia walked behind the bar counter and obtained two 12-ounce beers. She served the beers to the two agents. Agent Vega paid with a $10 bill. The agents subsequently exited the Licensed Premises.

(Findings of Fact ¶¶ 13-15.) Based on these findings of fact, the ALJ reached the following relevant conclusions of law:

> 19. Also on November 22, 2014 [*sic*], Samia solicited two beers from Agent Zavala. The bartender, Margarita Lopez, overheard the first solicitation, but not the second. Lopez paid a commission to Samia in connection with both solicitations, however, establishing that she was aware of them. As such, the violations alleged in counts 8 and 19 were established. Typically, only an employee would walk behind the bar counter to obtain a beer and serve it to a customer. Although Samia did

> just that in serving a round of beers to Agents Zavala and Vega, she did not display any other indicia of employment. Under these rather odd circumstances, the evidence was insufficient to establish employment (although it is further evidence that the Respondent was aware of Samia's actions and bespeaks of a close relationship between the two). Accordingly, count 9 was not established. By the same token, the condition violations alleged in counts 11 and 12 were not established with respect to Samia.

(Conclusions of Law ¶ 19.)

Appellant argues that the Department introduced no evidence showing that bartender Lopez overheard *either* Samia's first or second solicitation. Moreover, appellant contends that the placement of Agent Zavala's change — on the counter near Samia's beer — is not determinative of Lopez's knowledge of the solicitation. Appellant insists counts 10 and 12 must therefore be reversed. (App.Br. at pp. 12-13.)

As an initial matter, the ALJ sustained count 12 based on Olga's conduct alone, not Samia's. (See Conclusions of Law ¶¶ 18-19.) Only count 10 will be discussed here.

On direct examination, Agent Zavala testified as follows:

> [MS. WINTERS]
> Q And did you observe Lopez doing other waitressing duties?
>
> A Yes.
>
> Q What did you observe her doing?
>
> A Tending to the patrons, serving them beers, taking payment for the beers, picking up empties.
>
> Q And so when you moved to the other side of the bar, what happened when you sat down at the other side of the bar?
>
> A I began speaking to Samia.
>
> Q And did you speak in English or Spanish?
>
> A English.

Q And was she proficient in English?

A Yes.

Q And what happened next?

A Lopez came up to us, and Samia then asked me if I would buy her a beer.

[Objection; overruled.]

BY MS. WINTERS:
Q And what did you say?

A I said yes.

Q And what happened next?

A Lopez retrieved a 7-ounce bottle of Bud Light from the cooler and then brought it back to Samia.

Q And what happened next?

A I handed Lopez a $10 bill.

Q And then what did Lopez do?

A Lopez took the money to another female who was behind the bar.

Q Did you subsequently learn that person's name?

A Yes.

Q And what was her name?

A Irma Fajardo.

[¶ . . . ¶]

Q And so Lopez took the money. Did she take the money to the licensee, Ms. Fajardo?

A She did.

Q And what happened next?

A Lopez brought back a stack of ones and placed it near Samia's

beer.

Q And what happened next?

A She walked away.

Q And what did Samia do at that point?

A Samia took the money, placed it in a brown wallet, and then placed that brown wallet inside a black purse that was sitting on the bar.

(RT at pp. 81-83.) Zavala's testimony was largely consistent on cross-examination, except that he was unclear whether he paid Lopez before or after she retrieved the beers:

[MR. CHAVIRA]
Q Did Samia go with you and Agent Vega to the other side of the bar?

A Yes.

Q And was Margarita Lopez behind the bar as if she were tending bar?

A She was tending to patrons, yeah.

Q And at some point Samia asked you for a drink; is that correct?

A Yes.

Q And you agreed to buy her one?

A Yes.

Q You gave money in payment for that beer to whom?

A To Margarita Lopez.

Q And what amount of money was that, what denomination?

A Ten dollars.

Q Ten dollars?

A Ten dollars.

Q And what did Lopez do with that $10?

A Lopez took the money over to Fajardo.

[¶ . . . ¶]

Q And tell me what you saw after Lopez got to that counter [where Fajardo was located] with your money.

A I saw her, Lopez. I saw Lopez return with the beer and change.

Q Okay. So you saw her going there, and then you saw her coming back with money and beer; is that correct?

MS. WINTERS: I'm going to object. I'm confused. Is he talking about the very first time?

THE WITNESS: The very —

THE COURT: Hold on.

As I understand the question, we're talking about the first time that Samia solicited him. Is that correct, Mr. Chavira?

MR. CHAVIRA: Yes.

THE COURT: With that in mind, do you remember the question?

THE WITNESS: Lopez went to Fajardo, retrieved the beer, came back to Samia, and then I paid her.

Q Okay, and who did you pay?

A I paid Lopez.

Q Okay. So the beers were delivered, and then you paid Lopez.

A Yes.

Q And what did Lopez do with the money?

A Lopez took it over to Fajardo.

(RT at pp. 122-123, 126-127.) After a break, Zavala testified further on cross-examination regarding Samia's first solicitation, relying on his investigative report to

refresh his memory:

BY MR. CHAVIRA:

Q When Samia asked you for a beer, where was Lopez located or positioned?

A Which time?

Q I'm sorry, this is the date of November 22, and it is the first time you were solicited by Samia. Got that?

A Got it. Lopez was behind the fixed bar in front of us.

Q You wrote a report based on that first solicitation, did you not?

A I wrote a report, yes.

Q Does that report say that Lopez was in front of you and Samia?

A Yes.

Q It does? Do you want to point that out to me, "in front of"?

A Across from us.

Q And where do you see "across"?

A He walked up to me and Samia and Agent Vega —

Q Is that after —

A — where we were sitting.

Q — Samia lifted her arms and appointed [*sic*] the finger?

A No, that was before.

Q Your report doesn't say that, does it? It's a yes-or-no answer.

A I'd have to look at the report.

Q Okay, look at it.

[¶ . . . ¶]

THE WITNESS: Lopez walked up to Samia and I and Vega. She was behind the fixed bar.

BY MR. CHAVIRA:

Q And at what point in time in relation to the request by Samia for a drink?

A After Lopez approached us, Samia then asked me if I could buy her a beer.

[¶ . . . ¶]

Q And as you sat with Agent Vega, was Samia also sitting?

A She was sitting.

Q Were you in the middle of both individuals, or on one side or the other of Samia?

A Samia was in between Vega and I.

Q It is a fair statement to say that you were shoulder to shoulder with Samia?

A Not that close.

Q And Lopez put the money down and then walked away; is that correct?

A Yes.

Q And after she walked away is when Samia took some money; is that right?

A She took the money, yes.

(RT at pp. 132-135.) Ultimately, on redirect, counsel for the Department asked Zavala to read directly from his report:

BY MS. WINTERS:

Q Would you please read the first four sentences of that paragraph?

[¶ . . . ¶]

A "Samia and I engaged in general conversation. Lopez walked up to us, and in her presence Samia asked me 'One for me?' I replied 'Yes.' Samia then lifted her index finger — her right index finger while looking at Lopez and simultaneously nodded her head.

> Lopez retrieved a seven-ounce Bud Light beer from the cooler and returned to Samia and handed her the beer with a white napkin."

(RT at p. 149.) Zavala also confirmed on redirect where Lopez placed the change:

> [MS. WINTERS]
> Q When Lopez returned with the change, she put — Lopez put the change in front of Samia, isn't that correct?
>
> A Yes.

(RT at p. 150.)

While Agent Zavala's testimony was inconsistent as to whether he paid Lopez before or after she retrieved the beers, it was consistent on the two points appellant raises. First, Lopez was present when Samia solicited the first beer; it was therefore reasonable to infer that she overheard the solicitation take place, particularly since she left to retrieve the beer without further conversation. Second, Lopez placed the change on the counter in front of Samia — she did not hand it back to Agent Zavala, nor did she place it on the counter in front of him. It is reasonable to infer that Lopez intended the change to go to Samia — and, indeed, it was Samia who picked it up.

The only contrary testimony comes from Lopez, who testified that she only knew Samia because Samia came by "[o]nce or twice" and waited for her boyfriend. (RT at p. 180.)

Substantial evidence supports the ALJ's findings and conclusions of law. Count 10 is therefore affirmed.

III

Appellant contends that Agent Zavala's testimony is unreliable. In particular, appellant directs the Board to eccentricities in the languages spoken — particularly Vanessa's solicitation in Spanish, and Zavala's testimony that he feigned ignorance of

her Spanish solicitation, forcing her to solicit in English.

As above, this Board will not exercise its independent judgment on the evidence, but will accept all reasonable inferences and resolve any evidentiary conflicts in favor of the Department's decision. (See Part I, *supra*.)

With regard to counts 13 and 15, the ALJ made the following relevant findings of fact:

> 16. On December 14, 2013, Agent Zavala and Agent Vega returned to the Licensed Premises. They ordered two beers from Lopez, which she served to them.
>
> 17. The two agents were approached by Vanessa Guzman, who struck up a conversation with them. After a short while, Guzman asked Agent Zavala if he would buy her a beer. He agreed. Guzman asked Agent Zavala for $10, which he gave to her. Guzman walked behind the counter and gave the money to the Respondent. The Respondent gave Guzman a 7-oz bottle of beer. Guzman returned to the agents' location and sat down. The Respondent came over with some $1 bills and set them down in front of Guzman.
>
> 18. Guzman and Agent Vega had a conversation in Spanish. Agent Vega handed a $20 bill to Guzman, who walked behind the counter and gave it to Fajardo. Fajardo gave Guzman one 7-oz. bottle of beer and two 12-oz. bottles of beer. Guzman gave the two 12-oz. bottles to the agents, but kept the 7-oz. bottle for herself.
>
> 19. Guzman subsequently solicited a beer from Agent Vega in Spanish. Agent Vega paid by handing a $10 bill to Guzman. On direct, Agent Zavala testified that Guzman walked behind the counter and gave the money to the Respondent. Guzman returned with a 7-oz. bottle of beer. The Respondent came over and placed a stack of $1 bills in front of Guzman, who picked it up and placed it in her purse. On cross, Agent Zavala testified that Guzman paid Lopez, who obtained and served the beer to her. Lopez then took the money to the Respondent and obtained some change. Lopez returned the change to Guzman.

(Findings of Fact ¶¶ 16-19.) Based on these findings, the ALJ reached the following relevant conclusions of law:

> 20. On December 14, 2014 [*sic*], Vanessa Guzman (counts 13 and 15) solicited a beer from Agent Zavala. She subsequently engaged in

> conversation in Spanish with Agent Vega which resulted in the service of a 7-oz. beer to Guzman and two 12-oz. beers to Agent Vega and Agent Zavala. Finally, Guzman solicited a beer in Spanish from Agent Vega. Agent Zavala does not speak Spanish. Accordingly, he could not testify to the substance of the conversation between Guzman and Agent Zavala. Although the evidence implied that this conversation included a solicitation, the testimony did not establish that such a solicitation took place. Due to his experience with the Department, including his experience working b-girl cases, Agent Zavala understood Guzman's final solicitation of Agent Vega. He gave two different accounts of the third solicitation, however. Accordingly, the violations alleged in counts 13 and 15 were established based on the first solicitation only (the only time she solicited Agent Zavala). Since Agent Vega did not testify, there was insufficient evidence to establish a violation in connection with the second and third solicitations.

(Conclusions of Law ¶ 20.)

Appellant contends that Zavala's testimony is "suspect and not reliable" with regard to all counts because of the alternating use of Spanish and English. (App.Br. at p. 15.) Appellant argues:

> The strange part of Zavala's testimony is that before [Guzman] asked him in Spanish for a beer the two had been talking to one another in "broken English.["] [TP, P. 140, L. 22] It strains the imagination that Vanessa, fully knowing that Zavala did not speak Spanish and knowing that both had been speaking in broken English would then solicit Zavala in Spanish. Then, in aggravation to Zavala's strained account, he testified he pretended to not hear Vanessa's Spanish, though he allegedly knew what she meant, thereby somehow forcing Vanessa to solicit him in English.

(*Ibid*.)

Agent Zavala testified on direct examination regarding Guzman's first solicitation:

> [MS. WINTERS]
> Q What happened next?
>
> A Vega and I talked, and then I was shortly thereafter approached by a female who introduced herself as Vanessa.
>
> Q Did she tell you her last name?
>
> A During the conversation I asked her what her name was, and she said it was Guzman.

Q And did she speak English?

A She spoke broken English, Spanish and English, but she spoke English clearly enough for me to understand her.

Q And do you speak Spanish?

A No, I don't.

Q So she came over and introduced herself?

A She did.

Q And then what happened next?

A We talked. I asked her where she was from. She said she was from Tijuana. I asked her how old she was, and she said she was 42, and she was only there on Saturdays.

Q And what happened next?

A She asked me if she — she told me "Me compras una?" and I recognized that from prior B-girl investigations as "Will you buy me one?"

[Objection; overruled.]

BY MS. WINTERS:
Q And what did you say?

A I pretended like I didn't hear her, and I said "What?"

Q And what did she say?

A She said "One beer for me?"

Q And she said that in English?

A Yes.

Q And what did you say?

A I said yes.

(RT at pp. 88-90.) On cross-examination, Zavala's testimony was less clear:

[MR. CHAVIRA]

Q And in English she told you that she was from Tijuana?

A Yes.

Q But she advised you in Spanish; is that right?

A The first solicitation that first time was in Spanish.

Q But the discussion before the solicitation was in English?

A Broken English, yes.

(RT at p. 140.) It is unclear whether "[t]he first solicitation that first time" refers to Guzman's first solicitation on the evening in question, or Guzman's first spoken solicitation of Zavala — that is, before repeating her solicitation in English, as described by Zavala's testimony on direct.

The only contrary testimony, however, was from appellant, indicating that she didn't know anyone named Vanessa Guzman (RT at p. 251), and from bartender Lopez, indicating first that she didn't know anyone named Vanessa Guzman, then admitting "[i]t seems that I remember that it was a girl." (RT at p. 180.)

This Board is bound by the inferences reached by the ALJ. It was reasonable to infer that Zavala's testimony was consistent. The fact that Guzman communicated in broken English and first attempted to solicit Zavala in Spanish before soliciting in English does not undermine the validity of that inference. Counts 13 and 15 are therefore affirmed.

IV

With regard to count 18, appellant contends that Zavala was "completely confused" and broke the chain of custody when handling the two video machines allegedly taken from the licensed premises. (App.Br. at p. 16.)

Appellant defers argument as to count 19, and that count is submitted on the

record. (*Ibid*.)

Count 18 was brought under sections 330b, 330.1, and 330.4 of the California Penal Code. All three provisions are aimed at prohibiting possession or use of slot machines or similar devices.

Appellant's attack on count 18 focused not on the relevant provisions of law, but rather on the chain of custody of the machine allegedly found on appellant's premises. The California supreme court has noted, "Chain of custody is indeed a necessary showing for physical evidence to be admitted. But the trial court decides the admissibility of physical evidence based on challenges to the chain of custody, and, once admitted, any minor defects in the chain of custody go to its weight." (*Lucas*, *supra*, at p. 285, citing *People v. Diaz* (1992) 3 Cal.4th 495, 559 [11 Cal.Rptr.2d 353].)

In *People v. Wallace*, the supreme court addressed a criminal matter in which the chain of custody for a pair of socks was "far from perfect," but "disagree[d] with the defendant that these shortcomings rendered the admission of the socks an abuse of the trial court's discretion." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1061 [81 Cal.Rptr.3d 651], citing *People v Williams* (1997) 16 Cal.4th 153, 196 [66 Cal.Rptr.2d 123].) The court went on to quote *People v. Diaz*:

> The burden is on the party offering the evidence to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. . . . The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. . . . Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.

(*Wallace*, *supra*, at p. 1061, citing *Diaz*, *supra*, at p. 559.)

As above, this Board will not exercise its independent judgment on the evidence, but will accept all reasonable inferences and resolve any evidentiary conflicts in favor of the Department's decision. (See Part I, *supra*.)

The ALJ made the following findings of fact relevant to count 18:

> 22. After Agent Mathos secured the kitchen area, she noticed a video machine near the restrooms. The video machine was plugged in and operational. Based on her training and experience, Agent Mathos believed the video machine to be an illegal gaming machine. Accordingly, the video machine was seized and booked into evidence. A photograph of the machine was taken while it was inside the evidence room. (Exhibit A.)
>
> 23. The next business day, Agent Zavala plugged in the video machine. The screen displayed "Lucky 8 Lines." He put $1 in the machine and received four credits. He bet all four credits. The screen displayed three spinning reels of the type used by slot machines. When the reels stopped spinning, he noticed that he had won two credits on one of the eight pay lines. No skill was involved — the game was a pure game of chance. Agent Zavala opened up the machine and retrieved his $1 bet. Another $198 dollars were inside the machine as well.

(Findings of Fact ¶¶ 22-23.) In his conclusions of law, the ALJ reviewed the relevant sections of the Penal Code (Conclusions of Law ¶¶ 10-12) and ultimately concluded:

> 23. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that on December 20, 2013, the Respondent possessed an illegal slot machine or gaming device inside the Licensed Premises in violation of Penal Code section 330b, 330.1, and 330.4 (count 18).

(Conclusions of Law ¶ 23.)

At hearing, the ALJ made an explicit evidentiary ruling admitting the slot machine. The exchange proceeded as follows:

> THE COURT: Exhibit 3 is the video machine sitting over there in the corner. Any objection to my receiving that?
>
> MR CHAVIRA: Yes.

THE COURT: And what's the basis for that?

MR. CHAVIRA: Well, first of all, the testimony holding that that machine was at the licensed premises is completely unreliable. You've got the author of these reports, which were reviewed by the supervisor, which talks about two machines. I had been precluded from asking about any investigation of the liquor store next door because it was irrelevant. I happen to believe it is very relevant, because we think that's where the two machines came from.

So I don't think that a foundation has been laid to show that these two machines, which Zavala testified were from the licensed premises and which he played to prove that they were gaming devices — I don't think that it's an accurate foundation, and therefore unreliable, and I think the evidence is unreliable to show that that machine came from this licensed premises.

THE COURT: All right. First, I'm going to note when I asked you what was the relevance of your line of questioning, you did not mention that there were two machines listed in the report. You gave me other reasons. The two machines only came out when the last — not the last — when Agent Zavala was testifying after other witnesses had testified. I based my ruling on the information you gave me at the time.

But it's not Zavala's testimony that establishes that this machine is the one that was inside the premises. He testified he didn't see it in the premises. It's on Agent Mathos' testimony that this is the machine that she saw in the premises. Her testimony, which you have not attacked or challenged in your argument just now, is sufficient to establish that this is the machine that was found in the premises.

So I think an adequate foundation has been laid, so I'm going to admit Exhibit 3 as well.

(RT at pp. 168-169.)

In her brief, appellant again focuses solely on Agent Zavala, contending that he was "completely confused and actually broke the chain of custody when the machine, allegedly taken from appellant's premises, was labeled by him along with another almost identical machine." (App.Br. at p. 16.) Appellant also argues that Zavala "[didn't] know if he placed an evidence label on the other machine; however, he did not place them in the evidence room" and that "Zavala never saw the machine taken from

the Appellant's premises." (*Ibid.*)

Appellant cites no statutory or case law requiring that the chain of custody be established solely through one individual. Appellant's focus on Agent Zavala alone is therefore misplaced.

The Department counters with a series of citations to the record ostensibly establishing the chain of custody:

> The evidence established that Agent Mathos saw the slot machine near the restroom. The slot machine was plugged in, and it was not covered. (RT 28, 37.) She notified Supervising Agent-In-Charge Robles about the slot machine. (RT 25.) Agent Milloy testified he helped move the slot machine from appellant's premises, placed it in his car, and then placed it in the evidence locker at his office. (RT 19-20.)

(Dept.Br. at p. 16.) The Department, through witness testimony, established a chain of custody sufficient to justify admission of the slot machine under the standard articulated by the supreme court in *Lucas* and *Wallace*, *supra*. Count 18 is therefore affirmed.

In her closing brief, appellant argued that the machine should have been tested on-site: "[I]n almost all slot machine investigations the investigator plays the machine on-site at the conclusion of the investigation. This is done to ensure the machine is a game of chance, and to show the machine was operational; that is plugged in. This was not done." (App.Cl.Br. at p. 2.) Appellant provides no authority, however, to show that this is a requirement, or that the failure to test the slot machine on site constitutes a flaw in the evidence. Agent Mathos testified that the machine was plugged in (RT at pp. 26, 28) and Agent Zavala testified that it was a game of chance (RT at pp. 97-101). That is sufficient.

Appellant submits count 19 on the record and "defers argument." (App.Br. at p. 16.) Appellant did not appear at oral argument or otherwise present any cause for

reversal. Count 19 is therefore affirmed.

ORDER

Counts 1, 2, 3, 8, 10, 12, 13, 15, 18, and 19 are affirmed. Counts 5, 6, and 7 are reversed, and the decision is remanded to the Department for reconsideration of the penalty.[3]

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

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