

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

**AB-9674**

File: 41-510050; Reg: 17085418

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

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

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

Appeals Board Hearing: September 6, 2018  
Ontario, CA

**ISSUED SEPTEMBER 18, 2018**

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

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

**OPINION**

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

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<sup>1</sup>The decision of the Department, dated November 15, 2017, is set forth in the appendix.

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

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<sup>2</sup>**Section 24200.5(b)** states, in relevant part:

. . . the department shall revoke a license:

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

<sup>3</sup>**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.

<sup>4</sup>**Section 25657(b)** provides:

It is unlawful:

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

<sup>5</sup>**Section 23804** provides:

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

## FACTS AND PROCEDURAL HISTORY

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

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

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

(Exh. 6.)

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

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

Testimony established the following:

**Counts 1 - 2:**

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

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

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

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

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

**Counts 3 - 8:**

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

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

Lopez and Vergara went to a second room in the premises containing two pool tables. They played pool for awhile at one of the tables, then returned to the bar. (Count 4.)

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

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

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

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

Lopez and Vergara exited the bar.

**Count 9:**

On April 1, 2016, Agents Lopez and Vergara returned to the licensed premises. They each ordered a beer, which they were served. While they drank their beers, they listened to three men playing musical instruments. They listened to the music, then left the bar. (Count 9.)

**Counts 10 - 14:**

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

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

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

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

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

Flores asked Lopez if he would buy her another beer. He agreed, and also asked Marcela if she wanted a beer. She said she did. Flores obtained a can of Miller Lite beer for herself and a can of Tecate Light for Marcela. Lopez paid with a \$20 bill.

Flores rang up the sale and gave \$7 to Marcela. (Count 14.)

The agents both exited shortly thereafter.

**Counts 15 - 17:**

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

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

Following the hearing, on September 14, 2017, the administrative law judge (ALJ) issued a proposed decision, sustaining counts 1, 2, 6, 7, 8, 12, 13, and 14,<sup>6</sup> and recommended that the license be revoked for those violations. Concurrently, the ALJ sustained counts 3, 4, 9, 10, and 15,<sup>7</sup> and recommended that the license be suspended for 30 days for those violations (with 10 days stayed — conditioned on the discipline-free operation of the premises for three years). Counts 5, 11, 16, and 17 were dismissed.

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

<sup>7</sup>These counts were for violations of Business and Professions Code section 23804 — violation of conditions on the license.

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

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

## DISCUSSION

### I

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

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

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

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

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more

competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

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

**Count 1.** Appellant contends there is insufficient evidence that Rosa heard Maria Flores solicit Agent Zapata on March 14, 2016, because Rosa had to be called over to take the order and therefore would not have heard the exchange between Flores and Zapata. (AOB at p. 9.) However, the ALJ found that substantial evidence supported this charge of the accusation, and that Rosa was aware of and participated in the solicitation scheme — as evidenced by the fact that she placed a \$5 commission on the bar counter in front of Flores after serving her the drink. (Conclusions of Law, ¶ 8.) We agree. Rosa would not have paid Flores a commission unless she were part of the scheme to permit Flores to solicit drinks. This count is sustained.

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

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

**Count 7.** Appellant contends there was no agreement between appellant and Flores to pay her a commission, and further contends there is no evidence she actually received a commission. (AOB at pp. 11-12.) These assertions contradict the

testimony of Agent Vergara, who testified that the beers solicited from him by Flores cost \$10, while beers he purchased for himself cost \$5. (RT at pp. 87-89.) Agent Lopez testified to the same cost discrepancy. (RT at pp. 43-44.) Substantial evidence of a solicitation scheme supports this charge of the accusation; it is sustained.

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

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

**Count 12.** Appellant contends there is no evidence Flores was employed for the purpose of soliciting drinks and states “the lack of proof of an agreement means there was not substantial evidence to support *Count 7.*” (AOB at p. 13.) As noted in the previous paragraph, this contention requires no discussion since it fails to address the facts of the actual count. Even if appellant’s reference to the wrong count is overlooked, and we assume it meant to say count 12 rather than count 7, appellant’s argument ignores substantial evidence supporting Findings of Fact, paragraphs 21 and 24, wherein Flores encouraged Agent Lopez to buy Marcela a beer, then Flores paid Marcela a commission. This count is sustained.

**Count 13.** Appellant contends there is no evidence that a commission,

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

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

## II

Appellant contends the penalty of revocation is unduly harsh and excessive. It contends that the prior disciplinary action against the license was not charged as aggravation, and that therefore the instant matter should be charged with a penalty consistent with a first-time offense. Finally, it argues that the proposed decision does not designate a specific penalty for each count, so that if any counts are overturned by the Board, the penalty should be reduced. (AOB at pp. 14-16.)

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the

absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal. App. 2d 659, 666-667 (1966) [49 Cal. Rptr. 901].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

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

(Cal. Code Regs., tit. 4, § 144.)

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

The Penalty Policy Guidelines further address the discretion necessarily involved

in an ALJ's recognition of aggravating or mitigating evidence:

**Penalty Policy Guidelines:**

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

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

The Department requested that the Respondent's license be revoked. In support of this recommendation, the Department argued that the Respondent had been disciplined for the same type of violations in the past and, moreover, the same person was still soliciting drinks. The Respondent argued that, if the accusation were sustained, a lesser penalty was appropriate since the penalty imposed the first time was rather low—a significant increase in the penalty (short of revocation) would be sufficient to protect public welfare and morals and satisfy the need for progressive discipline. Accordingly, the Respondent suggested that a stayed revocation, coupled with a significant suspension, was appropriate.

Section 24200.5(b) mandates revocation for a violation of its provisions, although this has been construed to include some form of stayed revocation. Pursuant to rule 144,<sup>[fn.]</sup> the penalty for a violation of section 25657(a) or section 25657(b) is revocation (which also includes stayed revocation). Finally, the penalty for a condition violation is a 15-day suspension with 5 days stayed for one year.

In the present case, an aggravated penalty is warranted. First, the Respondent was previously disciplined for permitting illegal drink solicitation. Second, the solicitations at issue here were made by one of the Respondent's employees—the same employee who had been soliciting drinks in the prior case. Finally, the Respondent had previously been

disciplined for violating the conditions attached to her license.

The penalty recommended herein complies with rule 144.

(Decision at pp. 9-10.)

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

For purposes of imposition of penalty, if any arising from this accusation, it is further alleged the respondent-licensee(s) has/have suffered the following disciplinary history:

<u>DATE</u>	<u>VIOLATION</u>	<u>PENALTY</u>	<u>REG.NO.</u>
6/9/15	BP 24200.5(b), 25657(a), 25657(b), 23804, HS 11352	Revocation stayed 3 years & 20 day suspension	15082566

(Exh. 1, at p. 7.)

In the decision, the ALJ takes note of the prior discipline, and states: “[t]he foregoing disciplinary matter is final. (Exhibit 3.) They were not pled for the purposes of aggravation.” (Findings of Fact, ¶ 3.) However, we are not aware of any requirement — and appellant has cited no authority for this proposition — that the accusation must specifically include the word “aggravation” before the ALJ is permitted to utilize the prior disciplinary matter for that purpose. For what other purpose would the words “for purposes of imposition of penalty” be included in the accusation if not for aggravation? We believe appellant’s assertion that “[s]ince no aggravation was charged by the Department the accusation should be treated as a first-time offense for purposes of a penalty imposition” (AOB at p. 15) is disingenuous. This is appellant’s second disciplinary action in two years, not its first offense, and no justification was established for treating it as anything but a second offense.

In the present case, the ALJ sustained:

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

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

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

And again, I'm asking the Department to look at itself. And when dealing with a 57-count violation and a 20-day suspension, I think the Department didn't go far enough to educate this particular licensee, because when you give a 20-day suspension for 57-count drink solicitation, narcotics and condition violations, it apparently didn't drive home the point of how the Department actually views these violations, especially the narcotics violation.

So I think that I've never seen a penalty so low as a 20-day

suspension for a 57-count drink solicitation and drug sales allegation. And I think that the licensee was inadvertently misled to think that they weren't serious.

[¶ . . . ¶]

So I think that taking the licensee's license when the Department did a crappy job of reinforcing the seriousness of the prior count, that there was some sort of disconnect where the licensee didn't understand the gravity of the present activities . . .

[¶ . . . ¶]

And I think that if the mission statement of the Department is to in part educate its license holders, it didn't do a very good job on that prior matter, and certainly didn't drive home the point that maybe it should have driven. And to that extent I think maybe the Department shares blame for the continued activities of this particular premises. . . .

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

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. Even though the penalty of revocation may be harsh, as the Court in *Rice* stated:

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

(*Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr.

285], emphasis added.) The Board is simply not empowered to reach a contrary conclusion from that of the Department if the underlying decision is reasonable.

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

ORDER

The decision of the Department is affirmed.<sup>8</sup>

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

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<sup>8</sup>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.

# APPENDIX

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

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

**LAS LANGOSTAS CORPORATION  
MARISCOS CASA CORONA  
14540 VANOWEN ST  
VAN NUYS, CA 91405-3940**

**ON-SALE BEER AND WINE EATING PLACE -  
LICENSE**

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

**VAN NUYS DISTRICT OFFICE**

**File: 41-510050**

**Reg: 17085418**

**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 October 23, 2017. 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, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after December 26, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: November 15, 2017



Matthew D. Botting  
General Counsel

**RECEIVED**

**NOV 16 2017**

**Alcoholic Beverage Control  
Office of Legal Services**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Las Langostas Corporation	}	File: 41-510050
dba Mariscos Casa Corona	}	
14540 Vanowen St.	}	Reg.: 17085418
Van Nuys, California 91405-3940	}	
	}	License Type: 41
Respondent	}	
	}	Word Count: 22,000
	}	
	}	Reporter:
	}	Barbara Small
	}	California Reporting
	}	
<u>On-Sale Beer and Wine Eating Place License</u>	}	<b><u>PROPOSED DECISION</u></b>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on August 2, 2017.

Jennifer M. Casey, Attorney, represented the Department of Alcoholic Beverage Control.

Armando H. Chavira, attorney-at-law, represented respondent Las Langostas Corporation.

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

- (1) on four separate dates, it employed or permitted Maria Esperanza Flores to solicit or encourage others to buy her 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);<sup>1</sup>
- (2) on two separate dates, it employed or permitted Maria Esperanza Flores to solicit or encourage others to buy Marcela 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);
- (3) on three separate dates, it employed or permitted Maria Esperanza Flores for the purpose of procuring or encouraging the purchase or sale of an alcoholic beverage, or paid her 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);

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise noted.

- (4) on two separate dates, it employed or permitted Maria Esperanza Flores for the purpose of procuring or encouraging the purchase or sale of an alcoholic beverage for Marcela, or paid her a percentage or commission for procuring or encouraging the purchase or sale of an alcoholic beverage for Marcela, in the licensed premises in violation of section 25657(a); and
- (5) on March 14, 2016, it employed or knowingly permitted Maria Esperanza Flores to loiter in or about the licensed premises for the purpose of begging or soliciting patrons to purchase alcoholic beverages for them in violation of section 25657(b).

As is typically the case with b-girl violations, the counts overlap to some degree. In connection with these alleged violations, the Department also seeks to discipline the Respondent's license on the grounds that, on three separate dates, the Respondent failed to comply with the conditions attached to its license in violation of section 23804.

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 August 2, 2017.

#### FINDINGS OF FACT

1. The Department filed the accusation on March 15, 2017.
2. The Department issued a type 41, on-sale beer and wine eating place license to the Respondent for the above-described location on November 4, 2011 (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>
6/9/2015	15082566	BP §§ 24200.5(b), 25657(a), 25657(b), & 23804 and H&S §§ 11352(a)	Rev. stayed (3 years) w/20-day susp.

The foregoing disciplinary matter is final. (Exhibit 3.) They were not pled for the purposes of aggravation.

4. On April 28, 2011, the Respondent executed a petition for conditional license. (Exhibit 6.) This petition contained 13 conditions, including the following three conditions:

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

**March 14, 2016**  
**(Counts 1-2)**

5. On March 14, 2016, Agent Oscar Zapata entered the Licensed Premises. He sat down at the bar counter and ordered a Corona beer. The bartender, Rosa Ayona-Agustiniano, served the beer to him and charged him \$5, which he paid.

6. Maria Flores subsequently entered the Licensed Premises. Agent Zapata recognized her from the previous investigation (which resulted in the disciplinary action set forth above). Flores approached him and they engaged in some small talk. During this conversation, Flores asked him to buy her a beer and he agreed.

7. Flores called Ayona-Agustiniano over and ordered a beer. Ayona-Agustiniano obtained the beer and served it to Flores. Agent Zapata asked how much the beer cost. Ayona-Agustiniano told him that it cost \$10. He paid with a \$20 bill, which Ayona-Agustiniano took to the register. Ayona-Agustiniano returned and gave him \$10 in change. She also placed \$5 on the bar counter. Flores slid the \$5 under a napkin.

8. Ayona-Agustiniano called Flores over. Ayona-Agustiniano, Flores, and another woman spoke to each other. Flores returned to her seat. A short time later, she exited the Licensed Premises, leaving behind the \$5. Believing that the women recognized him as an officer, Agent Zapata exited as well.

**March 29, 2016**  
**(Counts 3-8)**

9. On March 29, 2016, Agent Alberto Lopez entered the Licensed Premises. He sat down at the bar counter and ordered a Bud Light beer from the bartender, Flores. Flores served the beer to him and charged him \$5, which he paid.

10. A short time later, Agent Danny Vergara entered the Licensed Premises and took a seat next to Agent Lopez. Agent Vergara ordered a bucket of beers, which Flores served to him. The bucket contained six bottles of beer, three Bud Light bottles and three Corona bottles. Flores charged him \$30, which he paid.

11. A second room inside the Licensed Premises contained two pool tables. The agents went over to one of the two tables and began to play. When they finished, they returned to the bar counter.

12. Flores asked Agent Vergara if he would buy her a beer. He said that he would and she obtained a can of Miller Lite beer. He asked her how much it cost and she replied that it cost \$10. He paid with a \$20 bill. She rang up the sale and gave him \$10 in change.

13. Marcela entered the Licensed Premises and took a seat at the bar counter. Flores approached Marcela and told her to sit with the two agents, which she did. A short time later, Flores asked Agent Lopez if he would buy Marcela a beer. He agreed and Marcela ordered a Tecate Light. Flores served the beer to Marcela. Agent Lopez handed Flores a \$20 bill. Flores took the money to the register and returned with some change. She gave \$10 of the change to Agent Lopez and the remaining \$7 to Marcela. Marcela asked for a cup and poured her beer into it.

14. Flores asked Agent Lopez if he would buy her a beer. He agreed and she obtained a beer for herself. Agent Lopez paid Flores with a \$20 bill. She gave him \$10 in change.

15. Flores subsequently asked Agent Lopez if he would buy Marcela another beer. He asked Marcela if she wanted another beer. She agreed. Flores obtained a can of Tecate Light and served it to Marcela. Agent Lopez asked Flores how much the beer cost. Flores said that it cost \$10, which he paid. Flores rang up the sale and placed \$7 in front of Marcela, who placed it in her purse.

16. Agent Lopez ordered a Tecate Light from Flores. She obtained two beers and served them to Agent Lopez and Marcela. Agent Flores paid with three \$5 bills. Flores took the money to the register and returned with \$7 in change, which she placed in front of Marcela.

17. The agents exited the bar a short time later.

**April 1, 2016  
(Count 9)**

18. On April 1, 2016, Agents Lopez and Vergara returned to the Licensed Premises. They ordered a beer each, which they were served. While they were inside, three men were playing instruments. They listened to the music, then left.

**April 5, 2016  
(Counts 10-14)**

19. On April 5, 2016, Agents Lopez and Vergara entered the Licensed Premises. Agent Vergara ordered a bucket of beers from Flores, the bartender. Flores served him a bucket containing six bottles of Corona beer.

20. Flores asked Agent Vergara if he would buy her a beer. He agreed and she obtained a can of Miller Lite. Agent Vergara handed \$40 to Flores to pay for the bucket of beer and Flores' can. She took the money and rang up the sale. She did not give him any change.

21. Marcela entered and sat down at the bar counter. Flores approached her and asked her to sit with the two agents. Flores then asked Agent Lopez if she should give Marcela a beer. Agent Flores asked Marcela if she wanted a beer and she said that she did. Flores obtained a can of Tecate Light and served it to Marcela. Agent Lopez paid with a \$20 bill; Flores gave him \$10 in change. She placed \$7 in front of Marcela, who placed it in her wallet.

22. At some point, Flores obtained a second beer for herself. She did not solicit it from either of the agents.

23. Flores obtained a third beer. She held it up in front of her and raised her eyebrows. Agent Vergara, believing that she was asking him to buy her another, nodded yes. She began to consume from the beer. Agent Vergara paid with a \$20. She did not give him any change.

24. Flores asked Agent Lopez if she should give Marcela another beer. Agent Lopez asked Marcela if she wanted him to buy her a beer; she said that she did. Flores obtained a can of Tecate Light and served it to Marcela. Agent Lopez paid with a \$20 bill. Flores gave him \$10 in change and placed the remaining \$7 in front of Marcela. Marcela placed the money in her wallet.

25. Flores subsequently asked Agent Lopez if he would buy her a beer. He said that he would. He also asked Marcela if she wanted a beer. She said that she did. Flores

obtained a can of Miller Lite beer for herself and a can of Tecate Light for Marcela. Agent Lopez paid with a \$20 bill. Flores rang up the sale and returned with \$7 in change, which she gave to Marcela.

26. The agents exited a short time later.

**April 8, 2016  
(Counts 15-17)**

27. On April 8, 2016, Agents Lopez and Vergara returned to the Licensed Premises. They took a seat at the bar counter and remained for a bit before leaving. They returned later that day. Flores, who was acting as a waitress, greeted them and asked them where they wanted to sit. They sat down at a table between the bar counter and the stage.

28. Flores asked them what they wanted to drink and Agent Vergara ordered a bucket of beers. Flores served them a bucket of six bottles of Corona beer and said that it cost \$30. Flores also brought a can of Miller Lite for herself. Agent Vergara paid Flores with two \$20 bills; he did not receive any change.

29. 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. Section 25657(b) provides that it is unlawful “[i]n any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.”

6. Section 23804 provides that the violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.

7. 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 sections 24200.5(b), 25657(a), and 25657(b) alleged in counts 1, 2, 6, 7, 8, 12, 13, and 14. (Findings of Fact ¶¶ 5-17 & 19-26.)

8. On March 14, 2016 (counts 1 and 2), Maria Flores solicited a beer from Agent Oscar Zapata. While the bartender, Rosa Ayona-Agustiniano, was not present for the solicitation, she was clearly aware of it since she placed a \$5 commission on the bar counter for Flores after serving her the drink. Although Flores subsequently left the \$5 behind, such an action does not vitiate the initial payment of the commission. (Findings of Fact ¶¶ 5-8.)

9. On March 29, 2016 (count 6), Flores, the Respondent’s bartender, solicited two beers on behalf of Marcela. Section 25657(a), unlike section 24200.5(b) (see below), does not require that the alcohol in question be for the person doing the soliciting. As such, these solicitations were in violation of section 25657(a). The third beer served to Marcela was not the result of a solicitation and, therefore, was not against the law. (Findings of Fact ¶¶ 9-17.)

10. Also on March 29, 2016 (counts 7 and 8), Flores solicited two beers for herself—one from Agent Danny Vergara and one from Agent Alberto Lopez. Flores retained a commission in connection with each of these beers. (Findings of Fact ¶¶ 9-17.)

11. On April 5, 2016 (count 12), Flores, the Respondent’s bartender, solicited two beers on behalf of Marcela. As noted above, section 25657(a) does not require that the alcohol in question be for the person doing the soliciting. Accordingly, these two solicitations violated this section. The third beer served to Marcela was not the result of a solicitation and, therefore, was not against the law. (Findings of Fact ¶¶ 19-26.)

12. Also on April 5, 2016 (counts 13 and 14), Flores solicited three beers for herself—one from Agent Lopez and two from Agent Vergara. Flores' first solicitation of Agent Vergara and her only solicitation from Agent Lopez were made verbally. Her second solicitation from Agent Vergara was based on gestures—she held up a beer in her hand and raised her eyebrows. She only opened the beer and consumed it after Agent Vergara nodded yes. Flores retained a commission in connection with each of these beers. Each such service is in violation of the law. Flores also obtained and consumed a fourth beer, but she did so without soliciting it from anyone. Accordingly, the service of this fourth beer was not in violation of the law. (Findings of Fact ¶¶ 19-26.)

13. Cause for suspension or revocation of the Respondent's license was **not** established for the violation of section 24200.5(b) alleged in counts 5, 11, 16, and 17. (Findings of Fact ¶¶ 9-17 & 19-28.)

14. On March 29, 2016 (count 5), Flores solicited two beers for Marcela from Agent Lopez. (Findings of Fact ¶¶ 3-8.) Section 24200.5(b), however, by its own terms, is only violated when a licensee "has employed or permitted any *persons* to solicit or encourage others, directly or indirectly, to buy *them* drinks." (Emphasis added.) Thus, this section cannot be violated when one person solicits a drink for another—it can only be violated when a person solicits a drink for himself or herself. Accordingly, count 5 must be dismissed.

15. On April 5, 2016 (count 11), Flores solicited two beers for Marcela from Agent Lopez. (Findings of Fact ¶¶ 19-26.) As noted above, section 24200.5(b) can only be violated when a person solicits a drink for himself or herself. Accordingly, count 11 must be dismissed.

16. On April 8, 2016 (counts 16 and 17), Flores served a bucket of beers to Agent Lopez and Agent Vergara. At the same time, she brought a can of beer for herself to the table, which she consumed. She did not solicit this beer from anyone. Thus, even though Agent Lopez paid for the beer (including a commission), neither section 24200.5(b) nor section 25657(a) were violated and both counts must be dismissed. (Findings of Fact ¶¶ 27-28.)

17. 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 23804 alleged in counts 3, 4, 9, 10, and 15. (Findings of Fact ¶¶ 4, 10-11, 18-20, & 28.)

18. On March 29, 2016 (count 3), Agent Danny Vergara ordered, and was served, a bucket of beers by the bartender, Flores. The bucket consisted of six bottles of beer

(three Bud Light and three Corona), for which Agent Vergara paid \$30. This sale violated condition 13. (Findings of Fact ¶¶ 4 & 10-11.)

19. On March 29, 2016 (count 4), Agent Vergara and Agent Lopez entered a room inside the Licensed Premises where two pool tables were located. They played pool on one of the tables. Maintaining these pool tables inside the Licensed Premises violated condition 7. (Findings of Fact ¶¶ 4 & 10-11.)

20. On April 1, 2016, (count 9), three men were playing music on their instruments inside the Licensed Premises. Such live entertainment violated condition 9. (Findings of Fact ¶¶ 4 & 18.)

21. On April 5, 2016 (count 10), Agent Vergara purchased a bucket of beer from the bartender, Flores. The bucket consisted of six beers. This sale violated condition 13. (Findings of Fact ¶¶ 4 & 19-20.)

22. On April 8, 2016 (count 15), the agents ordered a bucket of beer. The waitress, Flores, brought them a bucket of beer containing six bottles of Corona. Agent Lopez paid \$30 for the bucket. This sale violated condition 13. (Findings of Fact ¶¶ 4 & 28.)

### PENALTY

The Department requested that the Respondent's license be revoked. In support of this recommendation, the Department argued that the Respondent had been disciplined for the same type of violations in the past and, moreover, the same person was still soliciting drinks. The Respondent argued that, if the accusation were sustained, a lesser penalty was appropriate since the penalty imposed the first time was rather low—a significant increase in the penalty (short of revocation) would be sufficient to protect public welfare and morals and satisfy the need for progressive discipline. Accordingly, the Respondent suggested that a stayed revocation, coupled with a significant suspension, was appropriate.

Section 24200.5(b) mandates revocation for a violation of its provisions, although this has been construed to include some form of stayed revocation. Pursuant to rule 144,<sup>2</sup> the penalty for a violation of section 25657(a) or section 25657(b) is revocation (which also includes stayed revocation). Finally, the penalty for a condition violation is a 15-day suspension with 5 days stayed for one year.

In the present case, an aggravated penalty is warranted. First, the Respondent was previously disciplined for permitting illegal drink solicitation. Second, the solicitations at

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

issue here were made by one of the Respondent's employees—the same employee who had been soliciting drinks in the prior case. Finally, the Respondent had previously been disciplined for violating the conditions attached to her license.

The penalty recommended herein complies with rule 144.

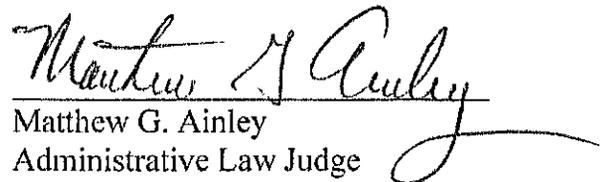
### ORDER

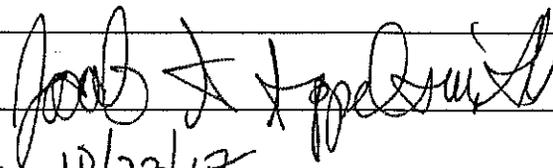
Counts 1, 2, 6, 7, 8, 12, 13, and 14 are sustained. In light of these violations, the Respondent's on-sale beer and wine eating place license is hereby revoked.

Counts 3, 4, 9, 10, and 15 are sustained. In light of these violations, the Respondent's on-sale beer and wine eating place license is suspended for 30 days, with execution of 10 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within three years from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Counts 5, 11, 16, and 17 are dismissed.

Dated: September 14, 2017

  
Matthew G. Ainley  
Administrative Law Judge

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By: 
Date: 10/23/17