

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

AB-9380

File: 40-427817 Reg: 12077496

JOSE CERVANTES and MARIA ELENA CERVANTES,
dba Adelita Bar
1302 North Wilmington Boulevard, Wilmington, CA 90744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 5, 2014
Los Angeles, CA

ISSUED JUNE 27, 2014

Jose Cervantes and Maria Elena Cervantes, doing business as Adelita Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license, with revocation stayed for three years, and imposed a 20-day suspension for violations of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b).

Appearances on appeal include appellants Jose Cervantes and Maria Elena Cervantes, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated October 3, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on November 10, 2005. On September 25, 2012, the Department instituted a forty-three count accusation against appellants charging that, on six separate dates in 2010 and 2012, appellant employed or permitted individuals to engage in drink solicitation activity within the premises, in violation of sections 24200.5, subdivision (b),² and 25657, subdivisions (a) and (b).³ The events underlying the original accusation took place in November and December of 2010.

²Counts 3, 6, 9, 12, 15, 18, 21, 30, 33, 38, 41, and 42 alleged violations of section 24200.5, subdivision (b). That section 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 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.

³Counts 2, 4, 7, 11, 14, 17, 20, 22, 24, 26, 29, 32, 35, 37, 40, and 43 alleged violations of section 25657, subdivision (a). Counts 1, 5, 8, 10, 13, 16, 19, 23, 25, 27, 28, 31, 34, 36, and 39 alleged violations of subdivision (b). Section 25657 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 on such premises.

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

On January 9, 2013, the Department filed a First Amendment to the Accusation, which modified the language of nine of the original counts. On February 15, 2013, the Department filed a Second Amendment to the Accusation. This Amendment added fifteen additional counts alleging violations of the same sections, bringing the total to fifty-eight counts.⁴ The events underlying the counts presented in the Second Amendment took place in April, May, and June of 2012.

At the administrative hearing held on May 15, May 16, and July 2, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Sergeants Liferlando Garcia and Stephen Moore of the Los Angeles Police Department (LAPD); by Officers Gabriel Ruiz, Juan Barillas, Francisco Lopez, and Victor Pacheco, also of the LAPD; by District Administrator Vincent Cravens and Investigator Frank Robles of the Department of Alcoholic Beverage Control; by appellants' Maintenance Manager, Felipe Ponse Ramos; and by co-licensee Maria Elena Cervantes.

Testimony established that on six separate dates, LAPD officers observed solicitation activity at the premises.⁵

The events underlying counts 1 through 12 took place on November 11, 2010. On that date, Sergeant Liferlando Garcia and Detective Pete Rodriguez entered the licensed premises and sat at the bar counter. They ordered a Tecate and a Corona

⁴Counts 46, 49, 52, 55, and 58 alleged violations of section 24200.5, subdivision (b). Counts 44, 47, 50, 53, and 56 alleged violations of section 25657, subdivision (a), and counts 45, 48, 51, 54, and 57 alleged violations of section 25657, subdivision (b).

⁵The Second Amendment to the accusation included three counts based on events that allegedly took place on a seventh date — June 8, 2012. No testimony was presented, however, to support these counts.

beer, respectively, from the bartender, Suyapa Chavez, and paid \$4 each.

Two women, identified as Dora Oliva and "Anjelica," approached them. Sergeant Garcia and Oliva recognized each other from another location, and commenced a conversation. Anjelica initiated a separate conversation with Detective Rodriguez. Oliva asked Garcia to buy her a beer. He agreed. Oliva ordered a beer from Chavez, and Garcia placed a \$20 bill on the counter. Chavez picked up the money, then obtained a Bud Light beer and served it to Oliva. Chavez placed \$17 change on the bar between Garcia and Oliva. Oliva picked up the change, took \$7, and handed the remaining \$10 to Garcia. She placed the \$7 in her bra and commented that she was taking her money. Chavez was four to five feet away at the time. (Counts 1-3.)

Sergeant Garcia and Oliva continued their conversation, during which Oliva indicated that some people believed he was a police officer. He denied it.

Shortly after Oliva solicited Sergeant Garcia, Anjelica solicited a beer from Detective Rodriguez. He agreed. Rodriguez placed a \$20 bill on the counter. Chavez took the money and returned with a Bud Light beer and some change. Chavez served the beer to Anjelica and placed the change on the counter. Anjelica picked up \$7 and placed it in her purse. Chavez was directly across the counter from Anjelica at the time. (Counts 4-6.)

Rosa Tarango entered the premises and approached the officers. She stated that she believed Sergeant Garcia was a police officer, but did not care. She asked Garcia to buy her a beer. He agreed. Tarango ordered a beer from Chavez. Garcia placed a \$10 bill on the counter, and Chavez picked it up. Chavez served a Bud Light beer to Tarango and placed \$7 in change on the counter. Tarango immediately picked

up the change. Chavez was directly across the bar counter at the time. (Counts 7-9.)

When Oliva and Tarango finished their beers, they each solicited a second beer from Sergeant Garcia. He agreed and gave Chavez a \$20 bill. Chavez served Oliva and Tarango one beer each and placed \$14 in change on the counter. Tarango picked up the change, took \$7 for herself, and handed \$7 to Oliva. Chavez was four to five feet away at the time.

Anjelica finished her beer and solicited a second beer from Detective Rodriguez. He agreed and placed \$10 on the counter. Chavez obtained a beer and served it to Anjelica. She placed \$7 in change on the bar counter. Anjelica picked up the money and placed it in her purse. Chavez was four to five feet away, looking directly at them. Anjelica consumed her beer and left.

Tarango then approached Detective Rodriguez and asked him to buy her a beer. He agreed and placed a \$20 bill on the counter, which Chavez picked up. Chavez served a beer to Tarango and placed \$17 on the counter. Tarango picked up the money, took \$7 for herself, and handed the remaining \$10 to Rodriguez. Tarango placed the \$7 in her purse. Chavez was four to five feet away, looking in their direction. (Counts 10-12.)

Tarango finished her third beer and asked Detective Rodriguez to buy her another. He agreed, and paid with a \$20 bill. Tarango received \$7 of the change and Rodriguez received \$10.

Oliva solicited two more beers from Sergeant Garcia. Both times Garcia paid for the beer, but Tarango received \$7 of the change.

The events underlying counts 13 through 27 took place on November 19, 2010. On that date, Sergeant Garcia, Sergeant Cabrera, and Officer Francisco Lopez entered

the licensed premises. They approached the bartender, Chavez, and ordered three beers. Chavez served them the beers, which cost \$4 each.

Oliva approached the officers and stated she would find a table for them. She asked some people to move from one of the tables, which they did. The three officers took seats at the table while Oliva stood next to it.

Oliva asked Sergeant Cabrera to buy her a beer. He agreed and handed her a \$20 bill. Tarango then approached the table and told Cabrera to buy her a beer as well. He agreed and told Oliva to bring a beer for Tarango. Tarango sat down at the table and Oliva went to the bar counter. Oliva returned with two beers. She gave one beer to Tarango, along with \$7 in change. She kept the other beer and the remaining \$7 in change for herself. Cabrera did not receive any change. (Counts 13-18.)

Two other women, Anjelica and Maria, joined them at the table. Tarango asked Officer Lopez if he was going to buy them beers. Lopez agreed and handed a \$20 bill to Tarango. Tarango stated that she and Oliva would also like beers. Sergeant Garcia agreed and handed a \$20 bill to Tarango as well. Tarango picked up the empty bottles and took them to the bar counter. She returned with four beers and some change. She gave one beer each to Anjelica, Maria, and Oliva. She also gave them each \$7 in change. She kept one beer and \$7 for herself. Neither Lopez nor Garcia received any change. (Counts 22-25.)

A woman identified as "Alva" joined them at the table. Either Tarango or Oliva asked the officers if they were going to buy drinks for Anjelica, Maria, and Alva. Sergeant Cabrera agreed. A waitress, "Estela," came over to the table and they ordered three beers. Cabrera handed Estela some money. Estela obtained the three beers and served one to each of the women. Anjelica, Maria, and Alva each received

\$7, and Garcia received \$10. (Counts 26-27.)

Estela remained at the table and asked Cabrera if he would buy her a beer too. He agreed and handed her a \$10 bill. She obtained the beer and returned to the table, where she began to consume her beer. She kept the change. After consuming the beer, Estela returned to her waitressing duties. (Counts 19-21.)

The officers indicated they needed to leave. One of the women asked the officers to buy them one more round. Sergeant Cabrera agreed and called Estela over. He ordered five beers and handed Estela \$60. Estela returned with five beers and some change. She gave one beer and \$7 to each of the five women at the table — Anjelica, Maria, Alva, Oliva, and Tarango — and gave \$10 to Cabrera. The women began to consume their beers, and the officers left the premises.

The events underlying counts 28 through 33 took place on December 10, 2010. On that date, Sergeants Garcia and Cabrera returned to the licensed premises and took seats at the bar. Chavez was again working as bartender. Garcia and Cabrera ordered a Tecate and a Modela, each of which cost \$4.

Oliva approached them and asked Sergeant Cabrera to buy her a beer. He agreed. Oliva ordered a Bud Light from Chavez. Cabrera paid with a \$10 bill. Chavez obtained the beer and some change. She served the beer to Oliva and placed \$7 on the counter in front of Oliva. Oliva picked up the money and kept it, then began to consume the beer. (Counts 28-30.)

The three of them moved to a table where Tarango joined them. Tarango asked Cabrera where the beer was. He agreed to buy her a beer and handed her a \$20 bill. Tarango took the money to the bar counter and returned with a beer and some change. She gave \$10 of the change to Cabrera and kept the remaining \$7 for herself. (Counts

31-33.)

When they finished their beers, Oliva and Tarango each solicited another one. The officers agreed and Oliva went to the bar counter and obtained the beers.

Estela came over to the table and asked if they needed another round. Sergeant Cabrera stated that he and Garcia each needed another beer. Oliva and Tarango stated that they wanted another beer as well. Cabrera handed Estela \$30. She went to the bar counter and returned with a Tecate, a Modelo, and two Bud Light beers. She served the beers to the four of them, handed \$7 to Oliva, and handed another \$7 to Tarango. Estela gave the remaining \$2 to Cabrera.

Oliva and Tarango solicited two more beers each. Each time, when one of the women solicited a beer, the other stated that she wanted one as well. Estela was the waitress for both rounds. Each woman received \$7 in connection with the solicitation.

The events underlying counts 34 through 43 took place on December 17, 2010. On that date, Officers Luna and Bravo, both female, entered the licensed premises. A short while later, Sergeants Garcia, Sergeant Cabrera, and Officer Lopez also entered the premises. Cabrera, Garcia, and Lopez went to the bar counter together and ordered one beer each from Chavez. Chavez served them a Tecate, a Modelo, and a Corona, each of which cost \$4.

Oliva approached and began to speak to Sergeant Cabrera. During this conversation, she asked him to buy her a beer. He agreed, and Oliva ordered a beer from Chavez. Cabrera handed Chavez a \$20 bill. Chavez obtained a Bud Light beer and served it to Oliva. Chavez handed \$10 in change to Cabrera and placed \$7 in front of Oliva. Oliva picked up the money, put it in her purse, and began to consume her beer. (Counts 36-38.)

Oliva directed the three male officers to an empty table and they entered into a conversation. Sergeant Garcia pointed to Officers Luna and Bravo and asked Oliva if she knew who they were. Oliva stated that she did not, then asked Garcia if he wanted her to bring them over. He said that he did, and Oliva left the table to talk to them. Oliva subsequently returned to the table with Officers Luna and Bravo.

Officer Luna asked Sergeant Garcia to buy beers for the two of them. He agreed. Oliva asked if he would buy her one as well. He agreed and gave Oliva \$40. Oliva went to the bar counter and returned with three beers and some change. She gave one beer and \$7 to Luna, a second beer and \$7 to Bravo, and kept the third beer and \$7 for herself.

Tarango came over and joined them at the table. She asked Sergeant Cabrera to buy her a beer. He agreed and gave her a \$20 bill. Tarango went to the bar counter and returned with a Bud Light and some change. She gave \$10 of the change to Cabrera and kept \$7 for herself, and began to consume her Bud Light beer. (Counts 34-35.)

Oliva subsequently brought Leticia Lopez to the table.⁶ L. Lopez asked Sergeant Garcia to buy her a beer. He agreed and gave her a \$20 bill. Tarango asked if he would buy her one as well. He agreed. Oliva indicated that she would get the drinks, and Garcia handed her \$20. She went to the bar counter and returned with two Bud Lights. Olive served the beers to L. Lopez and Tarango, and handed each of them \$7. Garcia did not receive any change. (Counts 39-40.)

⁶To avoid confusion, we will hereinafter refer to Leticia Lopez as L. Lopez, and Officer Francisco Lopez as Officer Lopez. This is in keeping with the usage in the decision below.

Later, Tarango asked Officer Lopez if he would buy beers for herself, L. Lopez, and Oliva. Officer Lopez agreed and handed \$40 to Oliva. Oliva went to the bar counter and returned with three beers. She kept one for herself and handed the others to Tarango and L. Lopez. At the same time, she handed \$7 to Tarango and \$7 to L. Lopez. Oliva kept \$7 for herself and handed \$10 to Officer Lopez. (Counts 41-43.)

Sergeant Victor Pacheco entered the licensed premises and proceeded to the bar. He noticed the five officers sitting at the table with Tarango. When Sergeants Garcia and Cabrera left the premises, Sergeant Pacheco went to the table and sat down.

Officer Bravo asked Sergeant Pacheco to buy her a beer. Oliva asked him to buy beers for all the women at the table. He agreed and handed \$40 to Oliva. Oliva went to the bar and returned with four beers, which she served to each of the women at the table, including herself. She also gave each woman \$7.

The events underlying counts 44 through 49 took place on April 27, 2012. On that date, Sergeant Garcia and Officer Lopez entered the licensed premises. They sat at a table and ordered two beers from the waitress, Estela, and were served.

Two women, Veronica Espinoza and "Ana," subsequently approached them. Espinoza and Sergeant Garcia began a conversation. Espinoza asked Garcia if he would buy her a beer. He agreed and handed Espinoza a \$20 bill. At the same time, Officer Lopez asked Ana if she was drinking. Ana replied that she was, but only if he would invite her to a beer. Officer Lopez agreed. They ordered two beers from Estela, and Officer Lopez gave Estela \$20. Estela left and returned with two beers and some change. She served one beer to Espinoza and one to Ana. Estela also handed each woman \$7 of the change. Espinoza placed the money in her pocket, while Ana placed

it in her purse. Both women proceeded to consume their beers.

Espinoza and Ana each solicited four more beers. The officers alternated paying for each round. Estela handed money to Espinoza and Ana each time. Espinoza always placed the money in her pocket, and Ana always placed the money in her purse. (Counts 44-49.)

The events underlying counts 50 through 55 took place on May 31, 2012. On that date, Officer Gabriel Ruiz and Juan Barillas entered the licensed premises and ordered two Bud Light beers from the bartender, Isabel. They paid \$5 for each beer.

A woman identified as "Claudia" approached the officers and asked if they wanted some company. They said they did and Claudia sat down. She subsequently asked the officers if they would buy her a beer. Officer Ruiz agreed and called Isabel over. Ruiz ordered two beers — one for himself and one for Claudia — and placed \$20 on the bar. Isabel obtained two beers, served them to Ruiz and Claudia, and picked up the \$20 bill. She took the money to the register and returned with \$12 in change, which she placed on the bar. Ruiz left the money on the counter. Isabel subsequently returned to their position and asked Ruiz if he was going to give any money to Claudia. He stated that he didn't know how much to give her. Isabel took \$8 from the change on the counter and handed it to Claudia, who placed it in her purse. Claudia proceeded to drink her beer.

Claudia asked Officer Ruiz if he would buy her a second beer. He agreed, called Isabel over, and ordered two beers, one for Claudia and one for himself. Isabel served them the two beers and Officer Ruiz paid with a \$20 bill. Isabel took the money to the register and retrieved some change. She gave \$8 to Claudia and \$4 to Ruiz. Claudia placed the money in her purse and proceeded to drink her beer.

Later, Claudia solicited a third beer from Officer Ruiz. He agreed and ordered two beers from Isabel. Isabel served the beers, and Ruiz paid by placing a \$20 bill on the counter. Isabel took the money and returned with change. She gave \$8 to Claudia and \$4 to Ruiz. (Counts 50-52.)

Officer Barillas noticed a man and a woman sitting at the bar counter a short distance away. When the man left, the woman waved him over. He moved to the seat next to her. She introduced herself as "Lizette." Lizette asked Barillas to buy her a beer. He agreed and called Isabel over. Barillas ordered two beers and handed Isabel a \$20 bill. Isabel left and returned with two beers and some change. She set down the beers, handed \$8 to Lizette, and \$4 to Officer Barillas. Lizette placed the money in her purse.

A short while later, Lizette asked Officer Barillas to buy her a second beer. He agreed, called Isabel over, and ordered two beers. Isabel retrieved the beers and served them. Barillas paid with a \$20 bill. Isabel obtained some change, gave \$8 to Lizette, and \$4 to Barillas. Lizette picked up one of the beers and began to drink it.

The events underlying counts 56 through 58 allegedly took place on June 8, 2010. No testimony was offered regarding these counts.

Subsequent to the hearing, the Department issued its decision which determined that counts 1, 3, 5, 6, 8-10, 19-21, 28, 30, 36, 38, 51, 52, 54, and 55 had been proven and no defense was established. The remaining forty counts were dismissed.

In recommending a penalty, the Department presented evidence of prior disciplinary action against the licensee for violations of the same solicitation provisions

at issue in this case.⁷ That action (hereinafter referred to as "the 2010 case") was grounded in investigations that took place in February and March of 2010. On November 4, 2010, the Department sent appellants a 309 memorandum informing them of the violations and offering to settle. Appellants met with the Department twice, on December 10 and 16, 2010, to negotiate a settlement pursuant to the 309 memorandum. The formal accusation in the 2010 case was filed on December 16, the same day appellants signed a stipulation and waiver to resolve the matter. The decision in the 2010 case became final on January 6, 2011, and resulted in a penalty of stayed revocation with a thirty-day suspension.

In the present case, the ALJ observed that of the counts supported by LAPD investigations that took place in late 2010, the majority predate the accusation in the 2010 case, and many occurred before appellants first met with the Department on December 10 to negotiate a settlement. He noted that one purpose of the progressive penalty scheme is to provide licensees with notice of illegal activity taking place at the premises. Thus, at the time that counts 1 through 43 allegedly occurred, appellants had no notice of illegal solicitation activity at their establishment. Accordingly, the ALJ declined to impose outright revocation for the counts that took place in 2010, and instead imposed stayed revocation with a 30-day suspension.

The ALJ imposed a separate penalty, however, for counts 51, 52, 54, and 55, which took place in May of 2012. Because those incidents of solicitation occurred while appellants were serving the stayed revocation imposed in the 2010 case, appellants were undeniably on notice of illegal solicitation activity taking place at the premises.

⁷See Reg. No. 11074081, January 6, 2011.

ALJ found an enhanced penalty appropriate for the 2012 violations only, and revoked the license outright on the strength of those four counts.

Appellants have filed an appeal making the following contentions: (1) the ALJ abused his discretion by admitting evidence of the 2010 case because appellants lacked notice of the present investigation when they signed the stipulation and waiver; (2) the admission of the prior decision led to an unfair hearing in the present case; (3) the ALJ abused his discretion by refusing to allow appellants to present surrebuttal testimony on the question of whether the Department was aware of the present investigation when it executed the stipulation and waiver in the 2010 case; (4) the present decision is not supported by substantial evidence; and (5) the penalty of outright revocation is excessive.

DISCUSSION

I

Appellants contend it was an abuse of discretion to admit evidence of prior disciplinary history in the 2010 case because the majority of the counts in the present case took place before that decision issued. Appellants argue they were unaware of the LAPD investigation taking place in November and December of 2010 when they signed the stipulation and waiver resolving the 2010 case; the Department knew the LAPD investigation was underway and deliberately failed to inform them; and that appellants were therefore fraudulently induced into signing the stipulation and waiver in the 2010 case. Appellants argue they would not have signed the stipulation and waiver if they had known another investigation was underway. Appellants, however, do not collaterally attack the decision in the 2010 case, but rather seek to have all counts dismissed in the present case.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its judgment on the effect or weight of the evidence, but must determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded without or in excess of its jurisdiction, or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const. art. XX, § 22, Bus. & Prof. Code §§ 23084 and 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

Appellants allege they were induced into signing the stipulation and waiver and foregoing a contested hearing in the 2010 case by the Department's intentional misrepresentations. This is an allegation of extrinsic fraud — in this case, by omission.

Extrinsic fraud is fraud which prevents a fair adversary hearing and deprives a party of an opportunity to present his claim or defense to the court. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855 [48 Cal.Rptr. 620, 409 P.2d 700]; *Westphal v. Westphal* (1942) [20 Cal.2d 393, 397 [126 P.2d 105]]; see generally, 8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in Trial Court, § 204-206, pp. 602-606.) To be entitled to relief from a judgment on the ground of extrinsic fraud, a party must show he or she had a meritorious defense, which would have been raised but for the other party's wrongful conduct (*Page v. Insurance Co. of North America* (1969) 3 Cal.App.3d 121, 130 [83 Cal.Rptr. 561]; see generally, 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 216, p. 620), and also must establish all the elements of fraud (*Zander v. Texaco, Inc.* (1968) 259 Cal.App.2d 793, 805-806 [66 Cal.Rptr. 561]; see generally, 5 Witkin, Cal. Procedure, *supra*, Pleading, § 828-829, pp. 273-275), which include an intentional or reckless misrepresentation and justifiable reliance on the misrepresentation by the aggrieved party. (*Gonsalves v. Hodgson* (1951) 38 Cal.2d 91, 100-101 [237 P.2d 656]; *Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 374-375 [122 Cal.Rptr. 732].)

(*In re David H.*, 33 Cal.App.4th 368, 381-382 [39 Cal.Rptr.2d 313] [claiming fraudulent inducement by, *inter alia*, the Department of Child Services to forego a contested hearing terminating parental rights]; see also *In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647 [267 Cal.Rptr. 218] [deliberate concealment of community property assets constitutes extrinsic fraud].) The burden of proof on an extrinsic fraud claim lies with the party asserting it and is significant.

Appellants, however, do not seek to overturn the stipulation and waiver in the 2010 case. Instead, they ask this Board to dismiss all counts in the present case, based on the claim they were fraudulently induced — by an omission of information — into signing the 2010 stipulation and waiver.

Appellants direct this Board to *Sotelo* (2014) AB-9338, which they argue has guiding parallels to this appeal. In *Sotelo*, two investigations took place, and two accusations were filed, both alleging multiple solicitation violations. (*Id.* at pp. 2-7.) The first investigation occurred in June 2009, the accusation was filed in November 2010, and the matter was resolved by stipulation and waiver in July of 2011, with a penalty of stayed revocation plus 20 days' suspension. (*Id.* at p. 7.) Meanwhile, in April of 2011, the second investigation took place. (*Id.* at pp. 3-6.) That investigation led to a second accusation, filed in June 2012, which ultimately led to the *Sotelo* appeal. (*Id.* at pp. 2-8.) The ALJ admitted evidence of the prior disciplinary matter and revoked the license outright. His reasoning for doing so does not help appellants here: the second set of violations, which took place in April 2011, could not violate the conditionally stayed revocation in the first case, because that penalty was not yet in place — it did not commence until July 2011, after the licensees had signed a stipulation and waiver and

the decision had issued. (*Id.* at pp. 11-12.) He added, however, that the April 2011 violations took place while the licensees were in the middle of defending the prior matter — indicating that the licensees were on notice of illegal solicitation activity taking place at their establishment, but had failed to take measures to prevent it. (*Id.* at p. 7.) This alone merited the aggravated penalty of outright revocation, without reference to the penalty imposed in the first case. (*Ibid.*)

On appeal, this Board affirmed, rejecting an argument identical to the one presented here — that the licensees were defrauded into signing the stipulation and waiver because the Department did not inform them of a pending investigation. (*Id.* at p. 10.) *Sotelo* remarked that the appellants "cite[d] no authority indicating that the Department's knowledge of the present violations is in any way relevant." (*Ibid.*) Moreover, the stipulation and waiver purported only to resolve the facts contained in the accusation, which was limited to the violations in the first case. (*Ibid.*) *Sotelo* also observed that, even if the Department's knowledge of the investigation was somehow relevant, appellants presented no evidence that the Department knew of the second investigation when it negotiated the stipulation and waiver. (*Ibid.*)

While this case is more factually complicated than the analogous facts of *Sotelo*, the reasoning and holding of that case provides useful guidance here. The accusation here is founded on two phases of investigations. The first phase, offered in support of counts 1 through 43, took place in November and December of 2010. (Accusation, Reg. No. 12077496, Exhibit 1.) Indeed, the last date of the first phase was December 17, 2010 — the day after the accusation in the 2010 case was filed and settled. (See Accusation, Reg. No. 12077496, Exhibit 1; Accusation, Reg. No. 111074081, Exhibit 2;

Stipulation and Waiver, Reg. No. 11074081, Exhibit 2.)

The second phase of investigations, offered in support of counts 44 through 58, began on April 27, 2012 — more than sixteen months after the earlier phase had concluded. (See Second Amendment to Accusation, Reg. No. 12077496, Exhibit 1.) At the time the violations occurred in this second phase, the 2010 case was final, and appellants were serving the stayed revocation imposed by that decision. (Decision, Reg. No. 11074081, Exhibit 2.)

At the administrative hearing, appellants claimed the Department was aware that the first phase of the present investigation was underway when it negotiated the stipulation and waiver in the 2010 case, but deliberately failed to inform them in order to induce them into settling the case, thereby setting them up to violate a stayed revocation. The ALJ addressed this argument in his Conclusions of Law:

¶ 23. The Respondents allege that they were misled by the Department when they signed the stipulation and waiver which arose from the [2010 case], i.e., that the Department withheld crucial information from them. Phrased another way, the Respondents believe that the Department set them up in order to justify a harsher penalty when an accusation was filed based on the [November and December 2010 investigation]. They claim that, had they known that a second investigation was pending, they would not have signed the stipulation. Accordingly, the Respondents believe that counts 1 through 43 (all of the counts arising from the [November and December 2010 investigation]) should be dismissed.

This argument is rejected. The evidence established that both the Department and the Respondents were unaware of the [November and December 2010 investigation] when the stipulation and waiver was executed. In fact, the evidence established that the Respondents learned of [this investigation] before the Department did — they were aware of it the night it concluded (December 17, 2010), whereas the Department did not learn of it until two months later (February 24, 2011).

The Board is bound by the aforementioned findings if supported by substantial evidence. Appellants presented no evidence to show the Department knew of the

pending investigation at the time of the stipulation and waiver, let alone that it deliberately withheld that information in order to exact a more onerous penalty. Appellants also presented no evidence or argument that they sacrificed a meritorious defense when they signed the 2010 stipulation and waiver. Indeed, the closest appellants come to making such an argument is when they claim they were deprived of the strategic benefits offered by long litigation delays:

If appellants had not signed [the 2010 stipulation and waiver], then it is reasonable to assume that the prior case would have gone to hearing and then appeal, and would not have been final for purposes of a prior at the time of the hearing on this case. In other words there would have been no prior, and the instant case would be treated as a first offense for imposition of penalty purposes.

(App.Br. at p.7.) Appellants have not established they were fraudulently induced into signing the stipulation and waiver.

Moreover, even if the Department knew of an active investigation at the premises — and we see nothing to show it did — it would not necessarily follow that its treatment of appellants was unfair.⁸ By its plain language, the stipulation and waiver is quite limited — it purports only to resolve the accusation filed on December 16, 2010, which encompassed thirty incidents observed by LAPD officers in February and March of 2010. (See Exhibit 2: Stipulation and Waiver; Accusation, Reg. No. 11074081.) It does not purport to disclose or resolve any other pending investigations, nor does it insulate appellants against future investigations. (See *ibid.*)

In any event, the ALJ considered the prior disciplinary action *only* in determining the penalty for counts 51, 52, 54, and 55. He expressly declined to consider the 2010

⁸In fact, there are strong policy reasons for a law enforcement agency to keep specific investigations confidential until they are complete — not least, to ensure the safety of undercover officers.

case when setting the penalty for counts arising from the November and December 2010 investigation:

Rule 144^[fn] provides for the enhancement of a penalty if a licensee has been disciplined for the same type of violation in the past. For a b-girl case, that typically means outright revocation of the license. The problem in this case is that the majority of the violations took place before the Department filed the accusation in the prior case. In fact, most of the violations took place before the Department met with the Respondents to advise them of the prior case.

One purpose of the progressive penalty scheme is to provide licensees with notice concerning illegal activity taking place at a licensed premises. Due to the timing of the prior case in relation to the present case, the Respondents were deprived of this notice, at least as it related to the counts arising from the [November and December 2010 investigation]. The complicating factor arises from the 2012 Investigation — there can be no doubt that the Respondents were fully aware that solicitation of drinks by b-girls was illegal and that such activity had taken place inside the Licensed Premises in the past. Under the circumstances, enhancement of the penalty seems warranted for the 2012 violations, but not for the violations arising from the [November and December 2010] Investigation.^[fn]

Appellants were on notice of illegal solicitation activity at the premises when the events underlying counts 51, 52, 54, and 55 took place; they have not shown fraudulent inducement or any other cause to disregard the existence of the 2010 case. There is no abuse of discretion in the ALJ's use of the prior disciplinary matter.

II

Appellants contend it was an abuse of discretion to deny their request to call surrebuttal witnesses. This testimony, argue appellants, would have shown the Department's knowledge of LAPD investigations taking place at the time appellants signed the stipulation and waiver in the 2010 case. Appellants believe the testimony would have justified absolute exclusion of the 2010 case as evidence of prior discipline.

The Government Code vests an ALJ with "discretion to exclude evidence if its

probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (Cal. Gov. Code § 11512(f).) On appeal, "[a] ruling of the administrative law judge admitting or excluding evidence is subject to review in the same manner and to the same extent as the administrative law judge's proposed decision in the proceeding." (Cal. Gov. Code § 11512(b).)

As discussed above, appellants bear the burden of proof in a claim of fraudulent inducement. Appellants failed to prove fraudulent inducement, in part because they failed to establish, as part of their case in chief, that the Department knew of the specific LAPD investigation taking place at the premises in November and December of 2010.

Cervantes testified that when she and her co-licensee husband met with Department representatives regarding the 309 memorandum they received in the 2010 case, the Department made no mention of an additional investigation. (RT at pp. 173-174.) However, it cannot be inferred from this snippet of vague testimony that the Department knew of an additional LAPD investigation and failed to inform appellants. Additionally, appellants provided two pieces of documentary evidence: a Department decision in an unrelated case with similar facts, which also found the licensees had failed to establish knowledge on the part of the Department, (Exhibit A) and a general statement of the goals of the Department's Grant Assistance Program, which aims to develop a close working relationship with local law enforcement and target problem premises. (Exhibit B.) Neither of these documents establishes the specific knowledge necessary to prove a claim of fraudulent inducement.

Nevertheless, the Department called Supervising Agent Frank Robles and District Administrator Vincent Cravens as rebuttal witnesses in order to reinforce the

Department's lack of knowledge. During the course of this rebuttal testimony, Agent Robles admitted that he considered Wilmington a "problem area" due to the "high number of reports from the [LAPD]." (RT at p. 50, 52.) At no point, however, did either Robles or Cravens indicate they had any knowledge of specific LAPD investigations prior to the receipt of reports.

At the July 2 hearing, appellants sought to present surrebuttal testimony to impeach the testimony offered by Robles and Cravens. (RT at p. 88.) The Department objected. (RT at p. 89.) The ALJ denied the request, with the following explanation:

I suspect you're going to bring in somebody who's going to say that Mr. Robles made the statements which he denied making here. And I'm going to deny your motion to reopen your direct or to present witnesses in surrebuttal, however you wish to characterize it.

Your defense, as I understand it, is not that the Department had some kind of vendetta against people in the Wilmington area generally, but rather that the licensees were misled in this case, and his denials relate to -- his denials don't relate to that. And although I understand that everybody's credibility is always at issue, I think we've heard enough testimony that's gotten fairly far afield from the underlying Accusation. So I'm going to deny your motion.

(RT at p. 89.)

In their brief, appellants confirm the ALJ's suspicions. They explain the proposed testimony as follows:

Department employees Robles and Cravens' testimony that they did not know that the Los Angeles Police Department (LAPD) was conducting an intensive series of ABC compliance investigations of all Hispanic bars in the Wilmington area is not credible. Appellants' witnesses, who had previously spoken to Investigator Robles, would have credibly testified that Supervising Investigator Robles told them "I am going to shut down all the bars in Wilmington," and would have materially impeached Roble's [sic] testimony in many areas of his testimony made under oath at the hearing. Appellants believe the ALJ saw this coming and therefore precluded Appellants' surrebuttal testimony.

(App.Br. at pp. 7-8.)

The proposed testimony is irrelevant. Robles admitted he considered Wilmington a problem area. Even if he did, at some point, say he intended to shut down every bar in Wilmington, this would not establish that he, Cravens, or anyone else at the Department knew an LAPD investigation was underway at this specific premises at the time appellants signed the stipulation and waiver.

Appellants failed to present evidence in their case in chief that the Department knew of an LAPD investigation taking place at appellants' premises and deliberately concealed it. Even if the ALJ had allowed the testimony as described, it could not have filled the holes in appellants' case. It was within his discretion to refuse to admit it.

III

Appellants contend that the sustained counts were not supported by substantial evidence and should be reversed.

As noted above, this Board may determine "whether the Department's decision is supported by its findings" and "whether those findings are supported by substantial evidence." (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) "'Substantial evidence' is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (*San Diego Unified School Dist. v. Comm. on Prof. Competence* (2013) 214 Cal.App.4th 1120, 1142 [154 Cal.Rptr.3d 751], citing *Hosford v. State Personnel Bd.* (1977) 74 Cal.App.3d 302, 307 [141 Cal.Rptr. 354].) "It is sufficient if any reasonable trier of fact could have considered it reasonable, credible, and of solid value." (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 52 [76 Cal.Rptr.2d 356].)

When, as here, the findings are attacked on the ground that there is a lack of

substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of Cal.* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

We cannot interpose our 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.

(*Masani, supra*, 118 Cal.App.4th at p. 1437.)

Appellants first challenge counts 1, 5, 8, and 10, brought under section 25657, subdivision (b), and counts 3, 6, and 9, brought under section 24200.5, subdivision (b). These violations allegedly took place on November 11, 2010.

With regard to these counts, the ALJ reached the following conclusions of law:

¶ 7. On November 11, 2010, Oliva solicited four beers from Sgt. Liferlando Garcia (counts 1 and 3.) Although all of the solicitations took place at the bar counter, there is no evidence that Suyapa Chavez heard any of the solicitations. In each case, Sgt. Garcia paid for the drinks, yet Chavez returned the change by placing it between Sgt. Garcia and Oliva. Chavez then watched as Oliva separated out her commission and kept it. As such, it is clear that Chavez was aware of the solicitations and was directly involved in paying commissions to Oliva. The same is true for the two beers Anjelica solicited from Det. Pete Rodriguez (counts 5 and 6) and the four beers Rosa Tarango solicited from the two officers (counts 8, 9, and 10). (Findings of Fact ¶¶ 4-12.)

Counts 1 and 3 alleged violations involving bartender Chavez and Dora Oliva.

(Exhibit 1.) The evidence is insufficient to conclude that Chavez was aware of or participated in solicitation activities involving Oliva on the date in question. As the ALJ acknowledges, there was no evidence Chavez overheard the solicitations.

(Conclusions of Law ¶ 7.) The Department is correct in its assertion that the bartender need not have overheard the words of solicitation in order for there to be a violation of section 24200.5(b) or 25657(b). However, there must be some other evidence that the bartender was aware of or participated in the solicitation scheme.

Dora Oliva allegedly solicited four drinks from Sergeant Garcia. Garcia testified about the first transaction:

Q: Then what happened next?

A: Dora ordered a Bud Light from the bartender, Chavez, and I put a \$20 bill on the bar that paid for Dora's drink. Chavez brought over a Bud Light, 12-ounce bottle. Dora picked up the \$20 that I had put on the bar and handed it to Chavez. She then went to the cash register, deposited the bill, returned with the change, and put the change on the counter.

THE COURT: Hold on a second. What kind of beer did you say she brought over for Dora?

THE WITNESS: A Bud Light, 12-ounce bottle, sir.

THE COURT: Thank you.

BY MR. SAKAMOTO:

Q: So when Chavez returns, what does she do?

A: She put the beer on the counter, and she puts the change on the counter as well.

Q: When she put the beer on the counter, was it in front of you or in front of Dora?

A: I would say it was probably in the middle between us.

Q: And when Ms. Chavez puts the change down from your beer, where does she put the \$20?

A: Are you saying when -- excuse me. Can you repeat that?

Q: When -- did the bartender bring back any change?

A: Yes. She put the change on the counter; I believe it was between the two of us.

Q: And how much change was there?

A: It was \$17.

Q: And after the bartender put the change on the counter, what's the next thing that happened?

A: What happened next was that Dora grabbed the change, and she took \$7 and handed me a \$10 bill as my change.

Q: Did Dora say anything as she was doing that?

A: Yes. Right before she grabbed it, she said, "Well, if you're not going to pay me, I will just take my -- I will just take my money now."

¶ . . . ¶

Q: And when Dora made that comment you just mentioned, who was she saying that to?

A: She was -- I believe she was saying it to the bartender.

Q: Was the bartender right there?

A: The bartender -- yes. The bartender was very close by. She was four to five feet away.

¶ . . . ¶

Q: Was she facing in the direction of you or --

A: Yes, she was.

(RT at pp. 12-14.) Garcia's testimony on cross-examination was similar. (See RT at pp. 87-91.) Garcia's testimony regarding the second of Oliva's alleged solicitations is largely similar:

Q: Going back to Dora and/or Rosa, as the evening progressed, did they

ever ask anything further of you?

A: Yes. We continued with our conversation and after Dora and Rosa were finished with their beers, they asked if I was going to buy them another beer.

¶ . . . ¶

Q: And are they still at the counter?

A: Yes. At the counter.

Q: Okay. And how did you respond to their request?

A: A [sic] agreed to purchase a beer for them.

Q: Okay. And what happened next?

A: I handed Chavez a \$20 bill.

Q: Okay. And --

A: And she retrieved two Bud Light beers, put them on the counter. She brought back the change, put the change on the counter, and at that time, I believe Rosa grabbed her change, and she took \$7 and gave \$7 to Dora.

¶ . . . ¶

Q: So you got no change back from your \$20?

A: I did not.

Q: When Rosa picked up the \$14 in change, where was Ms. Chavez, the bartender?

A: Ms. Chavez was very close to us because she remained there because all this talk that she was hearing about me being a Narco for some reason generated a lot of interest

¶ . . . ¶

Q: So this was when they were buying the second drink and Rosa picked up the \$14, how near or far is she?

A: Four to five feet away.

Q: Off the side of the counter?

A: Yes.

(RT at pp. 21-23.) Cross-examination elicited similar testimony. (See RT at pp. 94-95.)

Finally, Garcia's testimony regarding Oliva's third and fourth alleged solicitations is little more than a summary:

Q: What about Dora? As the evening progressed, did Dora ask you anything for the rest of your investigation?

A: Yes, she did. She solicited me for two additional beers.

¶ . . . ¶

Q: And what do you recall about any details about those additional two?

A: I agreed to purchase the beers for her. I paid for those beers, and she received \$7 for each one of those beers and she consumed both beers.

(RT at p. 28.)

It is undisputed that Chavez did not overhear Oliva solicit drinks from Garcia. In the first and second transaction, Chavez charged Garcia \$3 for each Bud Light beer ordered, and placed the change on the bar without dividing it. In both instances, it was Oliva that divided out \$7, while Chavez stood four or five feet away. In the first transaction, Garcia testified that Chavez was facing their direction. It is not clear from Garcia's testimony regarding either transaction that Chavez saw Oliva divide out the \$7. And even if she had, it is unreasonable to infer that her failure to stop Oliva from taking some of the change necessarily indicates awareness of a solicitation scheme — otherwise, bartenders would be obliged to supervise the sorting of change among private parties, lest they be accused of participating in a solicitation scheme. Testimony regarding Oliva's third and fourth solicitations tells us nothing about the division or placement of change, and is too vague to be helpful.

It is true that Garcia was charged \$3 for the Bud Light beers he ordered for Oliva,

but was charged \$4 for his Tecate beer. (Findings of Fact ¶ 1.) We can't read much into this, however, because they were different beers, and may have been assigned different prices. In fact, Garcia's own testimony supports this conclusion:

Q: Now, during the times that you were conducting undercover operations at the licensed premises here, did you make note of the price of the beers that you had purchased for yourself, probably Tecates, during your investigations of 2010?

A: In 2010, yes. I knew that they were \$4.

Q: Okay. And did you make note of the price of a Budweiser Light beer, not necessarily with the added commission for a female, but just the price alone for that of beer that you purchased?

A: Yes, sir. Bud Light, I believe, was \$3.

(RT at pp. 73-74.) We cannot infer knowledge of or participation in a solicitation scheme based solely on the difference in price between Tecate and Bud Light. We certainly cannot find support for the ALJ's conclusion that "it is clear that Chavez was aware of the solicitations and was directly involved in paying commissions to Oliva." (Conclusions of Law ¶ 7.) Her involvement, if any, consisted of not intervening in the division of change, once she had placed it on the counter. Counts 1 and 3 must therefore be reversed.

With regard to counts 5 and 6, testimony was similarly weak. These counts alleged solicitation activity involving bartender Chavez and "Angelica." (Exhibit 1.) Garcia testified regarding Anjelica's alleged solicitation of a drink from his partner, Officer Rodriguez:

Q: And you had mentioned that your partner, Officer Rodriguez, [sic] had also agreed to buy a beer for Angelica? [sic]

A: Correct.

Q: What did you see with respect to how that drink was served?

A: Rodriguez put a \$20 bill on the counter and Chavez took the \$20. She came back with a beer, a Bud Light, 12-ounce bottle, and -- with the change. She put the change on top of the bar, and Anjelica took her \$7 and gave Rodriguez a \$10 bill as his change.

¶ . . . ¶

Q: And when Angelica took the \$7 that Officer Rodriguez [sic] had put down, do you recall where Ms. Chavez was?

A: She was standing almost in the same position, 4 to 5 feet away looking right in our direction.

(RT at p. 15.) Testimony on cross-examination was similar (See RT at pp. 87-91.) In fact, Garcia testified that he conversed with Anjelica after she took the \$7, and that conversation is particularly revealing:

Q: When this happened, did you put any questions to Dora about, um, or regarding, you know, why Dora had taken the \$7 as she did?

A: I did. I asked her why -- why the bartender didn't pay her her commission, and she told me that she thought it was because the bartender -- and I believe the exact words she used was that she thought I was a Narco.

(RT at p. 15.) Garcia himself phrases the question to indicate that Chavez had failed to pay Anjelica a commission. Garcia's testimony regarding Anjelica's second solicitation of Officer Rodriguez follows the same pattern:

Q: Now, this -- this other woman that we mentioned, Anjelica --

A: Yes.

Q: -- as the evening progressed, did she have any further -- did she do anything that was of interest to you in terms of your investigation?

A: Yes. After she finished her first beer, she asked Rodriguez if he would buy her a second beer.

¶ . . . ¶

Q: And how did Officer Rodriguez [sic] respond?

A: He agreed to purchase a second beer for her.

Q: Okay. And then what happened next?

A: She ordered a beer from Chavez and Rodriguez, put a \$20 bill on the -- excuse me, a \$10 bill on the bar to pay for the beer, and Chavez retrieved the beer and the change, and she brought back a Bud Light, 12-ounce bottle and \$7 in change, which she put on the counter.

¶ . . . ¶

Q: At that point when she did pick up her \$7 from the counter, where was the bartender, Ms. Chavez?

A: She was very close to us. She was still in a four- to five-foot range looking right at us.

(RT at pp. 24-26.)

For the same reasons described above, this is insufficient to support the conclusion that Chavez was aware of or participated in the solicitation scheme. Counts 5 and 6 must also be reversed.

With regard to counts 8, 9, and 10, the issue is less clear. These counts alleged solicitation activity involving bartender Chavez and Rosa Tarango. (Exhibit 1.) Tarango allegedly solicited a total of four beers over the course of the evening. Of these, the second and third alleged solicitations, both made to Officer Rodriguez, followed the pattern above: Chavez deposited the change on the counter and moved to a position four or five feet away, looking in the direction of Tarango and the officers, after which Tarango herself divided the change. (RT at pp. 21-23, 26-27, 95-97.) Garcia described Tarango's fourth solicitation, from Officer Rodriguez, in summary only. (RT at p. 28.)

According to Sergeant Garcia's testimony, however, Tarango's first solicitation was somewhat different:

Q: So then after Rosa said or asked for you to buy her a beer, how did you respond to that?

A: I agreed to buy her a beer.

Q: Okay. And [w]hat happened next?

A: She ordered a beer from the bartender, Chavez, and I handed Chavez a \$10 bill to pay for that beer.

Q: Okay.

A: And Chavez retrieved a Bud Light, and she brought back the change and put the change on the counter. As soon as the change was put on the counter, Rosa immediately grabbed it.

Q: And the change was how much?

A: \$7.

Q: And when she, um, when Ms. Tarango, Rosa Tarango, grabbed -- picked up the [money] from the counter, where was Ms. Chavez the bartender?

A: She was still standing right there, right in front of us because she had just put it down. As soon as it was on the counter, she grabbed it.

(RT at pp. 20-21.) Garcia's testimony on cross-examination was similar. (See RT at pp. 93-94.) In this instance, Tarango did not divide the change herself. However, there was no need to do so, as Garcia paid with a \$10 bill and the Bud Light cost \$3. It is somewhat more supportive of the Department's case that Tarango grabbed the money as soon as Chavez placed it on the bar. However, once again, we hesitate to require bartenders to supervise the distribution of change among private parties. Moreover, the grabbing of the money was a decisive act by Tarango, not by Chavez. Given that the difference in beer price is explained by the difference in brand, there is little to support these counts beyond Chavez's admittedly suspicious failure to prevent Tarango from claiming the change. We therefore reverse counts 8, 9, and 10 as well.

Appellants next challenge counts 19, brought under section 25657, subdivision (b); count 20, brought under section 25657, subdivision (a); and count 21, brought

under 24200.5, subdivision (b). The events underlying these counts took place on November 19, 2010.

Each of these three counts alleged solicitation activity involving bartender Chavez and "Estela." (Exhibit 1.) Testimony indicates that Estela was an employee of the premises, engaged in waiting tables throughout the evening. (See RT at pp. 38-39.) Appellants do not contradict this. Garcia's testimony describes the alleged solicitation:

Q: And then after Estella [sic] had served the drinks and paid the money, did she remain there, also?

A: Yes, she did. She didn't leave right away, and she stayed there and at one point she said to Cabrerra, [sic] "Can you buy me a beer, too?"

Q: How did Sergeant Cabrerra respond?

A: He agreed to buy her a beer and [gave her] \$10 he had gotten as his change.

Q: What did Estella do then?

A: She went to the bar and got a Bud Light beer. She returned with a Bud Light and her change, and she kept the change. When she came back to the table, she tanked Cabrerra.

(RT at pp. 39-40.)

Appellants present a fairly meager attempt at challenging Sergeant Garcia's credibility, because he could not recall where Estela was standing when she was called over. (See App.Br. at p. 19; RT at pp. 109-110.) This Board defers to the credibility findings in the decision below. Moreover, Garcia's testimony is uncontroverted and shows that Estela, appellants' employee, solicited a drink from Sergeant Cabrera, which he paid for with a \$10 bill, and that Estela kept the change. This is sufficient to prove the charges. Counts 19, 20, and 21 are affirmed.

Appellants next challenge count 28, brought under section 25657, subdivision

(b), and count 30, brought under section 24200.5, subdivision (b). The events underlying these counts took place on December 10, 2010. Both counts allege solicitation activity involving bartender Chavez and Dora Oliva. (Exhibit 1.)

Garcia's uncontroverted testimony suggests that Chavez knew of and participated in Oliva's solicitation of Sergeant Cabrera. According to Garcia, after Cabrera paid, Chavez returned with a beer and change. She gave \$10 to Cabrera, and she placed the \$7 on the counter in front of Oliva. (RT at pp. 45, 112.) She was across the bar when Oliva took the money and put it in her bra. (RT at p. 112.)

Inexplicably, the findings and conclusions of law in the decision below do not reflect the testimony. The findings state first that Cabrera paid with a \$10 bill, and that Chavez returned \$7 in change, which Oliva kept (Findings of Fact ¶ 21.) The conclusions of law, in turn, depend on facts not present in either Garcia's testimony or the earlier findings: "In connection with this solicitation, Chavez returned the change by placing it between Sgt. Cabrera and Oliva, then watched as Oliva separated out her commission." (Conclusions of Law ¶ 9.)

We are in a difficult position. This Board is not entitled to make findings of fact. In the decision below, the findings are not supported by the evidence, and the conclusions of law are clearly at odds with the findings. We have no alternative but to dismiss counts 28 and 30.

Appellants next challenge count 36, brought under section 25657, subdivision (b), and count 38, brought under section 25200.5, subdivision (b). The events underlying these counts took place on December 17, 2010. Both counts allege solicitation activity involving bartender Chavez and Dora Oliva. (Exhibit 1.)

Sergeant Garcia testified that Oliva asked Sergeant Cabrera to buy her a beer,

and he agreed. The transaction proceeded as follows:

Q: And what happens next?

A: She ordered a beer from Chavez, and then Cabrerra [sic] handed Chavez a \$20 bill to pay for the beer. Chavez took the bill, made change and also retrieved a Bud Light beer, 12-ounce bottle.

¶ . . . ¶

Q: And when Ms. Chavez comes back with the beer and the change, what did she do with that change?

A: She gives Cabrerra \$10 and puts \$7 on the bar, I believe.

Q: Did she put the \$7 in front of either Sergeant Cabrerra or just Oliva?

A: It was in front of Oliva.

¶ . . . ¶

Q: And then what did Oliva do with the \$7 that was closer to her?

A: She took those \$7.

(RT at pp. 54.) Garcia's testimony on cross-examination was similar. (See RT at p. 118.)

The findings of fact on these counts accurately reflect Garcia's testimony. (See Finding of Fact ¶¶ 26-27.) In his Conclusions of Law, however, the ALJ inexplicably states that "Chavez returned the change by placing it between one of the officers and Chavez, then watched as Oliva separated out her commission." (Conclusions of Law ¶ 10.) This conclusion is not supported by the findings or the evidence.

This Board is not a finder of fact; it cannot correct faulty factual findings. It is, however, entitled to review questions of law. Where, as here, the factual findings are supported by sufficient evidence, this Board may correct faulty conclusions of law.

In this instance, Garcia's testimony, and the resulting findings of fact, show that

Chavez divided the change and placed \$7 in front of Oliva. This supports the conclusion that she was aware of and complicit in the solicitation scheme. Counts 36 and 38 are therefore sustained.

Finally, appellants challenge counts 51 and 54, brought under section 25657, subdivision (b), and counts 52 and 55, brought under section 24200.5, subdivision (b). The events underlying these counts took place on May 31, 2012.

These four counts must also be affirmed. With regard to these counts, appellants argue first that the women were not loitering within the meaning of the statute, and second, that there is no evidence the bartender, Isabel, overheard the solicitations.

Testimony on these counts was supplied by Officers Ruiz and Barillas. Counts 51 and 52 alleged solicitation activity involving bartender Isabel and "Claudia." (Exhibit 1.) Ruiz testified that Claudia approached him and solicited a drink. (RT at pp. 63-64.) He agreed to buy her one, and ordered two beers — one for Claudia and one for himself — from the bartender, Isabel, and paid with a \$20 bill. (RT at p. 64.) Isabel placed \$12 change on the bar. However, Officer Ruiz did not immediately pick up the change. (RT at p. 66.) Isabel returned, and according to Ruiz's testimony, facilitated the payment of a commission to Claudia:

Q: At some point, does Isabel the bartender return back to the location?

A: Yes. After a few minutes Isabel returned, and she asked me if I would like to give Claudia any money. I said I didn't know how much, and at that point Claudia removed \$8 from in front of me and handed it to Claudia.

Q: So the bartender came back, Isabel, and she came back and all your money was on the counter?

A: Yes.

Q: And then she asked what?

A: If I would like to give some money to Claudia.

Q: Okay. And did you say anything?

A: I advised her I didn't know how much to give her.

Q: And then Isabel did what?

A: The money sitting on the counter in front of me, she took \$8, showed it to me, and then handed it to Claudia.

Q: Did Claudia accept the money?

A: She accepted the money, and she put it in her purse.

(RT at p. 66.) Ruiz's testimony on cross-examination was similar. (RT at pp. 84-88.)

Claudia solicited two additional beers from Officer Ruiz over the course of the evening, and Ruiz testified that in both instances, he paid with a \$20 bill, and Isabel handed Claudia \$8 of the change. (RT at pp. 67-71, 88-90.) Counsel for appellants did question Ruiz on minor variations between his report and his testimony — specifically, the fact that testimony provided more detail than the report — but presented no contrary evidence. (See RT at p. 89.)

Counts 54 and 55 alleged solicitation activity involving bartender Isabel and "Lizette." (Exhibit 1.) Officer Barilla testified that shortly after entering the premises, Lizette waved him over and asked him to buy her a drink. (RT at pp. 98-99.) Barillas agreed, ordered two Bud Light beers from Isabel, and paid with a \$20 bill. (RT at p. 99.) Isabel returned with the beers and change, gave \$4 to Barillas, and handed \$8 to Lizette. (RT at p. 100.) About fifteen or twenty minutes later, Lizette solicited a second beer from Officer Barillas. (RT at pp. 101-102.) Barillas agreed, again ordered beers from Isabel, and again paid with a \$20 bill. (RT at p. 101.) Isabel returned with the

beers and change, gave \$4 to Barillas, and handed \$8 to Lizette. (RT at p. 102.)

The findings of fact are consistent with and supported by the testimony of Officers Ruiz and Barillas. (See Findings of PP 39-43.) The Conclusions of Law are consistent with and supported by the findings of fact. (See Conclusions of Law ¶ 11.) Uncontroverted testimony shows that Claudia and Lizette solicited alcoholic beverages. It is true that there is no indication Isabel overheard these solicitations, but the fact that she divided the change and handed \$8 to each woman in the course of each transaction was sufficient to show that she was aware of and participated in the solicitation scheme.

Appellants also contend that the women were not loitering for the purpose of soliciting. They insist that "[i]n order to sustain a violation of loitering there must be findings that the female in question wandered about, stood idly by, spent time idly, loafing or walking around aimlessly without purpose." (App.Br. at p. 23, citing *Garcia v. Munro* (1968) 161 Cal.App.2d 425 [326 P.2d 894].) Loitering is not an element of a section 24200.5(b) violation. Moreover, a violation of section 25657(b) does not consist simply of "loitering," but of loitering "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." (Emphasis added.) Because the statute uses the language "loitering *for the purpose of*," it is impossible for us to accept a definition of loitering that requires conduct entirely devoid of purpose.

A better definition is "'to linger idly by the way, to idle,' 'to loaf' or to 'idle.'" (*Wright v. Munro* (1956) 144 Cal.App.2d 843, 847 [301 P.2d 997], citing *Phillips v. Municipal Court* (1938) 24 Cal.App.2d 453, 455 [75 P.2d 548].) Another helpful definition, drawn from the Penal Code, "connotes lingering in the designated places for

the purpose of committing a crime as opportunity may be discovered." (*In re Cregler*, 56 Cal.2d 308, 312 [14 Cal.Rptr. 289].) Under this definition, "lingering idly by" would not constitute loitering provided the lingerer was merely waiting for legal purpose. (See *ibid.*)

The evidence is sufficient to support the conclusion that the women were loitering for the purpose of soliciting, and that the bartenders knew of their purpose. Both women lingered near the officers and solicited multiple drinks. (Findings of Fact ¶¶ 39-43.) Moreover, both women were engaged in conversation with other men before they initiated contact with the officers and solicited drinks. (RT at pp. 63, 98.) Finally, the distribution of change from Isabel to the women supports the inference that they were present on the premises for the purpose of soliciting drinks and earning commissions.

In sum, we affirm counts 19, 20, 21, 36, 38, 51, 52, 54, and 55. Counts 1, 3, 5, 6, 8, 9, 10, 28, and 30 are not supported by substantial evidence, and should be dismissed.

IV

Appellants contend the penalty of outright revocation is excessive. Appellants insist, for reasons addressed above, the 2010 case was inadmissible as a prior disciplinary matter. The present case, they argue, should have been treated as a first violation, for which the Department typically assigns a penalty of stayed revocation.

The Appeals 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].) However, it 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].)

The propriety of a penalty, including whether aggravating or mitigating factors in a particular case justify a higher or lower penalty, is vested in the Department's discretion. But the Department "does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [400 P.2d 745].)

As discussed above, appellants failed to establish extrinsic fraud, and without such proof, this Board cannot infer fraudulent inducement and force the Department to overlook the existence of the 2010 case.

The ALJ, however, did take into account the fact that many of the counts preceded execution of the stipulation and waiver in the 2010 case, and that this created notice issues. (See Part I, *supra*.) Accordingly, he assigned separate, concurrent penalties for the 2010 and 2012 phases of the present case, and enhanced the penalty only for those counts arising from the latter phase. For the counts arising from the investigation conducted in November and December of 2010, appellants received a penalty of stayed revocation; for the counts arising from the 2012 investigation, the license was revoked outright.

We must reverse the Department's decision on some of the counts arising from the 2010 phase of investigations. (See Part III, *supra*.) However, counts 51, 52, 54, and 55 — all of the counts arising from the 2012 phase of investigations — are sustained. Because the ALJ partitioned the penalty and explained his reasons for imposing outright revocation for these four counts alone, we need not remand for reconsideration of the penalty. In 2012, when the violations underlying these last four

counts occurred, appellants were undoubtedly on notice of illegal solicitation activity taking place on their premises, and failed to put an end to it. A penalty of outright revocation is therefore appropriate.

ORDER

With regard to counts 1, 3, 5, 6, 8, 9, 10, 28, and 30, the decision of the Department is reversed. Counts 19, 20, 21, 36, 38, 51, 52, 54, and 55 are affirmed, as is the penalty of revocation.⁹

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

⁹This 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.