

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

AB-9407

File: 40-478340 Reg: 13079165

THE RODRIGUEZ BAR CORPORATION,
dba El Potrero Bar
2140 3rd Street, Riverside, CA 92507,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 4, 2014
Los Angeles, CA

ISSUED JANUARY 13, 2015

The Rodriguez Bar Corporation, doing business as El Potrero Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking its license for permitting drink solicitation activity, in violation of Business and Professions Code section 24200.5, subdivision (b), and section 25657, subdivisions (a) and (b); and for permitting activity involving the sale of controlled substances in violation of Business and Professions Code section 24200.5, subdivision (a), and Health and Safety Code section 11379.

Appearances include appellant The Rodriguez Bar Corporation through its counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control

¹The decision of the Department, dated January 31, 2014, is set forth in the appendix.

(Department) through its counsel, Kimberly J. Belvedere.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on August 6, 2009. On September 4, 2013, the Department instituted a 37-count accusation against appellant charging that, on seven different dates from March 14, 2013 to May 16, 2013, appellant permitted individuals to engage in drink solicitation activity within the premises, in violation of Business and Professions Code sections 24200.5(b)² and 25657(a) and (b),³ and knowingly permitted the illegal sale of controlled substances in the licensed

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

[T]he 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.

³Section 25657 provides:

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.

(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.

premises, in violation of Business and Professions Code section 24200.5(a)⁴ and Health and Safety Code section 11379.⁵

At the administrative hearing held on November 26, 2013, documentary evidence was received and testimony concerning the violations charged was presented by the following witnesses: Enrique Alcala and Gerardo Sanchez, supervising agents for the Department; Richard Sotelo, Matthew Pavlich, and Jonathan Rubio, agents for the Department; and Ngoc Tran, a criminalist for the Department of Justice, Bureau of Forensic Services. Appellant presented no witnesses.

After the hearing, the Department issued its decision which determined that counts 1 through 9, 14 through 18, 20 through 23, 25 through 32, and 34 through 37 were proved and no defense was established. Counts 10, 11, 12, 13, 19, 24 and 33 were dismissed. Because appellant's license was previously disciplined for similar drink solicitation activity, and because it was determined that appellant had not taken any steps to prevent these types of violations from occurring, the Department found that aggravation of the penalty was warranted and appellant's on-sale beer license was

⁴Section 24200.5(a) states, in relevant part:

[T]he department shall revoke a license upon any of the following grounds:

(a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises. Successive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission.

⁵Section 11379 of the Health and Safety Code provides, in relevant part:

(a) . . . every person who transports imports, into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any controlled substance . . . shall be punished by imprisonment . . . for a period of two, three, or four years.

revoked.

Appellant filed a timely appeal raising a single issue regarding the charges that were sustained: the decision is not supported by substantial evidence.

DISCUSSION

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) "Substantial evidence" is relevant evidence which reasonable minds would accept as support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Testimony at the administrative hearing established that on seven occasions — March 14, March 21, March 29, April 18, May 2, May 9, and May 16, 2013 — the licensed premises was visited by undercover Department agents.

Counts 1-4:

On March 14, 2013, Agents Alcala and Rubio entered the licensed premises and approached the bar. They purchased two Bud Light beers from the bartender, Jenny Hall, and were charged four dollars for each beer. They were later approached by an individual named Nancy who introduced them to two other women, Ashley Escobedo and Candace Estrada. The group subsequently moved to a nearby table, and Escobedo asked Rubio if he would buy her and Estrada a beer; Rubio agreed. With the exception of Estrada, the party moved back to the bar, and Escobedo ordered two beers from Hall. Hall served Escobedo two Bud Light beers, and Rubio asked Hall how much they cost. Hall told him the beers cost twenty dollars, and Rubio handed Hall a twenty dollar bill. Hall went to the cash register and rang up the sale but, upon her return, she did not give any change to Rubio. Instead, Hall handed an undetermined amount of money to Escobedo. When Estrada rejoined the group at the bar, Escobedo told her that one of the beers was for her and then handed Estrada an undetermined amount of money.

After Escobedo finished her beer, she asked Agent Rubio if he would buy her another. Rubio agreed, and Escobedo ordered a beer from Hall. Hall served Escobedo a seven-ounce Bud Light beer, after which Rubio handed Hall two five dollar bills. Hall took the money to the register and made change. She did not give any of the change to Rubio, however, and instead placed an undetermined amount of money in front of Escobedo, who then consumed her beer.

Meanwhile, Estrada asked Agent Alcala if he would buy her a beer. Alcala agreed. Estrada ordered a beer from Hall, and Alcala paid Hall with a twenty dollar bill. Hall rang up the sale, gave Alcala ten dollars in change, and then handed Estrada an

undetermined amount of money prompting Alcala to believe he had been charged ten dollars for the beer.

Appellant argues that counts 1 through 4 cannot be sustained because the record is "devoid of any objection or protest to the agent's [*sic*] payment of the inflated prices for the beers." (App.Br. at p. 2.) Appellant contends further that it can be reasonably inferred that no commission payment would have taken place if each agent had objected to the price of the beers, and that the lack of objection constitutes a tacit agreement to pay a tip. (*Id.* at p. 3.)

What appellant's argument lacks, however, is authority to support its contention that objection to the inflated price by the officers is an element of the solicitation offense under either of the pertinent statutes. The above-quoted language⁶ from sections 24200.5(b) and 25657(b) of the Business and Professions Code establishes that the focus of the respective offenses is the conduct of the offenders, not of the undercover agents. Nowhere in either statute is there any mention of an affirmative obligation on the part of the agents to object to the price of the drinks, and we are aware of no case law establishing such an obligation. The Department is therefore correct that the offense under 25657(b), as charged in counts 2 and 4, is complete with the solicitation, while the offense of 24200.5(b), as charged in counts 1 and 3, is complete with the payment of commission. (Dept.Br. at p. 12.) Altogether, there is substantial evidence in the record to support counts 1 through 4 in this case, and we see no reason to upset the Department's determination.

Counts 5-9:

⁶Page 2, *supra*, footnotes 2 and 3.

Agents Rubio and Alcala returned to the licensed premises on March 21, 2013. On that date, three bartenders were working behind the bar; those bartenders were: Shawn Wages, an individual identified as "Rosa," and "Jane Doe," who was not identified. Upon entering the premises, the agents each ordered a Bud Light beer and were charged four dollars for each beer.

Agent Rubio was soon joined by Nancy. Nancy asked Rubio to buy her a beer, and he agreed. Nancy called Rosa over and ordered a beer, and Rosa served Nancy a Bud Light. Rubio handed Rosa two five dollar bills to pay for Nancy's beer and Rosa placed one of the bills on the bar counter in front of Nancy. Rosa then went to the register with the other five dollar bill, made change, and came back to put three more dollars in front of Nancy. Rubio did not receive any change.

Nancy finished her beer and asked Rubio to buy her another. Rubio agreed. Nancy ordered another beer from Rosa, and Rosa served Nancy a Bud Light. Rubio paid for Nancy's second beer with a ten dollar bill. Rosa placed the ten dollar bill in front of Nancy and grabbed two dollars from the pile of money in front of Nancy. Rosa then took the two dollars to the cash register. Again, Rubio received no change.

On the same day, Agent Alcala was joined by Estrada, whom he had met during his March 14, 2013 visit to the licensed premises. Estrada asked Alcala if he would buy her a beer, and Alcala agreed. Estrada ordered a beer from Jane Doe, and Jane Doe served her a seven ounce bottle of Bud Light beer. Alcala paid Jane Doe for Estrada's beer with a twenty dollar bill and received ten dollars in change. Jane Doe handed an undetermined amount of money to Estrada. Estrada finished her beer and asked Alcala to buy her a second. Alcala agreed, and Estrada ordered another beer, this time from Rosa. Rosa served Estrada a Bud Light, and Alcala paid for the beer by handing

Rosa a twenty dollar bill. Rosa took the money to the cash register, made change, gave Alcala ten dollars, and placed eight dollars in front of Estrada.

Estrada solicited a third beer from Agent Alcala, and Alcala agreed to purchase it. This time, Estrada ordered her beer from Wages. Wages served Estrada a Bud Light beer, but Rosa collected the payment. Alcala paid Rosa for Estrada's beer with a twenty dollar bill, and Rosa went to the cash register, made change, and gave Alcala ten dollars back. Rosa then placed eight dollars in front of Estrada. Estrada took the money and consumed her beer.

Appellant contends that there was no testimony that the bartender overheard any solicitation, that Alcala did not know what happened to any commission payment, and that it is not clear how Rubio knew to pay for the beer with two five dollar bills.⁷ (App.Br. at p. 4.) These contentions are without merit. First, regardless of whether there was testimony that the bartenders actually overheard the solicitations, the record establishes that they were active participants in the solicitation scheme on March 21, 2013 in that they paid commissions over to the soliciting individuals — Rosa on four occasions and Jane Doe on one. Next, as noted by the Department, whether Alcala knew what happened to the commissions after they were paid is irrelevant — the offenses were complete upon payment of commissions to either Estrada or Nancy. Finally, Rubio's decision to pay for Nancy's first beer with two five dollar bills does absolutely nothing to negate the fact that the change from the transaction was used to pay a commission to Nancy.

⁷Appellant also once again contends that the agents did not object to the inflated prices of the beers. As discussed above, however, this contention is unavailing to appellant.

As noted above, counts 10 and 11 related to drink solicitation activity involving Hall on March 29, 2013, but were dismissed.

Counts 12-14:

The events giving rise to counts 12 through 14 occurred on March 29, 2013. That evening, Agent Alcala entered the licensed premises at around 7:00 p.m. and approached Hall who was working behind the bar. Alcala asked Hall where he could get a "twenty of Perico," which means twenty dollars' worth of narcotics, especially cocaine. Hall replied that a woman comes to the bar and sells it but that the woman would not be at the bar until 9:00 p.m. Alcala informed Hall that he would be back later and left the premises.

At approximately 10:00 p.m. on March 29, Agents Alcala and Rubio returned to the premises. Alcala approached Hall, who was still working as bartender, and asked if Hall could get him the "twenty." Hall walked over to Liz, a woman seated at the bar whom Alcala recognized from previous investigations, and began to talk to her. Following their conversation, Liz made a phone call, and Hall walked back over to Alcala to inform him that she had called the guy and she could get him the "twenty." Alcala handed Hall a twenty dollar bill, and Hall walked over to Liz and handed Liz the twenty dollar bill. Liz briefly exited the premises and soon returned to speak to Hall. Alcala subsequently witnessed a hand-to-hand exchange between Hall and Liz, and Hall then engaged in a hand-to-hand exchange with Alcala wherein Hall handed Alcala a clear plastic baggie that was later determined to be 0.17 grams of methamphetamine.

The ALJ made the following findings with regarding to counts 12⁸ and 13:⁹

⁸Count 12 of the accusation alleged that Hall, appellant's employee, sold or furnished or offered to sell or furnish within the premises, a controlled substance, to-wit:

Only one incident of drug sales was charged in the Accusation and only one of Respondent's employees participated in the sale of drugs. Furthermore, the evidence did not establish that the Respondent had participated in the drug transaction or that it knowingly permitted the illegal sale or negotiations for sales of a controlled substance or dangerous drugs upon the licensed premises.

(Findings of Fact ¶ 17.)

These findings prompted the ALJ to conclude that cause for suspension or revocation of appellant's license was not established as to count 13. (Legal Basis for Decision and Conclusions of Law ¶ 15.) Also, because count 12 charged that Hall herself engaged in the sale of drugs as opposed to aiding and abetting a drug transaction as in count 14, it too was not established. Hence, counts 12 and 13 were dismissed and, of the drug-related counts, only count 14 was sustained.

Appellant argues that the evidence shows that there was no knowledge or awareness of the drug transaction by appellant, and that the Department erred in imputing the knowledge to appellant in count 14. (App.Br. at p. 4.) However, it is well-settled law that a licensee has an affirmative duty to ensure the licensed premises is not used in violation of the law and that the knowledge and acts of the employees are imputed to the licensee. (*Mack v. Dept. of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149, 153-154 [2 Cal.Rptr. 629]; *Oconco, Inc.* (2000) AB-7365 at pp. 3-4.) Actual knowledge of the acts is not required. (*Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal. Rptr. 405].) "This is true even for one-time acts of employees outside the scope of their employment, at least where there is some

methamphetamine, in violation of Health and Safety Code section 11379.

⁹Count 13 of the accusation alleged that appellant knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the licensed premises, in violation of Business and Professions Code section 24200.5(a).

nexus between the acts and the alcoholic beverage license and the licensee has not taken 'strong steps to prevent and deter such crime.' " (*Oconco, supra*, at p. 4, quoting *Santa Ana Food Market, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1999) 76 Cal.App.4th 570, 576 [90 Cal.Rptr.2d 523].) Such a nexus is necessary because it speaks to whether discipline of the license has a rational effect on public welfare and morals. (See *Santa Ana Food Market, supra*, 76 Cal.App.4th at p. 576.).

Here, the evidence shows that Hall facilitated the sale of methamphetamine from Liz to Alcala, a violation of Health and Safety Code section 11379. Furthermore, the transaction took place on the licensed premises, between two patrons, and while Hall was working as a bartender for appellant. There is therefore no doubt that a nexus exists between Hall's crime and the appellant's license, and that discipline of said license has a rational effect on public welfare and morals. (See, e.g., *Jesus Renteria Perez* (2000) AB-7402 at p. 5 ["[T]here is a definite risk to the public welfare and morals if sellers of illegal narcotics use their place of employment as a place to store narcotics in saleable quantities while they are on duty."].) Finally, appellant offered no evidence of steps it took to prevent and deter such crimes as Hall's. Hence, Hall's crimes can be imputed to appellant, and there is substantial evidence in the record that count 14 was established.

Counts 15-21:

On April 18, 2013, Agents Alcala and Rubio returned to the licensed premises, this time accompanied by Agent Sanchez. The agents took a seat at the fixed bar where Escobedo was working as bartender. The agents each ordered a Bud Light beer from Escobedo and were charged four dollars for each beer. Estrada subsequently

approached Alcala and asked him if he would buy her a beer. Alcala agreed, and Estrada ordered the beer from Escobedo. Escobedo brought Estrada a Bud Light beer, which Alcala paid for by handing Escobedo a twenty dollar bill. Alcala took the twenty dollar bill, rang up the beer, made change, gave Alcala ten dollars, and handed Estrada an undetermined amount of money. Estrada subsequently solicited three additional beers from Alcala; the second and third solicitations occurred exactly like the first, and the fourth proceeded in the same manner as the first three with the exception that Alcala paid for the fourth beer with a ten dollar bill and received no change from Escobedo.

Also on April 18, 2013, Escobedo, who was working as bartender, asked Agent Rubio if he would buy her a beer. Rubio agreed, and Escobedo retrieved a Bud Light beer for herself and drank it. Alcala paid Escobedo for her beer with a ten dollar bill, after which Escobedo took the bill, placed it in the cash register, and provided Alcala with no change.

Finally, on April 18, 2013, an individual identified as Isabel Gonzalez asked Agent Sanchez if he would buy her a beer, and Sanchez agreed. Gonzalez ordered a Bud Light beer from Escobedo. After Escobedo served the beer to Gonzalez, Sanchez gave Gonzalez a ten dollar bill, and Gonzalez gave the bill to Escobedo who was standing behind the bar in front of the two of them. Escobedo took the ten dollar bill to the register, made change, gave no change to Sanchez, but handed an undetermined amount of money to Gonzalez. Gonzalez consumed her beer and asked Sanchez if he would buy her another; Sanchez agreed. Gonzalez ordered a beer for herself and Sanchez from Escobedo, and Sanchez paid for the beers by handing a twenty dollar bill to Gonzalez while Escobedo stood behind the bar in front of the two of them. Gonzalez

handed the twenty dollar to Escobedo, and Escobedo rang up the sale, made change, gave Sanchez six dollars in change, and handed an undetermined amount of money to Gonzalez. Sanchez concluded that he had been charged ten dollars for Gonzalez's beer because he had only been charged four dollars for his own beer earlier in the evening.

Appellant argues that the transactions involving Agent Sanchez and Gonzalez did not involve the payment of commission because, in giving the change to Gonzalez, Escobedo, the bartender, was simply providing change to the person who paid her, and there was no evidence that she overheard any of the solicitations. (App.Br. at pp. 5-6.) These arguments simply run contrary to the facts on the record. The facts establish that, although Sanchez paid Escobedo for Gonzalez's beers by first handing the money to Gonzalez, Sanchez did indeed receive six dollars' change from Escobedo when he tendered the twenty dollar bill, which was more than the cost of the two beers — four dollars for his beer and ten dollars for Gonzalez's. (Findings of Fact ¶¶ 21-22.) This supports the inference that Sanchez was charged ten dollars for Gonzalez's beer while he was only charged four dollars for his own. Moreover, Escobedo herself solicited a drink earlier in the evening. (*Id.* at ¶ 20.) These facts establish both a scheme to pay a commission for solicited drinks and Escobedo's knowledge of and participation in that scheme.

Counts 22-26:

On May 2, 2013, Escobedo was again working as bartender at the licensed premises. Agent Sanchez, along with Agents Rubio and Alcala, entered the premises and sat at the fixed bar. Sanchez ordered a Bud Light beer from Escobedo and was charged four dollars. Escobedo asked Sanchez if he would buy her a beer, and he

agreed. Escobedo retrieved a Bud Light beer for herself and consumed it, but before Sanchez could pay for Escobedo's beer, she solicited a second one, which Sanchez also agreed to buy. Escobedo retrieved another Bud Light beer for herself, and Sanchez paid for her two beers with a twenty dollar bill. Escobedo rang up the two beers, made change, and gave no change to Sanchez. Instead, Escobedo placed an undetermined amount of money in a large clear jar near the cash register.

Also on May 2, 2013, Escobedo asked Agent Rubio if he would buy her a beer, and he agreed to do so. Escobedo retrieved a bottle of Bud Light beer for herself and consumed it. Rubio paid Escobedo for her beer with a ten dollar bill, and Escobedo placed the bill in the cash register but did not give Rubio any change. Later that night, Rubio ordered a beer for himself. Estrada, who was sitting at the fixed bar next to Agent Alcala, asked if he could make it three beers: one for Rubio, one for herself, and one for Alcala. Rubio agreed, and Escobedo served Rubio and Alcala each a twelve-ounce bottle of beer and Estrada a seven-ounce bottle of beer. Rubio paid for the three beers with a twenty dollar bill. Escobedo took the money to the cash register, made change, gave Rubio two dollars, and handed Estrada an undetermined amount of money. Estrada took the money and consumed her beer. Escobedo later solicited a second beer for herself from Rubio, and he agreed to purchase it. She retrieved a Bud Light beer and drank it. Rubio paid Escobedo for her beer with a twenty dollar bill and received ten dollars in change.

Counts 27-28:

Agents Alcala and Rubio returned to the licensed premises on the evening of May 9, 2013 and sat at the fixed bar where Escobedo was again working as bartender.

The agents each ordered a Bud Light beer and were charged four dollars for each beer. Estrada asked Alcala to buy her a beer. He agreed. Estrada ordered a beer from Escobedo and was served a seven-ounce bottle of Bud Light beer. Alcala paid for Estrada's beer with a twenty dollar bill, after which Escobedo took the bill to the register, made change, gave ten dollars in change to Alcala, and handed Estrada an undetermined amount of money. Estrada took the money, consumed the beer, and asked Alcala if he would buy her another. Alcala agreed, and Estrada ordered another beer from Escobedo. Escobedo served Estrada a seven-ounce bottle of Bud Light beer which Alcala paid for with a ten dollar bill. Escobedo went to the register, made change, gave nothing to Alcala, and gave an undetermined amount of money to Estrada.

Estrada solicited a third and fourth beer from Alcala. He agreed to both and paid with a twenty dollar bill and a ten dollar bill, respectively. Each time, Escobedo retrieved a seven-ounce bottle of Bud Light beer for Estrada, took the money to the register, made change, and handed an undetermined amount of money to Estrada. When Alcala paid with the twenty dollar bill, he received ten dollars in change; when he paid with the ten dollar bill, he received no change.

Counts 29-37:

The sequence of events giving rise to counts 29 through 37 occurred on May 16, 2013. That evening, Agents Alcala, Rubio, and Sanchez returned to the licensed premises and sat at the fixed bar; Escobedo was working as bartender. The agents each ordered a Bud Light beer and were charged four dollars for each beer. Estrada asked Alcala if he would buy her a beer, and he agreed. Estrada ordered a beer from Escobedo, and Escobedo served her a seven-ounce bottle of Bud Light beer. Alcala

paid Escobedo with a twenty dollar bill, and she took the money to the cash register, made change, gave Alcala ten dollars in change, and handed Estrada an undetermined amount of money. Estrada subsequently solicited three more beers from Alcala, and he agreed to buy her each of the beers. Each of these solicitations occurred in the same manner as the first except that Alcala paid with a ten dollar bill and received no change.

That same evening, Escobedo asked Agent Rubio if he would buy her a beer. He agreed, and she retrieved a seven-ounce bottle of Bud Light beer and consumed it. Rubio paid Escobedo for her beer with a ten dollar bill. She took the money to the register but gave no change to Rubio. Escobedo subsequently asked Rubio to buy her another beer, and he agreed. This second solicitation by Escobedo proceeded in a manner identical to the first.

Also on May 16, 2013, a female identified as Guadalupe Luna who was seated at the fixed bar solicited a beer from Agent Rubio. Rubio agreed, and Luna ordered and was served a Bud Light beer by Escobedo. Rubio paid Escobedo with a twenty dollar bill. She took the money to the register, gave Rubio ten dollars in change, and handed an undetermined amount of money to Luna. Luna then consumed her beer.

Finally on the evening of May 16, 2013, Agent Sanchez, who had been sitting at the fixed bar, walked outside where he was approached by an individual later identified as Flor Zaragosa. Zaragosa asked Sanchez if he would buy her a beer, and Sanchez agreed to do so. Zaragosa escorted Sanchez back to the fixed bar and ordered a Modelo beer from Escobedo. Escobedo served Zaragosa the Modelo, and Sanchez paid Escobedo for Zaragosa's beer with a twenty dollar bill. Escobedo took the money to the register, made change, gave Sanchez six dollars in change, and placed an

undetermined amount of money on the counter in front of Zaragosa, which Zaragosa then took and placed in her purse. After consuming her beer, Zaragosa stated to Sanchez that she hoped he did not mind that her beer had cost him fourteen dollars.

After finishing her beer, Zaragosa asked Agent Sanchez if he would buy her another, and he agreed. Zaragosa ordered one beer each for her and Sanchez from Escobedo. Escobedo served the two beers to Zaragosa, and Sanchez paid for the two beers with a twenty dollar bill. Escobedo took the money to the register, made change, gave Sanchez two dollars in change, and placed an undetermined amount of money on the bar counter in front of Zaragosa. Zaragosa kept the money, and Sanchez concluded that he had been charged four dollars for his beer and fourteen dollars for Zaragosa's.

Counts 19, 24, and 33 of the accusation each pertained to Escobedo and claimed that appellant employed or knowingly permitted her to loiter in the licensed premises for the purpose of drink solicitation in violation of Business and Professions Code section 25657(b) on April 18, 2013, May 2, 2013 and May 16, 2013, respectively. Each of these counts was dismissed.

Appellant repeatedly argues throughout its brief that the agents' consistent failure to object to the inflated price of ten dollars per solicited beer constituted a tacit agreement by the agents to generously tip appellant's bartenders — tips which the bartenders eventually came to expect after the agents had visited the premises and voluntarily paid the inflated prices on so many occasions. (App.Br. at pp. 2-8.) After receiving such tips, appellant contends, the bartenders were free to do with them as they saw fit, including handing them over to the solicitors. (*Id.*)

Appellant's interpretation of the facts of this case, while creative, does not hold

water. First, appellant ignores the very essence of a tip, which is defined as "a gift or a usually small sum of money tendered in payment or often in excess of prescribed or suitable payment for a service performed or anticipated." (Webster's 3d New Internat. Dict. (2002) p. 2398.) Implicit in this definition is the notion that a tip is tendered to the person offering services by the person receiving the benefit of the services. Appellant's contention that a bartender can, at his or her own discretion, unilaterally withhold money paid in excess of the price of an alcoholic beverage and then label that money a "tip" runs contrary to logic and custom.

Next, appellant fails to address the overall picture displayed by the findings and evidence and instead selectively addresses individual transactions, attempting to dismiss the solicitation and commission-paying activity as mere barroom camaraderie and generous tipping. Appellant ignores the fact that, each time agents ordered beers for themselves, they were only charged four dollars by appellant's bartenders and apparently did not feel compelled to provide such generous "tips." Appellant also attempts to divert attention from the fact that its own employees knew of and facilitated the illegal conduct by providing commissions to the solicitors. Moreover, one of appellant's bartenders, Escobedo, actively solicited beers for her own consumption on multiple occasions and withheld her own commission. A review of the record in its entirety leads to the conclusion that all of the sustained counts are supported by substantial evidence.

ORDER

The decision of the Department is affirmed.¹⁰

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

¹⁰This 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 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.