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

AB-9595
File: 47-444215 Reg: 15082915

JOSE GERARDO MARTINEZ and LYNN LUPE MARTINEZ,
dba El Vaquero Restaurant & Night Club
1747 East Gage Avenue, Los Angeles, CA 90001,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 4, 2017
Los Angeles, CA

ISSUED MAY 19, 2017

Appearances: *Appellants:* Melissa H. Gelbart, of Solomon Saltsman & Jamieson, as counsel for appellants.
Respondent: Kerry K. Winters and Matthew Gaughan as counsel for the Department of Alcoholic Beverage Control.

OPINION

Jose Gerardo Martinez and Lynn Lupe Martinez, doing business as El Vaquero Restaurant & Night Club (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] that revoked their license for permitting drink solicitation in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b), and concurrently suspended their license for 20 days for permitting on-premises nudity in violation of rule 143.3, subdivisions (1)(b) and (2).

1. The decision of the Department, dated June 9, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general eating place license was issued on October 30, 2006. On August 17, 2015, the Department instituted a 14-count accusation against appellants. On October 27, 2015, the Department filed an amended 17-count accusation against appellants (the "First Amended Accusation"). While the majority of the counts in the amended accusation were simply renumbered duplicates of the originals, the First Amended Accusation did include five counts that were either new or substantively modified from their previous incarnations.[2]

Counts 1 through 8 and 15 through 17 of the First Amended Accusation alleged appellants permitted drink solicitation activity in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b). Counts 9 through 14 alleged nudity and simulated sexual activity in violation of rule 143.3, subdivisions (1)(a), (1)(b), and (2).

A two-part administrative hearing was held on December 1, 2015 and March 1, 2016, at which documentary evidence was received and testimony concerning the violations charged was presented by Agents Oscar Zapata and Ricardo Carnet of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on three separate dates in January and February of 2015, Department agents visited the licensed premises and witnessed the events underlying the First Amended Accusation.

Counts 1 through 4

2. Counts 4, 5, 6, 7, and 16 of the First Amended Accusation are either entirely new, or entail a change to dates or parties that materially alters the substance of the allegations.

On January 8, 2015, Agents Carnet and Zapata entered the licensed premises. A few women dressed in black and wearing aprons were standing near the entrance. One of the women, Silvia Romero, asked them if they wanted a place to sit. When they indicated they did, she escorted them to a table.

While walking to the table, Romero asked Agent Carnet if he would buy her a beer. He agreed. Once at the table, Romero asked them if they wanted anything to drink. Agent Carnet ordered a Tecate beer and Agent Zapata ordered a Modelo beer.

Romero went to the bar counter and returned with a Tecate and a Modelo, which she served to the agents, and a seven-ounce Bud Light beer for herself. Romero charged Agent Carnet $22. Agent Carnet paid by giving Romero $25. Romero handed $3 in change to Agent Carnet and kept the rest, $8 of which she separated out for herself. Romero told them that their beers cost $6 each, but that her beer cost $10. Agent Carnet determined that the $10 for Romero's beer consisted of $2 for the seven-ounce Bud Light beer and an $8 commission.

Romero remained at the table while she consumed her beer. At times, she got up to take orders from other customers and clear tables. She returned to the table each time.

While at the table, Romero asked Agent Zapata if he wanted a woman to sit with him. He said that he did, and she called Ivana over. Ivana asked Agent Zapata to buy her a beer. He agreed, and Ivana asked Romero to get her a Bud Light. Romero went to the bar counter and returned with a seven-ounce bottle of Bud Light. She charged Agent Zapata $10 for the beer. Agent Zapata paid with a $20 bill. Romero gave him $10 in change and gave $8 to Ivana.

Later, Romero asked Agent Carnet to buy her another beer. He agreed, and she walked over to the bar counter. She returned with a seven-ounce Bud Light beer. Agent Carnet paid with a $20 bill. Romero gave him $10 in change and kept the rest. Once again, Romero separated out $8 for herself.

Ivana solicited a second beer from Agent Zapata. He agreed, and Romero obtained a seven-ounce Bud Light beer from the bar counter. Romero charged Agent Zapata $10, $8 of which she gave to Ivana by placing it on top of the $8 she had previously given her.

Romero solicited four more beers from Agent Carnet on January 8, 2015. Each time, he agreed, and she obtained a seven-ounce bottle of Bud Light from the bar counter. Each time she charged him $10, $8 of which she separated out for herself.

Ivana also solicited four more beers that night. Each time, Romero charged Agent Zapata $10, $8 of which she gave to Ivana.

During the course of the evening, the agents noticed that the six women wearing aprons were performing typical waitressing duties, such as carrying drinks to the tables and clearing tables.

Counts 5 through 11

The two agents returned to the licensed premises on January 23, 2015. They were greeted by a waitress wearing an apron, who seated them at one of the tables. Agent Carnet ordered a Tecate from her, while Agent Zapata ordered a Modelo. The waitress obtained the two beers, which she served to them. She charged them $6 each.

Agent Carnet asked the waitress if Romero would be working that night. The waitress responded that she would be there shortly. Romero subsequently came over to the table and sat down. Romero was not wearing an apron at first, but later put one on.

At some point, Romero asked them if they wanted anything to drink. They ordered a Tecate and a Modelo, which Romero obtained from the bar counter. Agent Carnet paid for the beers.

Romero asked Agent Carnet if he would buy her a beer. He agreed and handed her $20. She went to the bar counter and obtained a seven-ounce bottle of Bud Light, which she brought back to the table. Romero gave Agent Carnet $10 in change.

Jovana Garcia joined them at the table. She asked Agent Zapata if he would buy her a beer. He agreed. Garcia told him that it would cost $10, so he handed her a $20 bill. Although Romero was seated at the table at the time, Garcia got up and went to the bar counter. She returned with two seven-ounce Bud Light beers. Agent Zapata expressed surprise that she obtained two beers. Garcia responded by saying that she did not want to get up so soon. Agent Zapata did not receive any change.

Romero solicited five more beers from Agent Carnet on January 23, 2015. Each time, she obtained a beer from the bar counter. Each time she charged him $10.

Garcia solicited two more beers from Agent Zapata. He agreed and handed her a $20 bill. Romero was present when Agent Zapata handed the money to Garcia. Garcia subsequently solicited two more beers from Agent Zapata. Once again, he paid with a $20 bill. He did not receive any change. Agent Zapata saw her consume five of the six beers she obtained during her three trips to the bar counter. The last beer was still in front of her when they left.

Over the course of the evening, Romero got up from the table at times to wait on patrons by taking orders and serving them. Garcia was not wearing an apron and did not wait on any other tables.

During the course of the evening, three women in bikinis entered the licensed premises. One of them approached the corner of the licensed premises where the agents were seated and began to perform lap dances for the men sitting there. During these dances, she sat in the men's laps, grinding as she did so. She also pulled the men's faces into her breasts. She pulled her bikini top away from her body to receive tips from each of the men. As she did so, Agent Zapata was able to see her areolas or her full breast. This exposure took place on the floor of the licensed premises while she was right next to the patrons.

Counts 12 through 17

Agents Carnet and Zapata returned to the licensed premises on February 13, 2015. One of the waitresses, Maria Rojo, seated them at a table. They ordered two Bud Light beers from her. She served them two twelve-ounce Bud Light beers, charging them $5 each.

Six dancers came out from a back room. One of the dancers approached Agent Zapata and asked him if he wanted a lap dance. He said that he did and she began dancing. During the course of the dance, she placed his hands on her waist and moved them upward. She also pulled his face into her breasts and ground her buttocks into his groin. When he tipped her, she pulled her bikini top away from her body, exposing her areolas. Agent Zapata paid her for the dance when she finished. This same dancer performed for other patrons sitting nearby. She exposed her breast or areola at times when accepting tips from these patrons. Each time she exposed her breast she was on the floor of the licensed premises while she was near the patrons.

Agent Carnet invited two women, Yesenia Anaya and Erika Stephanie Osorio, to sit with them. After she had been at the table for a bit, Anaya asked Agent Carnet if he

would buy them a six-pack of beer each. He told her he would buy them one beer apiece. Anaya called Rojo over and ordered two beers. Rojo went to the bar counter and returned with two beers, which she served to Anaya and Osorio. Agent Carnet paid with a $20 bill. Rojo gave $8 to Anaya and $8 to Osorio, which they pocketed. Agent Carnet did not receive any change.

After the hearing, the Department issued its decision, which dismissed counts 5, 6, 9, 14, and 17,[3] but found the remaining counts had been proven and no defense was established. For counts 10, 11, 12, and 13, pertaining to on-premises nudity in violation of rules 143.3(1)(b) and (2), the ALJ found the violations were relatively mild and merited a mitigated penalty of 20 days' suspension. With regard to the remaining counts, all of which pertained to illegal drink solicitation activity under Business and Professions Code sections 24200.5(b) and 25657(a) and (b), the ALJ found a number of aggravating factors, including a past solicitation violation.[4] He therefore imposed a penalty of outright revocation for the drink solicitation counts.

Appellants then filed this appeal contending (1) counts 1, 2, 3, 4, 7, 8, 15, and 16—all pertaining to drink solicitation—are not supported by substantial evidence or findings of fact,[5] and (2) the ALJ failed to proceed in the manner required by law when

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3. Counts 5, 6, and 17 pertained to illegal drink solicitation under sections 24200.5 and 25657(b). Counts 9 and 14 pertained to simulated sexual activity under rule 143.3(1)(a).

4. The past disciplinary action included violations of Business and Professions Code sections 24200.5, 25657(a) and (b), 23038, and 23396. (See Reg. No. 11074834, filed Apr. 6, 2011.) The penalty imposed was stayed revocation with a 25-day suspension. (*Ibid.*)

5. Appellants do not challenge any of the counts brought under rule 143.3 alleging on-premises nudity. (See generally App.Br.)

he denied appellants' request for a continuance in light of the Department's First Amended Accusation.

Additionally, appellants filed a "Supplemental Opening Brief" alleging (3) that the Department's comment procedure, implemented in this case, is contrary to the legislature's intent, constitutes an underground regulation, and encourages illegal ex parte communications. Appellants' supplemental brief, however, was not timely. For the reasons discussed in Part III, *infra*, we therefore strike appellants' Supplemental Opening Brief and consider the comment procedure issue waived.

DISCUSSION

I

Appellants contend counts 1, 2, 3, 4, 7, 8, 15, and 16—all of which allege illegal drink solicitation activity—are not supported by substantial evidence. Appellants argue that "[i]n disciplinary administrative proceedings, guilt must be established to a reasonable certainty and cannot be based on surmise or conjecture, suspicion or theoretical conclusions, or uncorroborated hearsay." (App.Br., at p. 4, citing *Cornell v. Reilly* (1954) 127 Cal.App.2d 178, 183-184 [273 P.2d 572].) Appellants contend the Department's decision is improperly "based on surmise, conjecture, or theoretical conclusions" and must therefore be reversed. (App.Br., at p. 4.)

The counts of which appellants complain are each raised under one of three provisions of the Business and Professions Code prohibiting drink solicitation. Section 24200.5(b), the grounds for counts 2, 4, 8, and 16, states:

> 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.

(Bus. & Prof. Code, § 24200.5(b).) The payment of a salary to a soliciting individual is sufficient to bring charges under this provision. (*Garcia v. Martin* (1961) 192 Cal.App.2d 786, 789-790 [14 Cal.Rptr. 59].) In *Garcia*, a solicitation case, the court of appeal found:

> The evidence shows that . . . Brownie in the licensed premises asked a blonde man to buy her a beer, which he did. It likewise shows that . . . JoJo asked Hugh Boyle "to buy her a beer" from the licensee. Both Brownie and JoJo were on a salary. The proof of salary is sufficient to bring the case under section 24200.5 of the Business and Professions Code without evidence of any additional compensation based upon the number of drinks solicited, or some similar arrangement. "Admittedly appellant paid them a salary. When a licensee pays a salary to a female employee, [and] permits her to solicit drinks for herself from patrons, as appellant did here, appellant has committed the described offense. The statute does not require anything more than the payment of salary, that the licensee employ a person 'to solicit . . . others . . . to buy them drinks . . . under any salary . . . .' *Even in the absence of a system of solicitation, the department's ruling stands*."

(*Id.*, quoting *Greenblatt v. Martin* (1990) 177 Cal.App.2d 738, 743-744 [2 Cal.Rptr. 508], emphasis added.)

Counts 1 and 7 were brought under section 25657, subdivision (a), and counts 3 and 15 were brought under section 25657, subdivision (b). The statute as a whole 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 beverage for the one begging or soliciting.

(Bus. & Prof. Code, § 25657.)

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. (*Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor this 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. [Citation.] 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*, at p. 1437.)

In *Cornell*, cited by appellants, the court held that "in disciplinary administrative proceedings the burden of proof is upon the party asserting the affirmative [citation], and that guilt must be established to a reasonable certainty [citations] and cannot be based

on surmise or conjecture, suspicion or theoretical conclusions, or uncorroborated hearsay." (*Cornell*, *supra*, at pp. 183-184.) However, the court immediately qualified its remark: "But it is now well settled that such proceedings are not criminal in nature and are not governed by the law applicable to criminal cases." (*Id.* at p. 184.) The court went on to accept that the solicitation violations alleged had been proven by the evidence and "reasonable inferences therefrom." (*Id.* at p. 186.)

The *Cornell* court also relied on *Mantzoros* for the proposition that a licensee can be held accountable for the actions of his employees. (*Id.* at pp. 186-187, citing *Mantzoros v. State Bd. of Equalization* (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657].) The court held that employees' solicitation activity was properly imputed to the licensee:

> By virtue of the ownership of a liquor license such owner has a responsibility to see to it that the license is not used in violation of law. Obviously, the economic benefits of the solicitation of drinks by the entertainers with [the bartender's] knowledge and participation redounded to the benefit of appellant. The responsibility for [the bartender's] acts in the operation of the license can and should be imputed to appellant.

(*Cornell*, *supra*, at p. 187; see also *Garcia*, *supra*, at p. 790 [bartenders' knowledge of solicitation activity imputed to licensee].)

With regard to counts 1 and 2, appellants allege there was no evidence Romero was paid a percentage or commission. (App.Br., at p. 6.) Moreover, while appellants concede Romero was an employee, they argue there is no evidence that appellants "employed Romero *for the purpose of solicitation* or paid her a commission or percentage for that purpose." (App.Br., at p. 7, emphasis added.) Appellants rely on *Greenblatt* and *Cooper*, claiming these cases require the Department prove a "system" of solicitation, such as toothpicks or stirring rods collected from solicited drinks. (App.Br., at p. 6, citing *Greenblatt*, *supra*, and *Cooper v. State Bd. of Equalization* (1955) 137 Cal.App.2d 672 [260 P.2d 914].)

As an initial matter, appellant misreads both *Greenblatt* and *Cooper*. In *Greenblatt*, the court found that such a system did exist (in that case, involving toothpicks), but did not hold that proof of such a system was the only means by which to establish a violation. (See *Greenblatt*, *supra*.) Indeed, the court noted the licensee's payment of a salary to the soliciting employees was sufficient to prove the violation, and observed that:

> When a licensee pays a salary to a female employee, [and] permits her to solicit drinks for herself from patrons, as appellant did here, appellant has committed the described offense. The statute does not require anything more than the payment of salary . . . . *Even in the absence of a system of solicitation, the department's ruling stands*.

(*Id.*, at pp. 743-744, emphasis added.) Similarly, in *Cooper*, the facts showed a system of solicitation (involving stirring rods), and the court found this evidence "overwhelmingly supports the findings that employees of the bar . . . solicited drinks from patrons, and that the bartender knew of and participated in this activity." (*Cooper*, *supra*, at pp. 675-676.) The court, however, did *not* hold that evidence of a solicitation system was necessary to prove a violation in every case—only that it proved the violation in the case before it. (See generally *id.*) In fact, while the *Cooper* court found, based on the stirring rod evidence, that the employees were indeed hired for the specific purpose of soliciting drinks, it held that no such proof was required to find a violation of section 25657:

> Thus, the evidence is sufficient to support a finding that appellants personally hired or permitted these girls to solicit drinks on the premises. But even if the evidence were insufficient in this respect, this would not help appellants. *No such finding is required under the law.* The appellants as the owners and operators of the bar, and as licensees, are responsible for the acts of the bartender, and of their other employees.
>
> Appellants contend that the statutes involved require that the accused licensees cannot be held responsible unless they personally hired or permitted the solicitation. This contention is not supported by

either the language of the pertinent statutes or by the cases interpreting those sections.

(*Cooper*, *supra*, at pp. 676-677, emphasis added.)

On counts 1 and 2, the ALJ made the following relevant findings of fact:

4. On January 8, 2015, Agent Ricardo Carnet and Agent Oscar Zapata entered the Licensed Premises. A few women dressed in black and wearing aprons were standing near the entrance. One of the women, Silvia Romero, asked them if they wanted a place to sit. When they indicated that they did, she escorted them to a table.

5. While walking to the table, Romero asked Agent Carnet if he would buy her a beer. He agreed. Once at the table, Romero asked them if they wanted anything to drink. Agent Carnet ordered a Tecate beer and Agent Zapata ordered a Modelo beer.

6. Romero went to the bar counter and returned with a Tecate and a Modelo, which she served to the agents, and a 7-oz. Bud Light beer for herself. Romero charged Agent Carnet $22. Agent Carnet paid by giving Romero $25. Romero handed $3 in change to Agent Carnet and kept the rest, $8 of which she separated out for herself. Romero told them that their beers cost $6 each, but that her beer cost $10. Agent Carnet determined that the $10 for Romero's beers consisted of $2 for the 7-oz. Bud Light beer and an $8 commission.

[¶ . . . ¶]

9. Subsequently, Romero asked Agent Carnet to buy her another beer. He agreed and she walked over to the bar counter. She returned with a 7-oz. Bud Light beer. Agent Carnet paid with a $20 bill. Romero gave him $10 in change and kept the rest. Once again, Romero separated out $8 for herself.

[¶ . . . ¶]

11. Romero solicited four more beers from Agent Carnet on January 8, 2015. Each time, he agreed and she obtained a 7-oz. bottle of Bud Light from the bar counter. Each time she charged him $10, $8 of which she separated out for herself.

[¶ . . .¶]

13. During the course of the evening, the agents noticed that the six women wearing aprons were performing typical waitressing duties, such as carrying drinks to the tables and clearing tables.

(Findings of Fact, ¶¶ 4-6, 9, 11, 13.) Based on these findings, the ALJ reached the following relevant conclusions of law:

> 9. On January 8, 2015, Silvia Romero (counts 1 and 2) was working as a waitress at the Licensed Premises. In this capacity she sat the agents at a table, took their drink orders, and served them. She also took orders from other customers, served them, and cleared tables. During the course of the evening, she solicited a total of six beers from Agent Ricardo Carnet, retaining an $8 commission each time.

(Conclusions of Law, ¶ 9.)

Unrefuted testimony supports the conclusion that Romero was an employee of the licensed premises. She wore an apron (RT, vol. I, at pp. 15-16, 66, 160), greeted and seated the agents (RT, vol. I, at pp. 16, 67, 160), took their orders (RT, vol. I, at pp. 17, 163), picked up items from the table and carried drinks for other tables (RT, vol. I, at pp. 20, 73, 163), and collected payment for drinks (RT, vol. I, at pp. 18-20). Agent Carnet testified Romero told him "she works at the premises almost every night, until about 4:00 or 5:00 in the morning."[6] (RT, vol. I, at pp. 163-164.) It was wholly reasonable for the ALJ to infer that Romero was appellants' employee.[7] It was not necessary for the Department to produce Romero's paystubs or a formal contract of employment as further proof.

Moreover, it is unrefuted that Romero solicited drinks from Agent Carnet. (RT, vol. I, at p. 160.) Appellants only question whether she collected a commission.

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6. While this is arguably hearsay evidence, no objection was raised at hearing. (See RT, vol. I, at p. 164.) In any event, the statement is supported by other evidence of Romero's employment, and was therefore admissible as administrative hearsay. (See Gov. Code, § 11513(c).)

7. Indeed, the only other conceivable inference—that she was not an employee, but rather an unauthorized but curiously amiable interloper who felt compelled to wear an apron, wait on appellants' patrons, and clean appellants' tables—borders on the absurd.

The unrefuted testimony established that Romero charged the agents $6 for their own beers, but charged them an inflated $10 for her solicited beers. (RT, vol. I, at pp. 161-162, 179-180.) The unrefuted testimony also established that each time the agents paid for a beer Romero had solicited, she separated out $8. (RT, vol. I, at pp. 165-166.) According to both agents, Romero kept the separated $8 in her hands. (RT, vol. I, at pp. 19, 165, 180.)

Appellants argue that the Department failed to prove that Romero was paid a commission. (App.Br., at p. 6.) They claim "there is nothing to suggest where the money went after it left the table," and that "Carnet's testimony revealed only that Romero *temporarily* kept some amount of money in her hands for some amount of time." (*Id.*, at p. 6, emphasis in original.) Appellant ignores the relevant facts. The unrefuted testimony of two agents establishes that Romero *separated out* $8 from the remaining cash—an amount consistent with the $8 she separated and gave to Ivana for solicited drinks the same night. (See RT, vol. I, at pp. 22-23.) It was reasonable for the ALJ to infer that the $8 Romero consistently separated out was, in each case, a commission from the inflated price of a solicited beer. The Department was not required to trace where that cash went after Romero separated it out.

As noted above, circumstantial evidence and reasonable inferences are valid support for charges in an administrative disciplinary action. (*Cornell*, *supra*, at p. 186.) Substantial evidence therefore supports the conclusion that Romero was working as a waitress at the licensed premises on January 18th, 2015, that she solicited multiple beers from Agent Carnet, and that in each instance she charged an inflated price of $10, from which she separated and retained an $8 commission. Counts 1 and 2 are therefore sustained.

With regard to counts 3 and 4, appellants contend that they, as licensees, did not knowingly permit Ivana to loiter for the purposes of soliciting, and that the Department failed to prove Ivana was paid a commission.

On these counts, the ALJ made the following relevant findings of fact:

> 8. While at the table, Romero asked Agent Zapata if he wanted a woman to sit with him. He said they [he] did and she called Ivana over. Ivana asked Agent Zapata to buy her a beer. He agreed and Ivana asked Romero to get her a Bud Light. Romero went to the bar counter and returned with a 7-oz. bottle of Bud Light. She charged Agent Zapata $10 for the beer. Agent Zapata paid with a $20 bill. Romero gave him $10 in change and gave $8 to Ivana.
>
> [¶ . . . ¶]
>
> 10. Ivana solicited a second beer from Agent Zapata. He agreed and Romero obtained a 7-oz. Bud Light beer from the bar counter. Romero charged Agent Zapata $10, $8 of which she gave to Ivana by placing it on top of the $8 she had previously given her.
>
> [¶ . . . ¶]
>
> 12. Ivana also solicited four more beers that night. Each time, Romero charged Agent Zapata $10, $8 of which she gave to Ivana.

(Findings of Fact, ¶¶ 8, 10, 12.) Based on these findings, the ALJ reached the following conclusion of law:

> 10. Also on January 8, 2015, Romero brought a woman named Ivana (counts 3 and 4) over to the table. In front of Romero, Ivana solicited six beers from Agent Oscar Zapata. Each time, Romero obtained a beer from the bar counter and served it to Ivana, paying her an $8 commission in connection with each one.

(Conclusions of Law, ¶ 8.)

Firsthand knowledge of the licensee is not required to prove a violation of either section 25657(b) or section 24200.5(b). The conduct of an employee—here, Romero—is imputed to the licensee. (See *Cornell*, *supra*, at pp. 186-187; *Mantzoros*, *supra*, at p. 144; *Garcia*, *supra*, at p. 790; *Cooper*, *supra*, at pp. 676-677.) As noted above, it was reasonable to infer that Romero was appellants' employee. (See Conclusions of Law, ¶

9.) Undisputed testimony established that Romero, acting as appellants' employee and agent, allowed Ivana to loiter and solicit drinks from Agent Zapata. (RT, vol. I, at pp. 21, Findings of Fact, ¶¶ 8, 10, 12, 13.) In fact, it was Romero who arranged for Ivana to sit with the agents. (RT, vol. I, at pp. 21, 80-81.) It was therefore reasonable for the ALJ to impute Romero's actions to the licensee.

Moreover, the agents' undisputed testimony indicates that each time Agent Zapata paid for one of Ivana's solicited drinks, Romero separated out $8 and gave it to Ivana. (RT, vol. I, at pp. 22-24.) Following each of the first two solicitations, Romero put the $8 on the table in front of Ivana. (RT, vol. I, at p. 23.) After the second solicitation, Ivana "picked up all that money and put it away in her purse." (RT, vol. I, at p. 23.) The agents' undisputed testimony is more than sufficient to support the inference that Romero, acting as appellants' employee and agent, knowingly paid Ivana an $8 commission for each beer Ivana solicited. Her actions are imputed to appellants. Counts 3 and 4 are therefore sustained.

With regard to counts 7 and 8, appellants' arguments are virtually indistinguishable from those raised in response to counts 1 and 2 above. They claim there is no evidence that appellants employed Romero for the purpose of solicitation, and no evidence that she was paid a percentage or commission. (App.Br. at p. 11.) Counts 7 and 8 merely pertain to a different date and series of solicitations.

On these counts, the ALJ made the following relevant findings of fact:

> 14. The two agents returned to the Licensed Premises on January 23, 2015. They were greeted by a waitress wearing an apron, who seated them at one of the tables. Agent Carnet ordered a Tecate from her, while Agent Zapata ordered a Modelo. The waitress obtained the two beers which she served to them. She charged them $6 each.
>
> 15. Agent Carnet asked the waitress if Romero would be working that night. The waitress responded that she would be there shortly. Romero subsequently came over to the table and sat down. Romero was not

> wearing an apron at first, but later put one on. At some point, Romero asked them if they wanted anything to drink. They ordered a Tecate and a Modelo, which Romero obtained from the bar counter. Agent Carnet paid for the beers.
>
> 16. Romero asked Agent Carnet if he would buy her a beer. He agreed and handed her $20. She went to the bar counter and obtained a 7-oz. bottle of Bud Light, which she brought back to the table. Romero gave Agent Carnet $10 in change.
>
> [¶ . . . ¶]
>
> 18. Romero solicited five more beers from Agent Carnet on January 23, 2015. Each time, she obtained a beer from the bar counter. Each time she charged him $10.
>
> [¶ . . . ¶]
>
> 20. Over the course of the evening, Romero got up from the table at times to wait on patrons by taking orders and serving them.

(Findings of Fact, ¶¶ 14-16, 18, 20.) Based on these findings, the ALJ reached the following conclusion of law:

> 11. On January 23, 2015, Romero (counts 7 and 8) was working as a waitress at the Licensed Premises. On this date she solicited six beers from Agent Carnet. She retained a commission in connection with each one.[fn.] (Findings of Fact ¶¶ 14-20.)

(Conclusions of Law, ¶ 11.) In a footnote to this conclusion, however, the ALJ noted, "Unlike January 8, 2015, Agent Carnet did not see Romero separate out $8 as her commission. However, each of Romero's drinks cost $10, consistent with a price of $2 plus a commission of $8 as on January 8, 2015." (Conclusions of Law, ¶ 11, fn. 6.)

Curiously, however, unrefuted testimony from Agent Carnet *does* clearly support the inference that Romero retained an $8 commission on at least two of the beers she solicited on January 23—though there is indeed no specific testimony that she separated the $8 out, only that she kept $8 from each transaction. (See RT, vol. I, at pp. 169-171.) On direct examination, Agent Carnet described the change he received for Romero's first solicited beer:

> [BY MS. WINTERS:] When [Romero] returned with the 7-ounce Bud Light, did she give you any money?
>
> [AGENT CARNET:] She gave me—she did give me $10 in change.
>
> Q Did you see if she held any money in her hand?
>
> A Yes.
>
> Q How much did she have in her hand?
>
> A She ended up keeping $8 for herself.
>
> Q And you could clearly see the $8?
>
> A Yes.

(RT, vol. I, at pp. 169-170.) He then describes the pattern for the remaining five solicited beers:

> [BY MS. WINTERS:] After that—the first beer, did she ask you to buy her anymore [*sic*] beers?
>
> [AGENT CARNET:] Yes.
>
> Q How many more did you buy her that night?
>
> A Five more.
>
> Q And each time she asked you, did you agree?
>
> A Yes.
>
> Q And where did she go to get the beer?
>
> A She went in the fixed bar area.
>
> Q And how much did she charge you for those beers?
>
> A $10.
>
> Q And did you see how much money she kept from each of those?
>
> A Yes.
>
> Q How much did she keep?
>
> A $8.

(RT, vol. I, at pp. 170-171.)

Agent Carnet's testimony is sufficient to support the inference that Romero retained an $8 commission from each beer she solicited on January 23. More importantly, Agent Carnet's testimony is unrefuted—appellants offered no evidence, testimony or otherwise, to suggest that Agent Carnet's description of the transaction is false or flawed. Combined with the unrefuted testimony that Romero was again acting as appellants' employee and again charged an inflated $10 for solicited beers (see RT, vol. I, at pp. 169-170), there is substantial evidence to support counts 7 and 8.

With regard to count 15, appellants contend there is no evidence that appellants knowingly permitted Anaya to loiter on the premises for the purpose of soliciting alcoholic beverages. On count 16, they argue there is no evidence Rojo knew Anaya had solicited a beer from Agent Carnet. According to appellants, neither they nor any of their employees overheard Anaya solicit a beer from Agent Carnet.

On these counts, the ALJ made the following relevant findings of fact:

> 22. Agent Carnet and Agent Zapata returned to the Licensed Premises on February 13, 2015. One of the waitresses, Maria Rojo, seated them at a table. They ordered two Bud Light beers from her. She served them two 12-oz. Bud Lights, charging them $5 each.
>
> [¶ . . . ¶]
>
> 24. Agent Carnet invited two women, Yesenia Anaya and Erika Stephanie Osorio, to sit with them. After she had been at the table for a bit, Anaya asked Agent Carnet if he would buy them a six-pack of beer each.[fn.] He told her he would buy them one beer apiece. Anaya called Rojo over and ordered two beers. Rojo went to the bar counter and returned with two beers, which she served to Anaya and Osorio. Agent Carnet paid with a $20 bill. Rojo gave $8 to Anaya and $8 to Osorio, which they pocketed; Agent Carnet did not receive any change.

(Findings of Fact, ¶¶ 22, 24.) Based on these findings, the ALJ reached the following conclusions of law:

> 12. On February 13, 2015, Yesenia Anaya (counts 15 and 16) solicited a beer from Agent Carnet. There is no evidence that the Respondents or any of their employees overheard this solicitation. Anaya ordered a beer from the waitress, Maria Rojo, who served it to her. When Agent Carnet paid Rojo for Anaya's beer, she took $8 of the money and handed it to Anaya. Her payment of the commission established her knowledge of the solicitation and, in fact, is a key element of the violation. (Findings of Fact, ¶¶ 22 & 24.)

(Conclusions of Law, ¶ 12.)

Appellants do not contest the conclusion that Rojo was their employee. Instead, the whole of their argument turns on the assumption that, in order to prove knowledge of the solicitation scheme, Rojo must have *actually witnessed* Anaya solicit the drink. While that is one means of proving knowledge, other actions—including the payment of a commission—can establish knowledge and participation in a solicitation scheme.

Regarding this transaction, the testimony of the two agents differs only slightly. Agent Carnet stated Rojo herself divided out $8 each for Anaya and Osorio:

> [BY MS. WINTERS:] And what happened next?
>
> [AGENT CARNET:] Rojo charged me $20.
>
> Q Did you give her $20?
>
> A Yes.
>
> Q And what did she do when you gave her the $20?
>
> A She made change, and placed that change on the table in front of Anaya and Osorio.
>
> Q And how much did she place on the table?
>
> A $16.
>
> Q Did she separate it out?
>
> A Yes.
>
> Q How did she separate it out?
>
> A Each pile was $8.

Q And when she put the money on the table, did Anaya and Osorio take the money?

A Yes.

(RT, vol. I, at pp. 176-177.) Agent Zapata, on the other hand, stated that Rojo handed the change to Anaya, who then gave $8 of it to Osorio:

[BY MS. WINTERS:] How did [Agent Carnet] pay?

[BY AGENT ZAPATA:] With a $20 bill.

Q And when he gave the money to Rojo, what did she do?

A She didn't give him any change, but she made change for—for Anaya, and handed her the money.

Q And did you see how much she handed?

A Not—

Q Did you see how much Rojo handed to Anaya?

A Not to Anaya, no.

Q What did Anaya do when she got the money?

A She counted it out, and handed $8 to Osorio. She kept the other $8.

Q You could clearly see that each had $8?

A Yes.

(RT, vol. I, at pp. 44-45.)

Apart from the minor discrepancy between the two agents' accounts, the agents' testimony is unrefuted. In both accounts, Rojo established her knowledge of and participation in the solicitation scheme by charging an inflated price of $10 for the solicited beers and by handing an $8 commission to Anaya. Because Rojo was acting as appellants' employee and agent, her knowledge of the solicitation scheme and her participation in it—including allowing Anaya to loiter for the purposes of solicitation—is imputed to appellants. Counts 15 and 16 are therefore sustained.

II

Appellants contend the ALJ improperly denied their request for a continuance following receipt of the Department's First Amended Accusation. The original accusation was filed on August 17, 2015. (See Exh. 1.) On October 16, 2015, appellants received a Department notice scheduling a hearing for December 1, 2015. (App.Br., at p. 15.) On October 29, 2015, appellants received the Department's First Amended Accusation, which included substantive changes to several counts and introduced three new alleged violations of section 24200.5(b), a revocable offense. (App.Br., at p. 15; see also Exh. 1.)

Appellants requested a continuance before the hearing, which the ALJ[8] denied over a conference call.[9] (App.Br., at p. 3.) At the administrative hearing on December 1, 2015, appellants renewed their request for a continuance. (App.Br., at p. 3; RT, vol. I, at pp. 10-11.) The request was again denied. (RT, vol. I, at p. 11.)

Appellants now argue they were entitled to a continuance under section 11507 of the Government Code, and that the ALJ failed to proceed in the manner required by law in denying their request. They construe the language of Business and Professions Code section to *require* a continuance: "Thus, when the agency files an amended accusation, respondent is entitled to and the agency must afford additional time." (App.Br. at p. 15.)

Section 11507 states, in relevant part:

> At any time before the matter is submitted for decision, the agency may file, or permit the filing of, an amended or supplemental accusation . . . . All parties shall be notified of the filing. If the amended or supplemental

8. The conference call and initial denial was made by ALJ Lewis, while the administrative hearing took place before ALJ Matthew G. Ainley. (See RT, vol. I, at pp. 2, 11.)

9. The date of the conference call is not in the record, nor is it included in either party's brief.

> accusation . . . presents new charges, the agency shall afford the respondent a reasonable opportunity to prepare his or her defense to the new charges, but he or she shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation . . . may be made orally and shall be noted in the record.

(Gov. Code, § 11507.)

The statute does not define "new charges," nor does it explain what constitutes a "reasonable opportunity" to prepare a defense. (*Ibid.*)

Case law provides little additional guidance. In an early case, the court of appeal rejected a defense premised on section 11507 where the amended accusation was filed on the first day of the hearing and the trial court refused to grant a continuance. (*Buckley v. Savage* (1960) 184 Cal.App.2d 18, 32 [7 Cal.Rptr. 328] [accusation by the Real Estate Commissioner seeking revocation of a real estate agent's license].) After noting that the contention was not raised before the trial court, the court of appeal found that the amended accusation "in no way added new facts to the existing ones," but simply set forth that the respondent's conduct violated the law. (*Id.* at pp. 32-33.) While the court of appeal offered sparse reasoning, its holding is consistent with the plain language of section 11507, which guarantees a "reasonable opportunity" for the respondent to prepare *only* where the amended accusation introduces new charges. (See Gov. Code, § 11507.)

Later, in *Raab*, the court of appeal found no unfair advantage where the Department served an amended accusation on a respondent licensee a mere eighteen days before the hearing. (*Raab v. Dept. of Alcoholic Beverage Control* (1960) 177 Cal.App.2d 333, 334 [2 Cal.Rptr. 26].) In that case, the respondent licensee objected to the amended accusation, but did not seek a continuance, and the parties proceeded

with the hearing. (*Ibid.*) With little analysis, the court of appeal affirmed the trial court's finding that "no unfair advantage was taken" of the respondent licensee. (*Ibid.*)

While the decision in *Raab* appears to turn on the respondent's failure to request a continuance (see *ibid*.), it is important to note that the statute itself imposes no such requirement. Instead, it provides that "the agency shall afford the respondent a reasonable opportunity to prepare his or her defense to the new charges." (Gov. Code, § 11507.) Based on the plain language of the statute, a request for a continuance, or its omission, is not dispositive—the respondent is guaranteed a "reasonable opportunity" to prepare, regardless of whether it requests a continuance. It is therefore unclear whether the court of appeal intended to create such a requirement, or simply found that eighteen days was sufficient for the respondent to prepare a defense under the facts of that particular case.

What *is* clear, however, is that the statute does not necessarily entitle a party to a continuance or "additional time," as appellants insist. (See Gov. Code, § 11507; see also App.Br. at p. 15.) It provides only that "the agency shall afford the respondent a *reasonable opportunity to prepare his or her defense*"—and then only if the amended accusation includes new charges. (*Ibid*., emphasis added.) Depending on the facts of the individual case—including the complexity of the charges and the amount of time remaining for the respondent to prepare—a continuance may or may not be appropriate. If a continuance is indeed appropriate to ensure the respondent has a reasonable opportunity to prepare, the ALJ may find good cause to grant it pursuant to section 11524. (See Gov. Code, § 11524(a).)

The question, then, is twofold. Does the amended accusation introduce "new charges" as contemplated by section 11507? If so, did the Department "afford the

respondent a reasonable opportunity to prepare his or her defense"? (Gov. Code, § 11507.) On these questions, this Board defers to the ALJ as finder of fact, and will not reverse absent an abuse of discretion. (*Givens v. Dept. of Alcoholic Bev. Control* (1959) 176 Cal.App.2d 529, 532, 533 [1 Cal.Rptr. 446]; *Ring v. Smith* (1970) 5 Cal.App.3d 197, 201 [85 Cal.Rptr. 227] [refusal of request for continuance is not a denial of due process absent an abuse of discretion].)

There is no record of the conference call deciding appellants' original request for a continuance. The record, however, shows the ALJ at the administrative hearing considered whether the charges were new and whether appellants had a reasonable opportunity to prepare. At the beginning of the hearing, the following exchange took place:

> [THE COURT:] Are you still seeking a continuance?
>
> MR. SALTSMAN: If Your Honor is inclined to grant a continuance at this point—
>
> THE COURT: Well, I'm not inclined to do anything. I want to make sure the record is clear. I'll hear you if that's—if you want to make that motion. . . .
>
> MR. SALTSMAN: Well, I—let me do the more prudent thing. I will—I will renew the motion now. The original—for the following reasons, that the original had 14 counts to it. We now have 17 counts. And there are—simple mathematics, there are new charges in the First Amended Accusation, although the underlying facts are the same.
>
> That's not what the Code says. The code says, "New charges," if I remember reading the Code correctly.
>
> THE COURT: All right.
>
> MR. SALTSMAN: So I would renew the motion to continue.
>
> THE COURT: Ms. Winters?
>
> MS. WINTERS: The three counts that were added were all counts for Business and Professions Code Section 24200.5(b). And they did [not]

> add any new dates or new B-girls. It was merely three counts for exist—that corresponded with existing dates and existing B-girls.
>
> THE COURT: Alternate legal theories, in other words?
>
> MS. WINTERS: Yes.
>
> THE COURT: Mr. Saltsman?
>
> MR. SALTSMAN: New charges.
>
> THE COURT: All right. Looking at the dates in the jurisdictional package, the Notice of Hearing went out October 13, setting today's date. The First Amended Accusation went out October 27th. So even though it—that went out after this Hearing date was set, there's still an entire month plus a few days to get ready for this Hearing, for you [to] get ready for this Hearing, Mr. Saltsman.
>
> And a hearing can be held on a 10 day—as little as 10 days' notice. I think over 30 days is sufficient, given that there are no new facts here, simply alternate theories. So I'm going to make the same ruling Judge Lewis made in the telephone conference and deny the motion.

(RT, vol. I, at pp. 10-11.)

Notably, counsel for appellants conceded the "new charges" emerged from the same underlying facts. (RT, vol. I, at p. 10.) The ALJ took this into account and found "there are no new facts here, simply alternate theories." (RT, vol. I, at p. 11.) He could have ended his analysis there and found that there were no "new charges" triggering section 11507. Nevertheless, he continued to the second part of the analysis and concluded that, in light of the shared facts and the quantity of time between the filing of the amended accusation and the administrative hearing, appellants had sufficient time to prepare. (RT, vol. I, at p. 11.)

We find no error in the ALJ's analysis. As noted above, appellants were not entitled to a continuance simply because an amended accusation was filed. Regardless of whether the added counts were "new charges" or "alternate legal theories" brought under the same facts, appellants had more than thirty days to prepare before the

December 1 hearing date. It was not an abuse of discretion to find that this was a "reasonable opportunity" to prepare a defense.

III

In a "Supplemental Opening Brief," appellants allege the Department's comment procedure, adopted pursuant to its General Order 2016-02, violates the Administrative Procedure Act, constitutes an underground regulation, and encourages illegal ex parte communications. (Supp.App.Br., at pp. 2-15.)

Appellants' Supplemental Opening Brief, however, was not timely—and, in fact, was filed in open defiance of the deadlines imposed by this Board.

Rule 193, governing submission of briefs before this Board, states, in relevant part:

> The opening brief shall be served and filed within fifteen days after the date on the notice issued by the board stating that the record on appeal has been filed with the board. . . . An extension of time within which to file a brief will be granted only upon a showing of good cause.

(Code Regs., tit. 4, § 193(b).)

The rule also does not define "good cause." The California Rules of Court, though not binding on this Board, provide a helpful list of factors to be considered in determining whether good cause exists for a deadline extension. (See Cal. Rules of Ct., Rule 8.63(b).) Notably, under those rules, "[m]ere conclusory statements that more time is needed because of other pressing business will not suffice" to justify an extension. (See Cal. Rules of Ct., Rule 8.63(b)(9).) The factors outlined in the Rules of Court supply a metric for this Board in determining whether good cause exists to extend a briefing deadline.

Under the Code of Civil Procedure, a late brief may nevertheless be considered if the submitting party can show mistake, inadvertence, surprise, or excusable neglect.

(Code Civ. Proc., § 473.) A heavy caseload does not constitute "excusable neglect." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 684-685 [68 Cal.Rptr.2d 228] [rejecting counsel's argument that "the stress admittedly attending modern legal practice [affords] an acceptable excuse for neglect" and finding section 473 was not "intended to provide an avenue for attorneys to escape the consequences of their professional shortcomings by the filing of a simple motion"].)

As with the Rules of Court, this Board is not bound by the Code of Civil Procedure. The policy motivating section 473, however—that litigants should not be permitted to casually flout deadlines—applies equally to proceedings before this Board.

In this case, appellants' Opening Brief was due on February 2, 2017. On January 30, 2017, counsel for appellants requested a two-week extension of the briefing deadline. (Email from Melissa H. Gelbart, App. counsel, to Liliana Chavez-Cardona and Kerry K. Winters, Jan. 30, 2017 [hereinafter "Appellants' Extension Request"].) Counsel for appellants stated she was unable to meet the briefing deadline "due to hearings and other work." (*Ibid.*) Counsel did not specify what the "other work" entailed, or why it prevented her from filing a timely brief in the present case.

Later that day, counsel for the Department responded by opposing the request. (Email from Kerry K. Winters, Dept. counsel, to Liliana Chavez-Cardona and Melissa H. Gelbart, Jan. 30, 2017.) Counsel for the Department noted that an extension of briefing deadlines would conflict with her planned vacation. (See *ibid.*; see also Cal. Rules of Ct. Rule 8.63(b)(9) [permitting consideration of "[i]llness of counsel, a personal emergency, or a planned vacation that counsel did not reasonably expect to conflict with the due date and cannot reasonably rearrange"].)

This Board denied the extension request. (Email from Liliana Chavez-Cardona, SSA, Alcoholic Bev. Control Appeals Bd., to Kerry K. Winters and Melissa H. Gelbart, Jan. 30, 2017.) Appellants' brief was therefore due on or before February 2, 2017. (*Ibid.*)

On February 2, 2017, appellants timely filed their opening brief. (See App.Br.) However, eleven days later, on February 13, 2017—well after their briefing deadline—appellants filed a second "Supplemental Opening Brief." This document was not timely, and counsel for appellants did not seek this Board's leave to supplement the earlier Opening Brief. Furthermore, counsel did not allege—let alone establish—mistake, inadvertence, surprise, or excusable neglect justifying the late filing. Finally, the Supplemental Opening Brief raised the issue of the Department's comment procedure, which was not raised in the earlier, timely Opening Brief. (See generally App.Br.)

On February 14, 2017, counsel for the Department filed a request to strike appellant's Supplemental Opening Brief. (See Letter from Kerry K. Winters, Dept. counsel, to Chairman Rice & Board Members, Feb. 14, 2017.) Counsel for the Department noted that there was no explanation as to why the comment procedure issue was not raised in appellants' opening brief. (*Ibid.*) As counsel for the Department observed:

> The supplemental brief is nothing more than appellant's [*sic*] counsel granting herself an extension. The issue raised in the supplemental brief could have been raised in the opening brief. In fact, this issue has been raised in another brief filed by this law firm,[fn.] therefore, counsel was not required to create an argument from scratch. Counsel could have simply cut and pasted the argument from the other brief into the opening brief.
>
> This Board should not consider the issue raised in the supplemental brief. Counsel was denied an extension and if this Board addresses this issue, it will merely encourage appellant's counsel to disregard future orders of the Board and file a brief on her own schedule.

(*Ibid*.)

On February 16, 2017, counsel for appellants responded that the Supplemental Brief was necessary because the Department had initially omitted comments from the administrative record:

> On February 2, 2017, I timely filed Appellant's [*sic*] Opening Brief based on the administrative record I had before me, which did not include any comments submitted to the Director. At the time of filing, it was thus unknown whether any comments had been transmitted to the Director for her consideration, and to make any arguments based on that assumption would have been wholly speculative.

(Letter from Melissa H. Gelbart to Board and Counsel, Feb. 16, 2017.)

The record, however, shows that counsel was very much aware of both the existence and content of comments when she filed appellants' Opening Brief on February 2. First, Counsel herself informed the Board of the omission of comments from the administrative record on January 30, 2017 and moved to augment the record. (See Motion to Augment, Jan. 30, 2017.) The same day, the Department submitted an amended file transcript that included the comments. (See Amended File Transcript.) Moreover, the only comments submitted were from appellants themselves, through another attorney in the same firm.[10] Appellants' comments, submitted April 18, 2016, specifically attacked the Department's comment procedure in an argument very similar to that presented in appellants' Supplemental Brief. (Compare Motion to Augment, Attach. 2, Comments to the Director re Proposed Decision, with App.Supp.Br.) On January 30—the same day counsel requested a briefing deadline extension—counsel was indisputably aware of both the existence of comments and the comment procedure issue. There can be no doubt that she was aware of them three days later, on February 2, when she filed appellants' opening brief.

10. The Department filed no comments in this case. Had it done so, appellants would already have received notice and a copy of those comments as well.

Nevertheless, counsel failed to mention either the comments or comment procedure issue as justification for either the extension request or the Supplemental Brief. To raise that argument now as a defense to having ignored the Board's briefing deadlines is disingenuous, to say the least. If counsel for appellants legitimately felt that the initial omission of appellants' comments from the administrative record impaired her ability to make an argument on behalf of her clients and therefore required either an extension or a supplemental brief, then counsel could have notified the Board and argued good cause. Instead, counsel's request for an extension noted only that she could not complete the brief "due to hearings and other work." (Appellants' Extension Request, *supra*.) Similarly, counsel filed appellants' Supplemental Opening Brief without alleging "mistake, inadvertence, surprise, or excusable neglect" (see Code Civ. Proc., § 473) or any other justification whatsoever for its untimeliness, and without first requesting the Board's leave to submit it.

Briefing deadlines and procedures exist to ensure due process for all parties; we will not countenance their manipulation or casual defiance. We therefore strike appellants' Supplemental Brief and decline to address the comment procedure issue in this case.

ORDER

The decision of the Department is affirmed.[11]

BAXTER RICE, CHAIRMAN
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.