

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

AB-9724

File: 48-432424 Reg: 17086153

EL DESIERTO, INC.,
dba The Tenampa Inn
4522 West 1st Street,
Santa Ana, CA 92703,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: January 10, 2019
Ontario, CA

ISSUED FEBRUARY 7, 2019

Appearances: *Appellant:* Rick A. Blake, of Blake & Ayaz, as counsel for El Desierto, Inc., doing business as The Tenampa Inn.
Respondent: Kerry K. Winters as counsel for the Department of Alcoholic Beverage Control.

OPINION

El Desierto, Inc., doing business as The Tenampa Inn (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking its license, with revocation conditionally stayed for a period of three years provided no grounds for disciplinary action arise during that time, and concurrently suspending its license for 40 days because it employed or permitted individuals to engage in solicitation activity at the licensed premises in violation of Business and Professions Code section 24200.5(b) and section 25657(a) and (b).

1. The decision of the Department, dated June 21, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on November 7, 2006. Appellant has no record of prior disciplinary action.

On November 20, 2017, the Department filed a 16-count accusation against appellant. Counts 1, 4, 8, 11, and 14 alleged that appellant employed various individuals "for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or paid such person a percentage or commission" for so doing, a violation of Business and Professions Code section 25657(a). Counts 2, 5, 9, 12, and 15 alleged appellant employed or knowingly permitted various individuals "to loiter in or about [the licensed] premises for the purpose of begging or soliciting patrons or customers in such premises to purchase alcoholic beverages" for them, a violation of Business and Professions Code section 25657(b). Counts 3, 6, 10, 13, and 16 alleged appellant's agent or employee permitted various individuals "to solicit or encourage others, directly or indirectly, to buy her drinks . . . under a commission, percentage, salary or other profit-sharing plan, scheme or conspiracy" in violation of Business and Professions Code section 24200.5(b). Count 7 alleged appellant's agent or employee permitted another employee to solicit a drink for her own consumption, in violation of rule 143.

At the administrative hearing held on March 27, 2018, documentary evidence was received, and testimony concerning the sale was presented by Agents Eric Silva, Danny Vergara, and Bryan Rushing of the Department of Alcoholic Beverage Control. Appellant presented no witnesses.

Testimony established that Department agents visited the licensed premises on four separate dates.

Counts 1-7

On February 3, 2017, Agents Silva and Vergara entered the licensed premises in an undercover capacity. The agents observed a long, fixed bar on the west side of the premises, two pool tables at the south of the premises, and high bar tables with stools for seating. The agents sat down at the fixed bar. The agents observed Marina De Leon Topete (hereinafter referred to as "bartender Topete") performing normal bartending duties, including, but not limited to, taking orders, ringing up the orders on the cash register, placing beers on the fixed bar countertop, providing napkins, collecting money, providing change from the cash register, and clearing empties.

A female waitress approached the agents at the bar and identified herself as Rosie. Rosie asked Agent Silva what he wanted to drink. Agent Silva ordered a bottle of Coors Light beer. Rosie informed Agent Silva the beer would cost him \$10. Agent Silva was surprised to learn the beer cost \$10 because he felt that was a lot of money for a domestic brand of beer. Agent Silva turned to Agent Vergara and asked him what he wanted. Agent Vergara said that he wanted a 12 ounce bottle of Bud Light beer. Agent Silva told Rosie what Agent Vergara wanted. Rosie advised Agent Silva that if he wanted to buy her a beer the total cost would be \$30. Agent Silva agreed to buy Rosie a beer.

Rosie then walked to the service station of the fixed bar, which was a little to the right of where the agents were seated (approximately 15 feet from where Agent Vergara sat), and had a private conversation with bartender Topete. The agents observed bartender Topete and Rosie conversing and then saw bartender Topete turn around, retrieve the agents' drink orders from the coolers behind the bar, remove the bottle

caps, and place the beers on the counter. Rosie picked up the two beer bottles and brought them to the agents, inquired if they wanted limes, provided the agents napkins, and asked Agent Silva for \$30. Agent Silva gave Rosie two \$20 bills, which she took and returned to the service station. Agent Silva saw Rosie hand money to bartender Topete; he did not see how much money was given. Agent Silva observed bartender Topete place money into the cash register, provide change to Rosie, and retrieve a seven-ounce Bud Light beer, which she handed to Rosie. Rosie brought the seven-ounce Bud Light beer with her and sat with the agents, giving Agent Silva \$10 in change. Rosie drank from the seven-ounce beer bottle as she continued in casual conversation with Agent Silva.

Agent Vergara was then approached by Justina Marin, who ran her hand up Agent Vergara's thigh and asked if he wanted another beer. Agent Vergara agreed. Justina walked to the same service station at the fixed bar where Rosie had gone earlier. Justina exchanged words with bartender Topete, who gave Justina a 12-ounce Bud Light beer bottle, which Justina brought back to Agent Vergara. Justina did not charge Agent Vergara for the beer at that time, but engaged in conversation with him. Approximately 15 minutes later, Justina asked Agent Vergara if he wanted another beer, to which he agreed. Justina then asked if she could have a beer as well. Agent Vergara agreed to buy her a beer. Justina walked back to the service station and spoke with bartender Topete, who gave her a 12-ounce bottle of Bud Light beer along with a seven-ounce bottle of Bud Light beer. Justina returned with both beers to where Agent Vergara was seated. Agent Vergara handed Justina \$20. Justina looked at Agent Vergara, told him that would be enough money, and continued conversing with him as

she consumed her beer. Agent Vergara did not receive any change from the \$20 he gave to Justina.

While Agent Vergara was in conversation with Justina, Agent Silva spoke with Rosie. Both Agents Vergara and Silva are certified Spanish speakers. Agent Silva noticed Rosie had a slight accent, as if Spanish was not her primary language, so he asked her if she spoke English. She said she did. They spoke English thereafter. Agent Silva asked Rosie how long she had been working at the premises, to which she replied that it was only her second night working there. Rosie explained that she had a day job but needed another job, so she walked into the licensed premises seeking employment and the manager hired her to work Friday and Saturday nights. Agent Silva and Rosie continued in conversation.

At some point Rosie asked Agent Silva if he wanted another drink. Agent Silva ordered a Coors Light beer, for which she charged him \$10. Agent Silva gave Rosie \$20, which she took to the service station. At the service station, Rosie spoke with bartender Topete. Agent Silva observed Rosie and bartender Topete talking, and thought it odd that while they talked they looked at him, similar to two people gossiping about another while looking at that third person about whom they are gossiping. Bartender Topete took possession of the money Rosie handed to her, placed the money in the cash register, made change, which she gave to Rosie, and retrieved a 12-ounce Coors Light beer. Rosie took the beer and brought it to Agent Silva. As soon as Rosie placed the \$10 on the counter in front of Agent Silva, Justina leaned over and said to Agent Silva, "Why don't you take those [sic] \$10 and get her [referring to Rosie] another drink?" Agent Silva then turned to Rosie, who told Agent Silva if he was going

to buy her a beer it would cost \$10. Agent Silva laughed and agreed to buy her the beer, handing to Rosie the \$10 that was on the counter in front of him. Rosie approached the service station at the fixed bar, placed an order with bartender Topete, and handed the bartender the \$10. Bartender Topete turned and placed the \$10 into the cash register and made change, which she handed to Rosie. Agent Vergara saw that the change bartender Topete handed to Rosie was \$5. Both agents watched as Rosie placed the \$5 in a small purse wrapped around her wrist. Bartender Topete gave Rosie a seven-ounce Bud Light beer bottle, which Rosie brought back with her to Agent Silva's position, and engaged him in further conversation. Rosie did not give any change to Agent Silva. After some time, additional customers entered the licensed premises and Rosie excused herself to attend to the other customers. Rosie served those other customers and sat with them.

Counts 8-10

On February 24, 2017, Agents Silva and Vergara returned in an undercover capacity to the licensed premises and entered. The licensed premises appeared unchanged to Agent Silva. The agents had planned to sit at the fixed bar, but there were patrons seated about the fixed bar. The agents took a seat at a high table directly across from the fixed bar. A female waitress approached the agents and took their drink order of a bucket of Coors Light beer for \$25, which included a bucket of ice and six beers. The waitress served the agents their bucket of beers. Agent Silva recognized Rosie seated with a male patron at the north end of the fixed bar, directly to the agents' right. Agent Silva saw that Rosie was drinking a seven-ounce bottle of Bud Light beer and engaging in conversation with the male patron. At some point Rosie stood up,

walked to the service station, and placed an order for additional beverages, which she brought back and handed to the male patron.

Later, Rosie approached the agents' table, pulled up a chair, and sat with them. As they talked, Agent Silva pointed out the bucket of beer to Rosie and asked if she wanted one of their beers. Rosie explained that she had been reprimanded in the past by the manager, who prohibited her from drinking any other alcoholic beverages than the seven-ounce bottles of Bud Light beer. Thereafter, Rosie kept staring at Agent Silva, who then asked, "Well are you just going to watch us drink?" Rosie replied, "Well are you going to buy me one?" Agent Silva asked how much a beer for her would cost him, to which she replied, "I'm charging \$10 for my beer." Agent Silva agreed to buy her a beer and handed her \$20, which she took and walked to the service station of the fixed bar. Rosie handed the \$20 to the on-duty bartender, who placed the money in the cash register, made change, and handed the change along with a seven-ounce bottle of Bud Light beer to Rosie. Rosie brought the seven-ounce beer back with her and sat next to Agent Silva, handing him \$10 in change. Agent Silva and Rosie engaged in casual conversation.

At some point, other customers entered the licensed premises and Rosie excused herself to attend to them. Agent Silva observed as Rosie greeted those customers, took their drink orders, walked to the fixed bar, placed the orders, took possession of the drinks the bartender gave her, and brought them back to the customers along with napkins. Agent Silva noticed that along with the drinks she brought to the table was a seven-ounce bottle of Bud Light beer for herself, from which she took an occasional sip. Rosie never returned that night to the agents' table, at which

she had left the seven-ounce bottle of Bud Light beer Agent Silva had purchased for her.

Counts 11-13

On March 24, 2017, Agents Silva and Vergara returned to and entered the licensed premises in an undercover capacity with Department Agent Plotnik. The agents walked directly to the fixed bar and sat at the bar. The agents observed bartender Topete performing bartending duties behind the bar.

At some point a female, later identified as "Betty," approached Agent Vergara while he was seated at the fixed bar. Betty asked the agents if they wanted something to drink. Agent Vergara said he wanted a Bud Light beer and Agents Silva and Plotnik said they would like Coors Light beers. Betty told the agents if they bought a bucket of beer it would be cheaper, which the agents declined. Betty then walked to the service station of the fixed bar, where bartender Topete rang up the beers on the register. Betty removed money from her bra and paid the bartender for the beers. Betty then brought the beers to the agents and Agent Silva paid her for them.

Shortly thereafter, Agents Silva and Vergara saw Rosie enter the licensed premises, walk behind the fixed bar, perform something behind the bar, and speak to bartender Topete. Rosie then walked around to the patron side of the bar counter and engaged Agent Silva in conversation.

Betty conversed with Agent Vergara and at one point asked if the agents wanted a round of beers. Agent Silva declined, but Agents Plotnik and Vergara assented to another round of beers. Betty then walked to the bar service station and exchanged words with bartender Topete, who gave her a 12-ounce bottle of Coors Light and a 12-

ounce bottle of Bud Light. Betty retrieved money from her bra and paid the bartender for the beers. Betty then brought the beers to the agents and asked Agent Vergara, "Will you get me one too?" Agent Vergara agreed to buy Betty a beer. Betty walked back to the service station of the bar and spoke to bartender Topete, who gave Betty a seven-ounce bottle of Bud Light beer. Betty retrieved money from her bra and paid the bartender for the beer. Betty returned to the agents, and Agent Vergara handed her a \$20 bill, which Betty accepted without providing any change back to Agent Vergara. Agent Vergara asked, "Yours was \$10 right?" to which Betty acknowledged that her seven-ounce Bud Light beer cost \$10.

Counts 14-16

On April 20, 2017, Agents Silva and Vergara returned to the licensed premises and entered in an undercover capacity. The agents sat at the fixed bar, behind which worked bartender Topete. A female, later identified as Nohemy Marin Cruz, approached the agents and asked if they wanted drinks. The agents told Nohemy they wanted a Bud Light beer and a Coors Light beer. Nohemy walked to the service station at the fixed bar and exchanged words with bartender Topete, who gave Nohemy a 12-ounce bottle of Bud Light beer and a 12-ounce bottle of Coors Light beer. Bartender Topete rang up the two beers on the cash register. Nohemy returned to the agents' table, gave them their beers, and told Agent Vergara that their beers cost \$4 each.

Approximately 15 minutes later, around 9:15 p.m., Nohemy asked if the agents were ready for another round of beers, to which they said they were. Nohemy then asked, "How about one for me?" Agent Vergara agreed to buy Nohemy a beer. Nohemy walked to the waitress service station at the fixed bar and talked to bartender Topete.

Agent Vergara was seated approximately 10 to 15 feet from the waitress service station at which Nohemy stood while speaking to bartender Topete. Agent Vergara could overhear their conversation. He heard Nohemy tell bartender Topete what the agents wanted to drink, while pointing toward the agents, and then added "and one for me," which she said in Spanish. Nohemy did not specify what she wanted. Bartender Topete retrieved a seven-ounce bottle of Bud Light beer for Nohemy and handed it to her, along with the agents' beers. Bartender Topete rang up the beers, for which Nohemy paid. Nohemy then returned to the agents with their beers and her seven-ounce Bud Light beer. When Nohemy said nothing about the cost of the beers, Agent Vergara thanked her for buying their beers for them. Nohemy laughed and said, "No, you owe me \$18." She then broke down the cost of the beers, explaining the agents' beers cost \$4 each and her seven-ounce Bud Light beer cost \$10. Agent Vergara handed \$20 to Nohemy, who made change from her bra and handed Agent Vergara two single dollar bills as change.

At some later point, the Department entry team entered the licensed premises wearing their police attire and identified themselves as police officers. When the entry team entered, Nohemy, while seated next to Agent Vergara, pushed her seven-ounce Bud Light beer away from her, toward the bartender area, and said, "If anyone asks, say it's someone else's."

Department Agent Bryan Rushing was part of the entry team. His assignment was evidence collection. Agent Rushing walked behind the fixed bar and inspected the surrounding area. He found loose order slips near the cash register behind the bar, and a pad or order slips next to the cash register, which he confiscated. Agent Rushing

brought two loose order slips and the pad of order slips back to the district office where he booked them into evidence.

After the hearing, the Department issued a decision determining that counts 1, 2, 3, 5, 6, 8, 9, 10, 12, 13, 15, and 16 were proved and no defense was established. Counts 4, 11, and 14, all alleging violations of Business and Professions Code section 25657(a), and count 7, alleging a violation of rule 143, were dismissed because there was "insufficient evidence to establish that Justina Marin, Betty, and Nohemy Marin Cruz were employed by" appellant.

Appellant then filed this appeal contending (1) The evidence does not support the findings, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the evidence does not support the findings in the decision below. (App.Br., at p. 2.) Appellant argues the Department failed to establish that bartender Topete was aware of any scheme to solicit alcoholic beverages, and failed to "question the bartender on duty as to whether the suspected solicitors of alcohol were employees of the licensed premises or customers." (*Ibid.*) Appellant claims the agents' testimony was lacking in that "[a]t no time in the testimony could [A]gent Silva or Vergara state they saw the amounts of money exchanged between the presumed employees" and bartender Topete. (*Id.* at p. 3.) Moreover, appellant contends the agents heard no conversation between the purported employees and bartender Topete beyond "and one for me," which, according to appellant, "does not amount to a scheme to solicit alcohol." (*Ibid.*) Finally, appellant contends the ALJ ignored evidence, including

Cruz's statement to agents that she was not an employee of the licensed premises.

(Ibid.)

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

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

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) Where there are conflicts in the evidence, the Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences in support of the Department's findings. *(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)*

Section 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.

(Bus. & Prof. Code, § 25657.) Additionally, section 24200.5(b) provides:

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).)

Counts 1, 2, 3 8, 9, and 10—the surviving counts based on the conduct of waitress Rosie—are proved if the Department can establish that Rosie was an employee of the licensed premises and solicited drinks. (See Bus. & Prof. Code, §§ 24200.5(b), 25657(a) and (b).) With regard to Rosie's employment, the ALJ provided the following reasoning:

The evidence clearly established that Respondent employed Rosie as a waitress, and Marina De Leon Topete as a bartender along with the other unidentified bartender at the Licensed Premises. Respondent's argument otherwise is rejected. Waitress Rosie was there on a regular basis, went behind the bar, attended to customers, took orders from patrons, approached the service station to place drink orders with the bartenders, delivered drinks and napkins to patrons, and otherwise performed waitressing duties. Rosie even acknowledged to Agent Silva that Friday, February 3, 2017, was her second night of employment, with the Licensed Premises manager hiring her to work Friday and Saturday nights. Bartender Topete as well as the unidentified bartender performed bartending duties, working behind the bar, clearing empties, receiving orders, ringing up orders on the cash register, receiving money and providing change and alcoholic beverages to the females who approached

the service station. As employees, waitress Rosie and the bartenders' actions and knowledge are imputed to the Respondent.

(Conclusions of Law, ¶ 8.)

Despite appellant's suggestion to the contrary, the conclusion that Rosie was an employee was not based solely on her hearsay statement claiming as much. In fact, as described in the ALJ's conclusion, the agents testified in detail regarding the waitressing tasks Rosie performed. (See, e.g., RT at pp. 9-10 [taking drink orders]; RT at pp. 11, 15, 20, 28, 32 [approaching service station to communicate orders to bartender]; RT at p. 11, 20 [providing limes and napkins]; RT at pp. 11-12, 15, 20 [making change with bartender]; RT at p. 20 [greeting and performing waitressing tasks for other customers].) A mere customer would not perform these tasks.

Notably, appellant lodged no hearsay objection to Rosie's purported statement that she was employed by the licensed premises. (See RT at p. 14.) Any argument that it was inadmissible or insufficient to support a finding is therefore waived, and her statement is admissible regardless of corroboration. (See Gov. Code, § 11513(d).) Rosie's claim of employment, however, is indeed corroborated by the uncontradicted testimony of Agents Silva and Vergara describing the waitressing tasks she performed. The evidence therefore supports the ALJ's conclusion that Rosie was an employee of the licensed premises.

Appellant's assertion that the Department agents should have asked the bartenders if Rosie was an employee is absurd. (See App.Br., at p. 2.) If the bartenders were participating in a solicitation scheme as alleged, they would have a clear incentive to lie. No such inquiry is required, particularly where, as here, the weight of the independent evidence establishes Rosie was indeed an employee.

Appellant appears to concede that both Rosie and the other women engaged in solicitation activity. (See generally App.Br.) It was therefore established that Rosie was employed by the licensed premises for the purpose of soliciting drinks. This is sufficient to prove a violation of section 25657(a) and (b). We therefore affirm counts 1, 2, 8, and 9.

Counts 3 and 10 require an additional showing of payment under a "commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy." On that point, the ALJ provided the following analysis:

Furthermore, evidence of a scheme and commission paid is found in the agents' testimony that when they purchased their larger 12 ounce beers, for the price of \$4 each (or \$10 from Rosie on February 3, 2017), each of the soliciting females' \$10 charge for their smaller, seven-ounce Bud Light beers strongly suggests a scheme and commission between the soliciting females and the bartenders. It is not a coincidence that each female charged \$10 for their seven ounce Bud Light beer. On February 3 and 24, 2017, Rosie informed Agent Silva of the \$10 charge for her seven ounce beers. On March 24, 2017, Betty acknowledged to agent Vergara that her seven ounce beer cost \$10. On April 20, 2017, Nohemy Marin Cruz broke down for Agent Vergara the cost of the beers, explaining the agents' beers cost \$4 each and her seven ounce Bud Light beer cost \$10.

(Conclusions of Law, ¶ 10.) Appellant provided no witnesses or other evidence to counter the Department's showing, based on the agents' testimony, of a commission or payment scheme. With regard to Rosie, who was established to be an employee of the licensed premises, this is sufficient to prove a violation of section 24200.5(b). (See Bus. & Prof. Code, § 24200.5(b).) In Rosie's case, the separate knowledge of the bartenders need not be proven. (See *ibid.*) We therefore affirm counts 3 and 10.

The ALJ, however, found that with regard to Justina, Betty, and Nohemy, the Department had *not* proven they were employed by the licensed premises. (See Conclusions of Law, ¶ 12 [dismissing counts 4, 7, 11, and 14].) While the evidence of a

payment or commission scheme described above applies equally to each of the counts addressing the conduct of those three women, in order to establish the remaining counts the Department must also prove that appellant's agent or employee—namely, its bartender—permitted the women to solicit drinks as part of that scheme. (See Bus. & Prof. Code, §§ 25657(b) and 24200.)

On that issue, the ALJ provided the following reasoning:

Respondent's argument the bartenders were unaware of solicitations, commissions paid or would not know the conversation or what dollar amount was exchanged between the females and the agents is rejected. The bartenders' knowledge of the females' loitering, solicitation, and commissions paid is apparent when the bartenders produced only seven ounce Bud Light beers to each female, as discussed above. There was no attempt by the females to hide their loitering, solicitation or commissioned scheme; it was open and obvious. All of the solicitations took place either at the fixed bar (on February 3, March 24, and April 20, 2017) or directly across from the fixed bar at a high table (on February 24, 2017). On the respective nights each of the women were seated or standing with the agents (with Rosie also observed seated with other male patrons), engaged in conversation and drinking a seven ounce bottle of Bud Light beer. On each night all of the females knew, after each solicitation, to walk to the service station to get a seven ounce Bud Light beer from the on-duty bartender, for which they all charged the agents \$10 and retained a commission. From the totality of the circumstances, it is apparent that the scheme included the females asking for and collecting the commissions from the agents, with the bartenders' knowledge and express awareness thereof. Betty and Nohemy were each observed carrying money in their bras, from which they paid the bartender and kept their commissions. Agent Vergara credibly testified from his experience in drink solicitation cases, it was not uncommon to see the soliciting women carrying, what is known as a "bank" on their person, from which the female paid the bartender for the beers and thereafter asked payment from the agents. On April 20, 2017, as part of the entry team inspection, Agent Rushing found bar slips behind the bar, where the bartenders worked. All of the slips had Nohemy's name hand-written thereon and two with "1 Chiquita" written next to her name. (Exhibits 2a, 2b, and 2c.) This strongly suggests the bartenders were keeping track of the scheme and were knowingly permitting Nohemy to loiter to solicit patrons with commissions paid. Nohemy's pushing of her seven ounce Bud Light beer away from her along with her statement, "If anyone asks, say it's someone else's," further suggests her part in the scheme and knowledge that her loitering and

solicitations are illegal; she would have no other reason to be concerned when the police enter. Furthermore, bartender Topete was aware of the scheme and solicitations by her payment of commission to Rosie. On February 3, 2017, Agent Vergara watched bartender Topete give Rosie a \$5 commission for Rosie's beer solicitation of Agent Silva, despite bartender Topete not knowing the conversation between the agent and Rosie. Both agents then watched as Rosie placed the \$5 commission in her small purse, which she kept on her person.

(Conclusions of Law, ¶ 11.)

Appellant's objections to this reasoning center on the claim that the agents "could not testify as to seeing the amounts of money being exchanged, nor hearing of any scheme to solicit the sale of alcohol between the presumed employees and the licensed premises." (App.Br., at p. 2.) Additionally, appellant claims that "[a]t no time in the testimony could agent Silva or Vergara state they saw the amounts of money exchanged between the presumed employees and the bartender." (App.Br., at p. 3.)

While an overheard conversation discussing the payment scheme is certainly one means by which to prove the bartender's knowledge, it is not the only means. In this case, evidence of the bartender providing smaller seven-ounce bottles to the women, the bartender accepting orders from the women and providing change, from which the women pocketed a commission within the bartender's view, and the discovery of slips apparently recording Nohemy's solicitations, is sufficient to establish by a preponderance of the evidence that the bartenders knowingly permitted each of the women to solicit drinks and to loiter on the licensed premises for the purpose of doing so.

The ALJ reviewed the evidence in detail and inferred, based on a totality of the circumstances, that the bartenders were aware of the solicitation scheme. (Conclusions

of Law, ¶ 11.) This inference was reasonable. We therefore affirm counts 5, 6, 12, 13, 15, and 16.

II

Appellant contends a penalty of stayed revocation "exceeds the Penalty Guidelines" referenced in rule 144. (App.Br., at p. 3; see also Code Regs., tit. 4, § 144, Penalty Guidelines.) Appellant further argues the ALJ "failed to consider the mitigating circumstances" outlined in rule 144, including appellant's disciplinary history. (*Ibid.*) According to appellant, "revocation stayed with a 20-day suspension . . . is [a] more appropriate means of punishment to an establishment with over a decade of an immaculate record." (*Ibid.*)

The Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]) However, it will not disturb the Department's penalty order absent an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd.* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides penalty guidelines for Department discipline. That rule provides, in relevant part:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act [citation] and the Administrative Procedures Act

[citation], the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such a deviation—such as where facts in aggravation or mitigation exist.

(Code Regs., tit. 4, § 144, emphasis added.) The referenced penalty guidelines in turn state:

POLICY STATEMENT

It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.

PENALTY POLICY GUIDELINES

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

Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

(Code Regs., tit. 4, § 144, Penalty Guidelines, emphasis added.) Like the rule itself, the plain language of the penalty guidelines unequivocally entrusts the penalty to the Department's discretion. Moreover, the guidelines specifically permit the Department to impose a greater penalty if it finds such a penalty is warranted in light of aggravating circumstances.

For the violations at issue here, the recommended penalties are as follows:

Illegal Solicitation of Alcoholic Beverages:

Violation of Section 24200.5(b)	Revocation
Violation of Section 25657(a)	Revocation
Violation of Section 25657(b) and Section 303a PC	30 day suspension To revocation

(*Ibid.*, Penalty Guidelines.) Moreover, in the case of a violation of section 24200.5(b), the statutory language *mandates* revocation. (See Bus. & Prof. Code, § 24200.5(b) ["The department *shall* revoke a license upon any of the following grounds . . ."].)

The assigned penalty—revocation conditionally stayed for three years with a concurrent 40-day suspension—falls within these guidelines.

The record establishes that the ALJ did indeed consider appellant's disciplinary history in assigning the penalty:

The Department requested the Respondent's license be revoked, with revocation stayed for three years and a 45-day suspension. The Department based its recommendation on a number of factors, including, but not limited to Respondent's lack of evidence of any positive action taken to correct the problems, the severity of the violations, to ensure they do not occur again, and the fact the violations were open, obvious and spread out over several months with the Respondent's full knowledge.

The Respondent recommended no revocation with a 20 day suspension or some reduced suspension other than 45 days, based on Respondent's discipline-free history since November 7, 2006 (approximately 10 years and three months to February 3, 2017).

Rule 144 provides for a penalty ranging from a 30-day suspension up to revocation for a violation of section 25657(b). Sections 25657(a) and 24200.5(b), on the other hand, mandate a penalty of revocation for any violation of their provisions. This mandate is satisfied, however, by a stayed revocation as well as an outright revocation. In line with the penalty guidelines of rule 144 and considering the argued aggravating and mitigating factors, the penalty recommended herein complies with rule 144.

(Penalty.)

While appellant's discipline-free history is laudable and appears to have spared it from outright revocation, it cannot escape a period of suspension appropriate for the open and egregious nature of its present violations. We find the penalty is reasonable and does not constitute an abuse of discretion.

ORDER

The decision of the Department is affirmed.²

MEGAN MCGUINNESS, ACTING CHAIR
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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

APPENDIX

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

IN THE MATTER OF THE ACCUSATION
AGAINST:

EL DESIERTO INC
TENAMPA INN THE
4522 W 1ST ST
SANTA ANA, CA 92703

ON-SALE GENERAL PUBLIC PREMISES -
LICENSE

SANTA ANA DISTRICT OFFICE
2018 SEP 14 PM 2:17
RECEIVED
ABC APPEALS BOARD
File: 48-43242
Reg: 17086153
AB: 9724

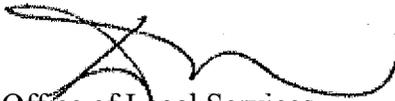
Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on August 31, 2018, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

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

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

EL DESIERTO, INC.
THE TENAMPA INN
4522 WEST 1ST STREET
SANTA ANA, CA 92703

ON-SALE GENERAL PUBLIC PREMISES
LICENSE

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

SANTA ANA DISTRICT OFFICE

File: 48-432424

Reg: 17086153

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after August 1, 2018, a representative of the Department will contact you to arrange to pick-up the license.

Sacramento, California

Dated: June 21, 2018

RECEIVED

JUN 21 2018

**Alcoholic Beverage Control
Office of Legal Services**



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

El Desierto, Inc.	}	File: 48-432424
Db: The Tenampa Inn	}	
4522 West 1 st Street	}	Reg.: 17086153
Santa Ana, California 92703	}	
	}	License Type: 48
Respondent	}	
	}	Word Count: 12,615
	}	
	}	Reporter:
	}	Marie Sanchez
	}	Kennedy Court Reporters
	}	
<u>On-Sale General Public Premises License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on March 27, 2018.

Kerry K. Winters, Attorney, represented the Department of Alcoholic Beverage Control.

Rick A. Blake, Attorney, represented Respondent, El Desierto, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on various dates. Respondent:

- (1) employed or permitted individuals to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under a commission, percentage, salary, or other profit-sharing plan, scheme or conspiracy in violation of California Business and Professions Code section 24200.5(b);¹
- (2) employed upon the licensed premises individuals for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or paid such individuals a percentage or commission for procuring or encouraging the purchase or sale of alcoholic beverages on the licensed premises in violation of section 25657(a); and
- (3) employed or knowingly permitted individuals to loiter in or about the licensed premises for the purpose of begging or soliciting patrons or customers to purchase alcoholic beverages for them in violation of section 25657(b).

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

The Department further seeks to discipline the Respondent's license on the grounds that, on February 3, 2017, the Respondent's agent or employee, Marina De Leon Topete, permitted Justina Marin, an employee, to solicit upon the licensed premises, the purchase or sale of a drink intended for her consumption, in violation of California Code of Regulations, Title 4, Division 1, Section 143. (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on March 27, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on November 20, 2017.
2. The Department issued a type 48, on-sale general public premises license to the Respondent for the above-described location on November 7, 2006 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.

February 3, 2017 (Counts 1-7)

4. On February 3, 2017, Department Agents Eric Silva and Danny Vergara entered the Licensed Premises in an undercover capacity. The agents observed a long, fixed bar on the west side of the premises, two pool tables at the south of the premises and high bar tables with stools for seating. The agents sat down at the fixed bar. The agents observed Marina De Leon Topete (hereinafter referred to as bartender Topete) performing normal bartending duties, including, but not limited to, taking orders, ringing up the orders on the cash register, placing beers on the fixed bar countertop, providing napkins, collecting money, providing change from the cash register, and clearing empties.

5. A female waitress approached the agents at the bar and identified herself as Rosie (hereinafter waitress Rosie). Waitress Rosie asked Agent Silva what he wanted to drink. Agent Silva ordered a bottle of Coors Light beer. Waitress Rosie informed Agent Silva the beer would cost him \$10. Agent Silva was surprised to learn the beer cost \$10 because he felt that was a lot money for a domestic brand beer.² Agent Silva turned to Agent Vergara and asked him what he wanted. Agent Vergara said that he wanted a 12 ounce bottle of Bud Light beer. Agent Silva told waitress Rosie what Agent Vergara

² Agent Silva had been to the Licensed Premises on January 12, 2017, and ordered a 12 ounce Coors Light beer, for which he was charged \$4 that night.

wanted. Waitress Rosie advised Agent Silva that if he wanted to buy her a beer the total cost would be \$30. Agent Silva agreed to buy waitress Rosie a beer.

6. Waitress Rosie then walked to the service station of the fixed bar, which was a little to the right of where the agents were seated (approximately 15 feet from where Agent Vergara sat), and had a private conversation with bartender Topete. The agents observed bartender Topete and waitress Rosie conversing and then saw bartender Topete turn around, retrieve the agents' drink orders from the coolers behind the bar, remove the bottle caps, and place the beers on the counter. Waitress Rosie picked up the two beer bottles and brought them to the agents, inquired if they wanted limes, provided the agents napkins, and asked Agent Silva for \$30. Agent Silva gave waitress Rosie two 20 dollar bills, which she took and returned to the service station. Agent Silva saw waitress Rosie hand money to bartender Topete; he did not see how much money was given. Agent Silva observed bartender Topete place money into the cash register, provide change to waitress Rosie, and retrieve a seven ounce bottle of Bud Light beer, which she handed to waitress Rosie. Waitress Rosie brought the seven ounce Bud Light beer with her and sat with the agents, giving agent Silva \$10 in change. Waitress Rosie drank from the seven ounce beer bottle as she continued in casual conversation with Agent Silva.

7. Agent Vergara was then approached by Justina Marin, who ran her hand up Agent Vergara's thigh, and asked if he wanted another beer. Agent Vergara agreed. Justina walked to the same service station at the fixed bar where waitress Rosie had gone earlier. Justina exchanged words with bartender Topete, who gave Justina a 12 ounce Bud Light beer bottle, which Justina brought back to Agent Vergara. Justina did not charge Agent Vergara for the beer at that time, but engaged in conversation with him. Approximately 15 minutes later, Justina asked Agent Vergara if he wanted another beer, to which he agreed. Justina then asked if she could have a beer as well. Agent Vergara agreed to buy her a beer. Justina walked back to the service station and spoke with bartender Topete, who gave her a 12 ounce bottle of Bud Light beer along with a seven ounce bottle of Bud Light beer, Justina returned with both beers to where Agent Vergara was seated and he handed Justina \$20, Justina looked at Agent Vergara, told him that would be enough money and continued conversing with him while she consumed her beer. Agent Vergara did not receive any change from the \$20 he had given to Justina.

8. While Agent Vergara was in conversation with Justina, Agent Silva spoke with waitress Rosie. Both Agents Vergara and Silva are certified Spanish speakers. Agent Silva noticed that waitress Rosie had a slight accent, as if Spanish was not her primary language, so he asked her if she spoke English, which she said she did. They spoke English thereafter. Agent Silva asked waitress Rosie how long she had been working at the premises, to which she replied that it was only her second night working there. Waitress Rosie explained that she had a day job but needed another job, so she walked

into the Licensed Premises seeking employment and the manager hired her to work Friday and Saturday nights. Agent Silva and waitress Rosie continued in conversation.

9. Waitress Rosie at some point asked Agent Silva if he wanted another drink. Agent Silva ordered a Coors Light beer, for which she charged him \$10. Agent Silva gave waitress Rosie \$20, which she took to the service station and spoke with bartender Topete. Agent Silva observed waitress Rosie and bartender Topete talking, and, thought it odd that, while they talked they looked at him, similar to two people gossiping about another while looking at that third person about whom they are gossiping. Bartender Topete took possession of the money waitress Rosie handed to her, placed the money in the cash register, made change, which she gave to waitress Rosie, and retrieved a 12 ounce Coors Light beer. Waitress Rosie took the beer and brought it to Agent Silva. As soon as waitress Rosie placed the \$10 on the counter in front of Agent Silva, Justina leaned over and said to Agent Silva, "Why don't you take those [sic] \$10 and get her (referring to waitress Rosie) another drink?" Agent Silva then turned to waitress Rosie, who told Agent Silva if he was going to buy her a beer it would cost \$10. Agent Silva laughed and agreed to buy her the beer, handing to waitress Rosie the \$10 that was on the counter in front of him. Waitress Rosie approached the service station at the fixed bar, placed an order with bartender Topete, and handed the bartender the \$10. Bartender Topete turned and placed the \$10 into the cash register, and made change, which she handed to waitress Rosie. Agent Vergara saw that the change bartender Topete handed to waitress Rosie was \$5. Both agents watched as waitress Rosie placed the \$5 in her small purse wrapped around her wrist. Bartender Topete gave waitress Rosie a seven ounce Bud Light beer bottle, which waitress Rosie brought back with her to Agent Silva's position, and engaged him in further conversation. Waitress Rosie did not give any change to Agent Silva. After some time, additional customers entered the Licensed Premises and waitress Rosie excused herself to attend to the other customers. Waitress Rosie served those customers and sat with them.

February 24, 2017
(Counts 8-10)

10. On February 24, 2017, Agents Silva and Vergara returned in an undercover capacity to the Licensed Premises and entered. The Licensed Premises appeared unchanged to Agent Silva. The agents had planned to sit at the fixed bar, but there were patrons seated about the fixed bar. The agents took a seat at a high table directly across from the fixed bar. A female waitress approached the agents and took their drink order of a bucket of Coors Light beer for \$25, which included a bucket of ice and six beers. The waitress served the agents their bucket of beers. Agent Silva recognized waitress Rosie seated with a male patron at the north end of the fixed bar, directly to the agents' right. Agent Silva saw that waitress Rosie was drinking a seven ounce bottle of Bud Light beer and engaging in conversation with the male patron. At some point waitress Rosie stood up,

walked to the service station, placed an order for additional beverages, which she brought back and handed to the male patron.

11. Later, waitress Rosie approached the agents' table, pulled up a chair and sat with them. As they talked, Agent Silva pointed out the bucket of beer to waitress Rosie and asked if she wanted one of their beers. Waitress Rosie explained that she had been reprimanded in the past by the manager, who prohibited her from drinking any other alcoholic beverages than the seven ounce bottles of Bud Light beer. Thereafter, waitress Rosie kept staring at Agent Silva, who then asked, "Well are you just going to watch us drink?" Waitress Rosie replied, "Well are you going to buy me one?" Agent Silva asked how much a beer for her would cost him, to which she replied, "I'm charging \$10 for my beer." Agent Silva agreed to buy her a beer and handed her \$20, which she took and walked to the service station of the fixed bar. Waitress Rosie handed the \$20 to the on-duty bartender, who placed the money in the cash register, made change and handed the change along with a seven ounce bottle of Bud Light beer to waitress Rosie. Waitress Rosie brought the seven ounce beer back with her and sat next to Agent Silva, handing him \$10 in change. Agent Silva and waitress Rosie engaged in casual conversation.

12. At some point, other customers entered the Licensed Premises and waitress Rosie excused herself to attend to them. Agent Silva observed as waitress Rosie greeted those customers, took their drink orders, walked to the fixed bar, placed the order, took possession of the drinks the bartender gave her, and brought them back to the customers along with napkins. Agent Silva noticed that along with the drinks she brought back to the table was a seven ounce bottle of Bud Light beer for herself, from which she took an occasional sip. Waitress Rosie never returned that night to the agents' table, at which she had left her seven ounce bottle of Bud Light beer Agent Silva had purchased for her.

March 24, 2017
(Counts 11-13)

13. On March 24, 2017, Agents Silva and Vergara returned to and entered the Licensed Premises in an undercover capacity with Department Agent Plotnik. The agents walked directly to the fixed bar and sat at the bar. The agents observed bartender Topete performing bartending duties behind the bar.

14. At some point a female, later identified as Betty, approached Agent Vergara while he was seated at the fixed bar. Betty asked the agents if they wanted something to drink. Agent Vergara said he wanted a Bud Light beer and Agents Silva and Plotnik said they would like Coors Light beers. Betty told the agents if they bought a bucket of beer it would be cheaper, which the agents declined. Betty then walked to the service station of the fixed bar, where bartender Topete rang up the beers on the register. Betty removed

money from her bra and paid the bartender for the beers. Betty then brought the beers to the agents and Agent Silva paid her for them.

15. Shortly thereafter Agents Silva and Vergara saw waitress Rosie enter the Licensed Premises, walk behind the fixed bar, perform something behind the bar, and speak to bartender Topete. Waitress Rosie then walked around to the patron side of the bar counter and engaged Agent Silva in conversation.

16. Betty conversed with Agent Vergara and at one point asked if the agents wanted a round of beers. Agent Silva declined, but Agents Plotnik and Vergara assented to another round of beers. Betty then walked to the bar service station, exchanged words with bartender Topete, who gave her a 12 ounce bottle of Coors Light and a 12 ounce bottle of Bud Light. Betty retrieved money from her bra and paid the bartender for the beers. Betty then brought the beers to the agents and asked agent Vergara, "Will you get me one too?" Agent Vergara agreed to buy Betty a beer. Betty walked back to the service station of the bar, and spoke to bartender Topete, who gave Betty a seven ounce bottle of Bud Light beer. Betty retrieved money from her bra and paid the bartender for the beer. Betty returned to the agents and Agent Vergara handed her a \$20, which Betty accepted without providing any change back to Agent Vergara. Agent Vergara asked, "Yours was \$10 right?" to which Betty acknowledged that her seven ounce Bud Light beer cost \$10.

April 20, 2017
(Counts 14-16)

17. On April 20, 2017, Agents Silva and Vergara returned to the Licensed Premises and entered in an undercover capacity. The agents sat at the fixed bar, behind which worked bartender Topete. A female, who was later identified as Nohemy Marin Cruz,³ approached the agents, and asked if they wanted drinks. The agents told Nohemy they wanted a Bud Light beer and a Coors Light beer. Nohemy walked to the service station at the fixed bar, exchanged words with bartender Topete, who gave Nohemy a 12 ounce bottle of Bud Light beer and a 12 ounce bottle of Coors Light beer. Bartender Topete rang up the two beers on the cash register. Nohemy removed money from her bra and paid bartender Topete for the beers. Nohemy returned to the agents' table, gave them their beers and told Agent Vergara their beers cost \$4 each.

18. Approximately 15 minutes later, around 9:15 p.m., Nohemy asked if the agents were ready for another round of beers, to which they said they were. Nohemy then asked, "How about one for me?" Agent Vergara agreed to buy Nohemy a beer. Nohemy walked to the waitress service station at the fixed bar, and talked to bartender Topete. Agent Vergara was seated approximately 10 to 15 feet from the waitress service station at

³ Nohemy's name was spelled a variety of ways, including Noemi, Nohemy, and Nohemi. However, for consistency with Agent Vergara's testimony and use of Nohemy, the undersigned will spell her name hereinafter as Nohemy.

which Nohemy stood while speaking to bartender Topete. Agent Vergara could overhear their conversation. He heard Nohemy tell bartender Topete what the agents wanted to drink, while pointing toward the agents, and then added, “and one for me,” which she said in Spanish. Nohemy did not specify what she wanted. Bartender Topete retrieved a seven ounce bottle of Bud Light beer for Nohemy and handed the same to Nohemy, along with the agents’ beers. Bartender Topete rang up the beers, for which Nohemy paid. Nohemy then returned to the agents with their beers and her seven ounce Bud Light beer. When Nohemy said nothing about the cost of the beers, Agent Vergara thanked her for buying their beers for them. Nohemy laughed and said, “No, you owe me \$18.” She then broke down the cost of the beers, explaining the agents’ beers cost \$4 each and her seven ounce Bud Light beer cost \$10. Agent Vergara handed \$20 to Nohemy, who made change from her bra and handed Agent Vergara two single dollar bills as change.⁴

19. At some later point, the Department entry team entered the Licensed Premises wearing their police attire and identified themselves as police officers. When the entry team entered, Nohemy, while seated next to Agent Vergara, pushed her seven ounce Bud Light beer away from her, toward the bartender area, and said, “If anyone asks, say it’s someone else’s.”

20. Department Agent Bryan Rushing was part of the entry team. His assignment was evidence collection. Agent Rushing walked behind the fixed bar and inspected the surrounding area. He found loose, order slips near the cash register behind the bar, and a pad of order slips, next to the cash register, which he confiscated. Agent Rushing brought two loose order slips and the pad of order slips back to the district office where he booked them into evidence. (Exhibits 2a-2c.)⁵

21. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

⁴ With the 40 drink solicitation investigations Agent Vergara participated in, it was not uncommon for him to see the soliciting women carrying, what is known as a “bank” on their person, from which the female pays the bartender for the beers and thereafter asks payment from the agent. Agent Vergara, therefore, did not find it unusual that both Betty and Nohemy carried a bank on themselves, from which they paid bartender Topete for the alcoholic beverages.

⁵ Exhibit 2a had written thereon the date of 4/20/17, along with “Angelica 4:pm,” “Mago 6:pm,” “Noemi 6:30.” Exhibit 2b had written thereon the date of 4-20-17, along with “1 Chiquita 8:00,” and “Nohemi.” Exhibit 2c had written thereon 4-20-17, along with “1 Chiquita 9:00,” and “Nohemi.” “Chiquita” in Spanish means “small.”

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 24200.5(b) provides that the Department shall revoke a license "[i]f the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy."
4. Section 25657(a) provides that it is unlawful "[f]or any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises."
5. Section 25657(b) provides that it is unlawful "[i]n any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting."
6. Rule 143 prohibits a licensee's employees from soliciting, in the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee. Rule 143 further prohibits a licensee's employees from accepting, in the licensed premises, any drink purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee.
7. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violations of sections 24200.5(b), 25657(a) and 25657(b) as alleged in counts 1 to 3, 5, 6, 8 to 10, 12, 13, 15 and 16. (Findings of Fact ¶¶ 4-20.)
8. The evidence clearly established that Respondent employed Rosie as a waitress, and Marina De Leon Topete as a bartender along with the other unidentified bartender at the Licensed Premises. Respondent's argument otherwise is rejected. Waitress Rosie was there on a regular basis, went behind the bar, attended to customers, took orders from patrons, approached the service station to place drink orders with the bartenders, delivered drinks and napkins to patrons, and otherwise performed waitressing duties. Rosie even acknowledged to Agent Silva that Friday, February 3, 2017, was her second night of employment, with the Licensed Premises manager hiring her to work Friday and Saturday nights. Bartender Topete as well as the unidentified bartender performed bartending duties, working behind the bar, clearing empties, receiving orders, ringing up

orders on the cash register, receiving money and providing change and alcoholic beverages to the females who approached the service station. As employees, waitress Rosie and the bartenders' actions and knowledge are imputed to the Respondent.

9. The evidence clearly established a common scheme at the Licensed Premises with each female either employed or permitted (or knowingly permitted to loiter for the purpose) to solicit beer from patrons and be paid a commission for the solicitations. On each of the four various nights, Respondent's employees (the bartenders) were aware of each of the females' loitering and solicitations (whether it was by Rosie, Betty, Justina Marin or Nohemy Marin Cruz), when the bartenders provided only seven ounce bottles of Bud Light beer to the soliciting females. Rosie acknowledged the existence of a system or scheme that only the soliciting females were to receive seven ounce Bud Light beers. On February 24, 2017, Rosie explained to Agent Silva her discipline by the Respondent's manager, prohibiting her from drinking any other alcoholic beverage than the seven ounce bottles of Bud Light beer. On April 20, 2017, agent Vergara overheard Nohemy Marin Cruz telling bartender Topete what the agents wanted to drink, while pointing at the agents, and adding "and one for me," without specifying what she wanted. Bartender Topete, aware of the scheme, retrieved a seven ounce Bud Light beer for Nohemy along with the agents' beers.

10. Furthermore, evidence of a scheme and commission paid is found in the agents' testimony that when they purchased their larger 12 ounce beers, for the price of \$4 each (or \$10 from Rosie on February 3, 2017), each of the soliciting females' \$10 charge for their smaller, seven ounce Bud Light beers strongly suggests a scheme and commission between the soliciting females and the bartenders. It is not a coincidence that each female charged \$ 10 for their seven ounce Bud Light beer. On February 3 and 24, 2017, Rosie informed Agent Silva of the \$10 charge for her seven ounce beers. On March 24, 2017, Betty acknowledged to agent Vergara that her seven ounce beer cost \$10. On April 20, 2017, Nohemy Marin Cruz broke down for Agent Vergara the cost of the beers, explaining the agents' beers cost \$4 each and her seven ounce Bud Light beer cost \$10.

11. Respondent's argument the bartenders were unaware of solicitations, commissions paid or would not know the conversation or what dollar amount was exchanged between the females and the agents is rejected. The bartenders' knowledge of the females' loitering, solicitation, and commissions paid is apparent when the bartenders produced only seven ounce Bud Light beers to each female, as discussed above. There was no attempt by the females to hide their loitering, solicitation or commissioned scheme; it was open and obvious. All of the solicitations took place either at the fixed bar (on February 3, March 24, and April 20, 2017) or directly across from the fixed bar at a high table (on February 24, 2017). On the respective nights each of the women were seated or standing with the agents (with Rosie also observed seated with other male patrons),

engaged in conversation and drinking a seven ounce bottle of Bud Light beer. On each night all of the females knew, after each solicitation, to walk to the service station to get a seven ounce Bud Light beer from the on-duty bartender, for which they all charged the agents \$10 and retained a commission. From the totality of the circumstances, it is apparent that the scheme included the females asking for and collecting the commissions from the agents, with the bartenders' knowledge and express awareness thereof. Betty and Nohemy were each observed carrying money in their bras, from which they paid the bartender and kept their commissions. Agent Vergara credibly testified from his experience in drink solicitation cases, it was not uncommon to see the soliciting women carrying, what is known as a "bank" on their person, from which the female paid the bartender for the beers and thereafter asked payment from the agents. On April 20, 2017, as part of the entry team inspection, Agent Rushing found bar slips behind the bar, where the bartenders worked. All of the slips had Nohemy's name hand-written thereon and two with "1 Chiquita" written next to her name. (Exhibits 2a, 2b, and 2c.) This strongly suggests the bartenders were keeping track of the scheme and were knowingly permitting Nohemy to loiter to solicit patrons with commissions paid. Nohemy's pushing of her seven ounce Bud Light beer away from her along with her statement, "If anyone asks, say it's someone else's," further suggests her part in the scheme and knowledge that her loitering and solicitations are illegal; she would have no other reason to be concerned when the police enter. Furthermore, bartender Topete was aware of the scheme and solicitations by her payment of commission to Rosie. On February 3, 2017, Agent Vergara watched bartender Topete give Rosie a \$5 commission for Rosie's beer solicitation of Agent Silva, despite bartender Topete not knowing the conversation between the agent and Rosie. Both agents then watched as Rosie placed the \$5 commission in her small purse, which she kept on her person.

12. Cause for suspension or revocation of the Respondent's license was not established for the violations of section 25657(a) as alleged in counts 4, 11, and 14, and the violation of California Code of Regulations, Title 4, Division 1, section 143, as alleged in count 7. (Findings of Fact ¶¶ 4,7, 13,14, and 16 to 19.) There was insufficient evidence to establish that Justina Marin, Betty, and Nohemy Marin Cruz were employed by the Respondent.

PENALTY

The Department requested the Respondent's license be revoked, with revocation stayed for three years and a 45-day suspension. The Department based its recommendation on a number of factors, including, but not limited to Respondent's lack of evidence of any positive action taken to correct the problems, the severity of the violations, to ensure they do not occur again, and the fact the violations were open, obvious and spread out over several months with the Respondent's full knowledge.

The Respondent recommended no revocation with a 20 day suspension or some reduced suspension other than 45 days, based on Respondent's discipline-free history since November 7, 2006 (approximately 10 years and three months to February 3, 2017).

Rule 144 provides for a penalty ranging from a 30-day suspension up to revocation for a violation of section 25657(b). Sections 25657(a) and 24200.5(b), on the other hand, mandate a penalty of revocation for any violation of their provisions. This mandate is satisfied, however, by a stayed revocation as well as an outright revocation. In line with the penalty guidelines of rule 144 and considering the argued aggravating and mitigating factors, the penalty recommended herein complies with rule 144.⁶

ORDER

Counts 1 to 3, 5, 6, 8 to 10, 12, 13, 15 and 16 of the accusation are sustained. With respect to those counts Respondent's on-sale general public premises license is hereby revoked, with the revocation stayed for a period of three years from the effective date of this decision, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and revoke Respondent's license, and should no such determination be made, the stay shall become permanent. In addition, the license is suspended for 40 consecutive days.

Counts 4, 7, 11 and 14 of the accusation are dismissed.

Dated: April 19, 2018



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Jacob A. Applegate</u>
Date: <u>6/11/18</u>

⁶ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.