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

AB-9868
File: 42-587660; Reg: 19088732

BRENDA OCEGUERA SANCHEZ,
dba Mona Lisa
703 South Oxnard Boulevard
Oxnard, CA 93030-7146,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 14, 2020
Telephonic

ISSUED AUGUST 20, 2020

Appearances: *Appellant:* Armando H. Chavira, as counsel for Brenda Oceguera Sanchez,

Respondent: Lisa Wong, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Brenda Oceguera Sanchez, doing business as Mona Lisa (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking her license because she employed or permitted individuals to engage in solicitation activity at the

[1] The decision of the Department, dated February 24, 2020, is set forth in the appendix.

licensed premises, in violation of Business and Professions Code[2] sections 24200.5(b) and 25657(a)-(b).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on November 28, 2017. There is no record of prior departmental discipline against the license.

The Department filed the accusation on April 11, 2019, and a first amended accusation on August 7, 2019. In its amended accusation, the Department brought 58 counts against appellant. The Department charges[3] that, over the course of six different occasions (March 30, 2018, April 6, 2018, May 11, 2018, May 18, 2018, May 25, 2018, and June 15, 2018), appellant employed or permitted individuals to engage in solicitation and drinking activity in violation of sections 24200.5(b), 25657(a), and 25657(b), as well as rule 143.[4]

At the two-day administrative hearing, held on August 28-29, 2019, documentary evidence was received, and testimony concerning the violations was presented by Department Agents Alberto Lopez and Alberto Villanueva, as well as Supervising Agent of the Department's Special Operations Unit, Ricardo Carnet. Luis Arreola Gomez

---

[2] All statutory references are to the Business and Professions Code unless otherwise stated.

[3] The accusation also alleged violations of Health and Safety Code sections 11351 and 11352. However, since these counts were ultimately dismissed by the Department, they are not discussed herein. Likewise, the facts of the alleged solicitation activities that were dismissed by the Department are omitted from discussion here.

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

(Gomez), manager of the licensed premises, appeared as a witness for appellant. On the first day of the hearing, the Department moved to amend several counts by interlineation, which was granted. The Department also dismissed count 58.

Testimony established that on March 30, 2018, April 6, 2018, May 11, 2018, May 18, 2018, May 25, 2018, and June 15, 2018, appellant's licensed premises was visited by undercover agents.

March 30, 2018

On March 30, 2018, Supervising Agent Carnet, and Agents Lopez and Villanueva entered the licensed premises and ordered beers, which they were served. Agent Lopez approached the bar counter and ordered a beer. He was charged $5 for the beer. That night, Maria Rincon-Cisneros, Marina Canongo-Amigon, Luis "Liliana" Santos-Zavaleta, and Cindy Tapia-Amigon were on duty as bartenders.

Solicitation of Carnet

A woman identified as "Mari" asked Supervising Agent Carnet to buy her a beer. He agreed and Mari ordered a beer from Canongo-Amigon. Carnet gave $20 to Canongo-Amigon, who obtained change and gave $5 of the change to Carnet and $10 to Mari. Later, Mari asked for a second beer and an identical transaction took place. Mari went on to solicit Carnet for three more beers, with each solicitation transpiring in the same manner as the previous two solicitations.

Subsequently, Mari solicited Carnet two more times. Santos-Zavaleta was the bartender who handled these two transactions. Santos-Zavaleta took the money from Carnet and obtained change. She gave $10 in change to Mari, and $5 to Carnet.

Solicitation of Lopez

Mari also asked Agent Lopez to buy her a beer. He agreed and ordered from Canongo-Amigon, who served a beer to Mari. Lopez paid for the beer with a $20 bill and received $5 in change back from Canongo-Amigon. Later, Santos-Zavaleta, one of the bartenders, also asked Lopez to buy her a beer. Lopez agreed and Santos-Zavaleta served herself a beer. Lopez paid for the beer by handing $15 to Santos-Zavaleta, who placed the money in the register and did not give any change to Lopez. Santos-Zavaleta solicited a second beer from Lopez under the same transaction.

Solicitation of Villanueva

Rincon-Cisneros asked Agent Villanueva if he would buy her a beer. He agreed and handed her a $20 bill. She obtained beer for herself, which she consumed. She handed Villanueva $5 in change from her pocket. She solicited a second beer from Villanueva with the transaction taking place in the same manner as the previous solicitation.

Subsequently, Rincon-Cisneros solicited Villanueva for a third beer. He agreed and handed her a $20 bill. She took the money to Gomez, who placed the money into the register and gave her back $15 in change. Out of this, she pocketed a $10 bill and returned $5 backed to Villanueva. Rincon-Cisneros obtained and consumed a beer.

April 6, 2018

On April 6, 2018, Supervising Agent Carnet, and Agents Lopez and Villanueva returned to the licensed premises. They entered around 11:00 p.m. and approached the bar counter. Agent Lopez ordered a beer from Rincon-Cisneros, one of the bartenders that night. She served Lopez the beer and charged him $5.

Solicitation of Lopez

Tapia-Amigon, who was working behind the counter, began a conversation with Lopez. During this exchange, Rincon-Cisneros asked Lopez if he would buy Tapia-Amigon a beer. After Lopez asked her directly, Tapia-Amigon said she wanted a beer and he agreed to purchase a beer for her. Tapia-Amigon then obtained a beer from behind the counter, and Lopez paid her with a $20 bill. She took the money to the register, returned with $5 in change, and gave it to Lopez.

Tapia-Amigon asked Lopez if he wanted another beer, which he said he did. She then pointed to herself, indicating she also wanted beer for herself. Lopez agreed, and Tapia-Amigon obtained two beers, serving one to Lopez and keeping one for herself. Lopez paid for the beers by handing a $20 bill to Tapia-Amigon. She placed the bill in the register, obtained change, and placed the leftover money into a jar on the employee side of the counter. Tapia-Amigon did not give any change back to Lopez.

Solicitation of Villanueva

On the same night, Mari, who was also working behind the bar counter, asked Agent Villanueva if he would buy her a beer. He agreed and handed her a $20 bill, which Mari gave to Rincon-Cisneros. Rincon-Cisneros took the money to the register and returned $15 in change to Mari. Mari pocketed $10 of the change and returned the remaining $5 to Villanueva. Rincon-Cisneros obtained a beer and served it to Mari.

Afterwards, Mari asked Villanueva if he would buy her a second beer, which he agreed to do. She also asked if he wanted another beer for himself, to which he also responded in the affirmative. He paid with a $20 bill. Mari took the bill and handed it to Rincon-Cisneros, who placed it in the register, gave Mari a $10 bill, and served the beers to Villanueva and Mari. Villanueva did not receive any change.

Solicitation of Carnet

Mari also asked Supervising Agent Carnet to buy her a beer. He agreed to do so and ordered a beer from Rincon-Cisneros. After Rincon-Cisneros served the beer to Mari, Carnet paid for it with a $20 bill. Rincon-Cisneros obtained change, gave $10 of it to Mari, and $5 to Carnet. Subsequently, Mari solicited Carnet for a beer two more times. Each transaction transpired in the same manner as the first solicitation.

Next, Carnet began a conversation with Rincon-Cisneros, who asked him to buy her a beer. He agreed and paid her with a $20 bill after she obtained a bottle of beer for herself. Rincon-Cisneros gave the money to Gomez, who made change by giving $10 to Rincon-Cisneros and $5 to Carnet. Rincon-Cisneros would go onto solicit a beer from Carnet four more times. Each of these subsequent solicitations took place in the same manner as the first solicitation.

May 11, 2018

On May 11, 2018, Agents Lopez and Villanueva returned to the licensed premises. They approached the bar counter where they ordered two beers from Rincon-Cisneros.

Solicitation of Lopez

When Lopez paid for those two beers with a $20 bill, Rincon-Cisneros asked Lopez if he was going to buy a beer for Tapia-Amigon. Lopez asked Tapia-Amigon directly if she wanted him to buy her a beer, which she said she did. Rincon-Cisneros served the beers to them, told Lopez the beers would cost $25, and received an additional $20 bill from Lopez. She went to the register and returned $15 in change to Lopez. Prior to leaving the premises that night, Lopez ordered and was served beer, for which he was charged $5.

Solicitation of Villanueva

Rincon-Cisneros also asked Agent Villanueva if he would buy her a beer. He agreed and handed her a $20 bill. Rincon-Cisneros took the bill to Canongo-Amigon, who was working the register at the moment. Canongo-Amigon handed her change, of which Rincon-Cisneros kept a portion. Villanueva received $5 in change. Canongo-Amigon obtained a beer and served it to Rincon, who consumed it.

Rincon-Cisneros then solicited Villanueva for another beer. He agreed and also ordered a beer for himself. Villanueva handed a $20 bill to Rincon-Cisneros, who handed the money to Canongo-Amigon. Canongo-Amigon gave Rincon-Cisneros some change, which Rincon-Cisneros kept and pocketed. Rincon-Cisneros then obtained two beers; she served one to Villanueva and consumed the other herself.

Finally, Rincon-Cisneros solicited a third beer from Villanueva. Like before, he handed a $20 bill to Rincon-Cisneros, which she handed to Canongo-Amigon. Canongo-Amigon then gave change, a portion of which Rincon-Cisneros kept and pocketed. Rincon-Cisneros gave the remaining $5 to Villanueva. Rincon-Cisneros obtained two beers, serving Villanueva one and consuming the other herself.

May 18, 2018

On May 18, 2018, Supervising Agent Carnet and Agent Lopez returned to the licensed premises. After entering, Lopez went to the bar counter and ordered a beer from Rincon-Cisneros, who served it to him.

Solicitation of Carnet

After sitting down at the counter, Carnet saw Mari, who asked him to buy her a beer. He agreed, and ordered her a beer from Rincon-Cisneros. After Mari was

served with the beer, Carnet paid with a $20 bill. Rincon-Cisneros took the money to the register and obtained change. She gave $10 to Mari and $5 to Carnet.

Next, Rincon-Cisneros asked Carnet if he would buy a beer for her. He agreed and handed her a $20 bill. Rincon-Cisneros obtained a beer for herself and gave the money to Canongo-Amigon, who obtained change. Canongo-Amigon gave $10 of the change to Rincon-Cisneros, and the remaining $5 to Carnet. Rincon-Cisneros then solicited a second beer for herself from Carnet. The transaction took place in the same manner as the first beer. After obtaining the beer, Rincon-Cisneros consumed it.

For the rest of that night, Rincon-Cisneros solicited five more beers from Carnet. Each of these five solicitations transpired in the same manner as the first two solicitations.

May 25, 2018

On May 25, 2018, Agents Lopez and Villanueva returned to the licensed premises. After Villanueva sat down at the bar counter, Rincon-Cisneros—working behind the bar counter—asked him to buy her a beer. He said he would. When Rincon-Cisneros asked if he would like a beer for himself, he said he did.

Villanueva gave $40 to Rincon-Cisneros to pay for his beer, Rincon-Cisneros's beer, as well as a beer each for Agent Lopez and another individual, Juan Barajas-Segoviano. Rincon-Cisneros took the money to the register, and returned $10 in change to Villanueva. She obtained and served the beers, including one for herself. She poured her beer into a plastic cup because, as she explained, she believed police officers were in the area and did not want to be caught drinking while on duty.

Rincon-Cisneros then asked Villanueva to buy her a second beer. He agreed and paid for the beer with a $20 bill. Rincon-Cisneros placed the money into the register, gave Villanueva $5 in change, and obtained a can of beer for herself.

June 15, 2018

On June 15, 2018, Carnet, Lopez, and Villanueva returned to the licensed premises. After entering, they ordered beers from Rincon-Cisneros, who was a bartender that night.

After sitting at the bar counter, Carnet was greeted by Rincon-Cisneros. She then asked him if he would buy her a beer, which he agreed to do. After Rincon-Cisneros obtained a beer for herself, Carnet paid her with a $20 bill. She gave the money to Gomez, who obtained change and returned it to Rincon-Cisneros. She gave $5 of the change to Carnet and consumed the beer.

On December 9, 2019, the administrative law judge (ALJ) submitted his proposed decision sustaining counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 34, 38, 40, 41, 42, 43, 44, 45, 49, 50, 51, 56, and 57. Counts 1, 11, 25, 26, 30, 31, 32, 33, 35, 36, 37, 39, 46, 47, 48, 52, 53, 54, 55, and 58 were dismissed. The ALJ recommended revocation of appellant's license. The Department adopted the ALJ's proposed decision on February 21, 2020.

Appellant filed a timely appeal raising the following issues: 1) the counts sustained in the decision are not supported by substantial evidence; 2) the penalty is excessive; 3) the penalty violates due process and equal protection, and; 4) the decision should be remanded for penalty reconsideration. Issues 2 and 3 will be discussed together.

APPLICABLE LAWS

The laws at issue in the instant case are provided below for ease of reference.

Section 24200.5(b):

> [T]he department shall revoke a license upon any of the following grounds:
>
> [¶ . . . ¶]
>
> (b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit sharing plan, scheme, or conspiracy.

Section 25657:

> 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.
>
> Every person who violates the provisions of this section is guilty of a misdemeanor.

Rule 143 - Employees of On-Sale Licensees Soliciting or Accepting Drinks:

> No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon 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, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee.

> It is not the intent or purpose of this rule to prohibit the long-established practice of a licensee or a bartender accepting an incidental drink from a patron.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends the counts sustained in the decision are not supported by substantial evidence. Specifically, appellant argues there is insufficient evidence to support counts 2-10, 12-24, 27-29, 34, 38, 40-45, 49-51, and 56-57 of the accusation that were sustained below.

In determining whether a decision of the Department is supported by substantial evidence, this Board's review is limited to determining, in light of the entire administrative record, whether substantial evidence exists—even if contradicted—to reasonably support the Department's factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*).) The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74] (*Harris*).) A factual finding of the Department may not be overturned or disregarded merely because a contrary finding would have been equally or more reasonable. (*Boreta*, at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve any evidentiary conflicts in favor of the Department's decision and view the whole record in a light most favorable to the decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th

1429, 1437 [13 Cal.Rptr.3d 826].) The Board must accept all reasonable inferences from the evidence which support the Department's decision. (*Harris*, at p. 113.)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

Testimony at the administrative hearing established that on six occasions—March 30, 2018, April 6, 2018, May 11, 2018, May 18, 2018, May 25, 2018, and June 15, 2018—appellant's licensed premises was visited by undercover agents.

March 30, 2018

On March 30, 2018, Carnet, Lopez, and Villanueva entered the licensed premises. After entering, they made their way to the bar counter. There, Lopez ordered a 12-ounce Modelo beer, for which he was charged $5. Rincon-Cisneros, Canongo-Amigon, Santos-Zavaleta, and Tapia-Amigon were the bartenders on duty.

Counts 2-3

Appellant first challenges count 2, brought under section 25657(b), and count 3, brought under section 24200.5(b). On appeal, appellant alleges that the record is "devoid of evidence that bartender [Canongo-Amigon] permitted Mari to 'loiter'" or "permitted Mari to solicit." (Appellant's Opening Brief, p. 15 (AOB).) She argues there is no evidence that "bartender had actual or constructive notice that Mari solicited … or,

that bartender encouraged Mari to solicit [Agent Lopez]." (*Ibid*.) Furthermore, she contends there is no evidence that Mari ever received a commission. (*Ibid*.)

As an initial matter, appellant cites to *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] (*Laube*) for the proposition that liability only attaches to a licensee "for unlawful conduct on the premises that licensee [has] actual or constructive" knowledge about. (AOB, p. 11.) However, *Laube* does not help appellant's case.[5] It is settled law that a licensee has constructive knowledge of the on-premises conduct of an employee, because the employee's knowledge is imputed to the employer. (See *Harris v. Alcoholic Beverage Control Appeals Bd*. (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629].) This includes solicitation activities. (See *Cornell v. Reilly* (1954) 127 Cal.App.2d 178, 187 [273 P.2d 572] [imputing bartender's knowledge of solicitation activities to owner]; see also *Garcia v. Martin* (1961) 192 Cal.App.2d 786, 790 [14 Cal.Rptr. 59] ["It is apparent that the female bartenders had knowledge [of the solicitation] and this knowledge is imputed to appellant."]; *Munro v. Alcoholic Beverage Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527] ["The owner of a liquor license has the responsibility to see to it that the license is not used in violation of

[5] In that case, the court annulled the Department's decision imposing discipline on a licensee for surreptitious drug transactions of which neither the licensee nor the licensee's employees knew or had reason to suspect were occurring among patrons of the "upscale hotel, bar and restaurant." The court criticized the Department's use of a strict liability standard in "permitting" cases and extensively analyzed the line of cases on which the Department relied, concluding that, in fact, "the licensee's knowledge is essential." (*Laube*, *supra*, 2 Cal.App.4th at p. 376.) However, the licensee need not have actual knowledge; constructive knowledge, such as that imputed to the licensee through knowledge of a licensee's employee, is sufficient. (*Id*. at pp. 376-377.)

law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee."].)

While appellant may not have actually known of a particular violation, she had constructive knowledge as one of her own employees acted unlawfully. As such, this knowledge may properly be imputed to appellant. Accordingly, based on the above authority, the Department only needed to show that appellant's employees either solicited patrons or had knowledge of the solicitation activities on the premises for that conduct to be imputed to the appellant. This applies not only to these counts—2 and 3—but to the other counts at issue in the instant case that are discussed below.

Appellant maintains the decision below was conclusory. However, it appears appellant is guilty of what she accuses as her argument, aside from briefly citing *Laube*, is advanced without any meaningful support. On the contrary, based on the record, there is sufficient evidence to support counts 2 and 3. In the decision below, the Department found that Mari solicited five beers from Carnet, and one beer from Lopez. Canongo-Amigon was the bartender on duty who processed these transactions.

After soliciting Carnet, Mari ordered a beer directly from Canongo-Amigon and Carnet paid by handing a $20 bill to Canongo-Amigon. Each time, Canongo-Amigon split the change by returning $5 to Carnet, and $10 to Mari. Mari took and kept the money in Canongo-Amigon's presence. (RT at p. 212.) This happened five times.

After soliciting Lopez, Mari ordered a beer directly from Canongo-Amigon. Lopez paid for Mari's beer—a 12-ounce bottle of Modelo—with a $20 bill, but only received $5 in change. Notably, he was charged $5 for a 12-ounce bottle of Modelo earlier that night, and thus would have expected $15 back in change. (RT at pp. 12, 90-91.) When asked if the difference, $10, was meant to be a tip to Mari, Lopez said it

was not meant to be a tip. (RT at pp. 108-109.) The Department reasonably found that this constituted a surcharge.

There was no evidence that night that Mari was employed or working for appellant. For example, appellant does not point to any evidence that Mari was waitressing or bartending that night. The record only reflects that she was sitting with the agents and asking for drinks. In fact, Mari told Carnet that night that she liked the bar because she made $10 for every beer she solicited. (RT at p. 211.)

As there was no evidence presented that Mari was engaged in any employee duties, it was reasonable to infer that the $10 Mari received was a commission, not a tip. This is the same $10 amount that Mari told Carnet that she earned as commission for every beer solicited on the licensed premises. It was also reasonable to infer from Canongo-Amigon's distribution of the $10 surcharge to Mari that Canongo-Amigon was a participant in the drink solicitation scheme and conspiracy. How otherwise would she have known to distribute the money in that manner? This participation, and therefore knowledge, is properly imputed to the appellant.

As to Lopez specifically, it was also reasonable to infer Canongo-Amigon permitted Mari to solicit him for a beer. Lopez was sitting at the bar, where Canongo-Amigon was bartending on the employee's side. While sitting, he was approached by Mari, who successfully solicited him for a beer. Canongo-Amigon received the order from Mari and received payment for the beer from Lopez. It was reasonable to infer that Canongo-Amigon was aware of the solicitation. Moreover, appellant does not cite to any contrary evidence that would show Canongo-Amigon could not have been aware of Mari's solicitation of Lopez. Altogether, we conclude that counts 2 and 3 are supported by substantial evidence and are therefore affirmed.

Counts 4-6

Appellant challenges count 4, brought under section 25657(a), count 5, brought under section 24200.5(b), and count 6, brought under rule 143. She contends, on appeal, that there was no evidence of a "violation of Section 24200.5(b) or 25657(a) since the price of the Bud Light was never established" and that all three counts were "based solely on the hearsay testimony of Agent Lopez which is not sufficient to support a finding under Government Code, Section 11513(d)." (AOB, pp. 15-16.)

Appellant argues that the price of Bud Light was not established. However, Agent Lopez testified, earlier that night, he only paid $5 when he purchased a 12-ounce bottle of Bud Light for a Jane Doe. (RT at p. 16.) We must resolve this conflict in favor of the Department.

Lopez's unrefuted testimony also provides that Santos-Zavaleta—one of the bartenders working that night—solicited Lopez for a beer, charged him $15 for a 12-ounce bottle of Bud Light, did not return any change, and drank the beer in his presence. This same interaction repeated for a second bottle of Bud Light.

Since the agent's testimony, if believed, is evidence of the solicitation activity, the issue is really one of credibility, and, as outlined earlier, the ALJ is the person who makes that determination. Moreover, both the Government Code and the Code of Regulations explicitly permit the use of hearsay in administrative hearings "for the purpose of supplementing or explaining other evidence." (Gov. Code, § 11513(d); Code Regs., tit. 2, § 7429(f)(4).) In this case, the ALJ chose to accept the testimony of the agent, and our review of the record satisfies us that this was reasonable. The statements were admissible as administrative hearsay.

Appellant's brief relies on references to details in the hearing transcript to impeach the testimony of the officers. However, little would be served by addressing each and every factual contention made by appellant. We cannot say that the ALJ's reading of the facts was in any way erroneous. Substantial evidence shows Santos-Zavaleta was employed by appellant. It shows she solicited Lopez—twice—to buy her a beer. Lopez observed her drinking both beers at the bar. As Lopez received no change after paying $15, it was reasonable to infer that Santos-Zavaleta was a participant in the drink solicitation scheme and conspiracy. Altogether, we conclude counts 4-6 are supported by substantial evidence. Therefore, those counts are affirmed.

Counts 7-10, 12

Appellant challenges count 7, brought under section 25657(a), counts 8 and 10, brought under section 24200.5(b), as well as counts 9 and 12, brought under rule 143. She argues, on appeal, that the "hearsay testimony of Agent Villanueva" does not support the findings below. (AOB, pp. 16-18.)

As outlined earlier, the agent's testimony, if believed, is evidence of the solicitation activity. As the issue is really one of credibility, the ALJ is the person who makes that determination. Moreover, both the Government Code and the Code of Regulations explicitly permit the use of hearsay in administrative hearings. In this case, the ALJ chose to accept the testimony of the agent, and our review of the record satisfies us that this was reasonable. The statements were admissible as administrative hearsay.

The record indicates Rincon-Cisneros was working as a bartender. (RT at pp. 13, 168:8-11.) She solicited Agent Villanueva for a drink, he handed her a $20 bill, and

she retrieved a Bud Light beer from a cooler behind the bar. As established above, on the same night, Agent Lopez was only charged $5 for the same beverage. After taking the $20 bill, Rincon-Cisneros gave $5 in change to Villanueva from her pocket and drank the beer in his presence. Afterwards, she solicited him for a second beer with the exact same sequence taking place as before. The evidence is not in dispute as to Rincon-Cisneros' conduct; she clearly was a full participant in the commission scheme. Her knowledge of and participation in the solicitation scheme was established when she charged an inflated price for the solicited beers, including a $10 commission that she retained. Because Rincon-Cisneros was acting as appellant's employee and agent, her knowledge of the solicitation scheme and her participation in it is imputed to appellant. Accordingly, counts 7-9 are supported by substantial evidence, and are therefore affirmed.

As to Count 10, substantial evidence supports finding a section 24200.5(b) violation. Rincon-Cisneros worked that night as a bartender for appellant. The evidence is not in dispute as to Rincon-Cisneros' conduct; she clearly was a full participant in the commission scheme as outlined above. Because Rincon-Cisneros was acting as appellant's employee and agent, her knowledge of the solicitation scheme and her participation in it is imputed to appellant.

Since Gomez operated the register for this third solicited beer, appellant argues the evidence did not show that Gomez "overheard any solicitation from Rincon as to Villanueva, or that he observed Rincon pocket any money on any occasion." (AOB, p. 17.) However, Villanueva's unrefuted testimony established that Gomez took the $20 bill from Villanueva, obtained a $10 bill and $5 bill in change, returned the $5 to Villanueva and placed the $10 bill on Rincon-Cisneros's person. (RT at pp. 171-172.)

Gomez himself testified that Villanueva, whom he identified as one of several Cuban men at the premises on March 30, 2018, "asked me for a beer and then told me 'Give [Rincon-Cisneros] a beer.'" (RT at pp. 14, 16-17.)

Thus, viewing this matter in the light most favorable to the Department's decision, substantial evidence also supports the finding that Gomez was aware of and permitted Rincon-Cisneros's solicitation activity. It was reasonable to infer that Rincon-Cisneros and Gomez both participated in and were aware of solicitation scheme. Moreover, Gomez's knowledge or permission is not required under section 24200.5(b) as he is not the licensee. In fact, he testified that on March 30, he was working as a normal employee, not as the manager as appellant alleges. (RT at p. 16.) Accordingly, appellant's argument is dismissed. We conclude count 10 is supported by substantial evidence, and is affirmed.

As to count 12, substantial evidence supports finding a rule 143 violation. After soliciting and consuming the first two beers, Rincon-Cisneros solicited Villanueva for a third beer. This time, however, she handed Villanueva's $20 bill to Gomez, who obtained change from the register and handed it to Rincon-Cisneros. Just as before, she obtained a beer for herself from the cooler and consumed it in Villanueva's presence. This activity, and therefore knowledge, is properly imputed to the appellant. We conclude count 12 is supported by substantial evidence and is therefore affirmed.

Counts 13-14

Appellant challenges counts 13 and 14, both brought under section 24200.5(b). She argues that Carnet's testimony was "ambiguous and not reliable." (AOB, p. 19.) As outlined earlier, the agent's testimony, if believed, is evidence of the solicitation activity. As the issue is really one of credibility, the ALJ is the person who makes that

determination. Moreover, both the Government Code and the Code of Regulations explicitly permit the use of hearsay in administrative hearings. In this case, the ALJ chose to accept the testimony of the agent, and our review of the record satisfies us that this was reasonable. The statements were admissible as administrative hearsay.

As to count 13, appellant's arguments are not without merit. The decision below states that Canongo-Amigon "gave" $5 in change to Carnet and $10 to Mari. (Findings of Fact ¶¶ 5-7.) However, Carnet appears to contradict this in his own testimony. Specifically, during cross-examination, he stated that the $10 and $5 bills in change were not "given" but, rather, placed on the counter by Canongo-Amigon. (RT at p. 232.) Moreover, Carnet could not recall how long the change left by Canongo-Amigon remained on the counter before he and Mari took the money. (RT at pp. 232-233.) Carnet's testimony is also vague as to whether Canongo-Amigon divided the change as she placed it on the counter, or whether Mari split and divided the change herself. (RT at pp. 231-235.) Finally, Carnet did not contest Mari's taking of the $10. In fact, he agreed that he "picked up the $5 and left the $10" on the counter. (RT at p. 234.)

On the other hand, Carnet's unrefuted testimony established that Mari solicited a beer from Carnet, Mari ordered a beer directly from Canongo-Amigon, that Carnet was charged $15 for each 12-ounce beer, and that this happened for a total of five beers. His testimony also established that Canongo-Amigon witnessed Mari pick up the money and retain it. (RT at p. 233.) Unrefuted testimony, referenced throughout this decision, established $5 as the price for a 12-ounce beer, including Bud Light, Michelob Ultra, and Modelo. Thus, it was reasonable to infer that the $10 inflation in the price of beer constituted a form of commission retained as part of a solicitation scheme. Not only that, but as referenced earlier, Carnet testified that Mari told him that she made $10

for each beer she solicited at the licensed premises. (RT at p. 211.) Finally, when asked if the $10 could have been a tip, Carnet did not respond in the affirmative. (RT at pp. 234-235.)

Viewing this matter, as we must, in the light most favorable to the Department's decision, we conclude—despite Carnet's testimony being somewhat vague—that substantial evidence supports the decision. A reasonable inference to be drawn from the price discrepancy of the beers is that Canongo-Amigon was a participant in the drink solicitation scheme and conspiracy. Why else would she have charged Carnet $15 for each beer, and not object as she watched Mari take $10 of the change? Appellant provides no argument otherwise. This participation, and therefore knowledge, is properly imputed to the appellant. We thus conclude that count 13 is supported by substantial evidence and is therefore affirmed.

As to count 14, appellant's brief relies on references to minute details in the hearing transcript to impeach the testimony of the officers. However, little would be served by addressing each and every factual contention made by appellant. We cannot say that the ALJ's reading of the facts was erroneous.

Carnet's unrefuted testimony established that Mari solicited him for two more beers, with Santos-Zavaleta handling these two transactions. For each transaction, he paid for the beer by handing a $20 bill to Santos-Zavaleta; Santos-Zavaleta gave $5 of the change to Carnet and $10 to Mari; and Mari retained the $10 in Santos-Zavaleta's presence. Appellant points out it is unclear whether Mari was "given" the $10 bill each time or whether she "picked" it up. (AOB, p. 19.) As this topic appears not to have been explored on cross-examination, we are not empowered to reach a contrary determination of the facts. To the extent there is an evidentiary conflict, we are

required to resolve it in favor of the Department. Next, while appellant mentions Santos-Zavaleta did not approach Mari and Carnet until after her solicitation, appellant cites no authority requiring the solicitation be witnessed in real time as it takes place.

What is clear, however, is that Santos-Zavaleta separating out the change so that Mari received a $10 bill after each solicitation is consistent with how other employees of the appellant—in the affirmed counts discussed here—processed those transactions. This is the same $10 amount that Carnet testified Mari told him she earned for each beer she solicited at the licensed premises. Altogether, it was reasonable to infer that the $10 separated out was a commission paid to Mari for each solicited beer.

Viewing this matter in the light most favorable to the Department's decision, we conclude that Santos-Zavaleta permitted Mari to solicit Carnet under a drink solicitation scheme and conspiracy. We thus conclude that count 14 is supported by substantial evidence, and is therefore affirmed.

April 6, 2018

On April 6, 2018, Lopez, Villanueva, and Carnet returned to the licensed premises. After entering, they made their way to the bar counter. There, Lopez ordered a 12-ounce Bud Light beer from Rincon-Cisneros, one of the bartenders that night. He was charged $5 for this drink.

Counts 15-17

Appellant challenges count 15, brought under section 25657(a), count 16, brought under section 24200.5(b), and count 17, brought under rule 143.

As to count 15, appellant argues the evidence does not show Rincon-Cisneros was employed for the purpose of "anything save being a bartender." (AOB, p. 21.)

Appellant's primary argument is that being "hired to be sociable and nice to patrons" is "not the same as being hired for [the] purpose of encouraging solicitation activities." (*Ibid*.) However, establishing a violation of section 25657 does not require proof that employees were hired for the specific purpose of soliciting drinks. (*Cooper v. State Bd. of Equalization* (1955) 137 Cal.App.2d 672, 675-677 [260 P.2d 914] (*Cooper*).) As appellant concedes, Rincon-Cisneros was working as a bartender that night. Furthermore, the evidence shows Rincon-Cisneros encouraged and asked Lopez to buy Tapia-Amigon a beer, that Lopez paid $20 for a 12-ounce Bud Light, and that he only received $5 in change. We conclude that count 15 is supported by substantial evidence, and is thus affirmed.

As to count 16, appellant merely asserts that Tapia-Amigon's actions do not amount to a solicitation. Appellant argues "the plain words of the statute require Tapia to be permitted to solicit" but that this was "not the case according to the testimony of Lopez." (AOB, p. 21.) However, this contention is presented without any specific citations to the record or legal support. To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or authority for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing court. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72] (*Atchley*).)

Here, the evidence shows that this solicitation activity took place while Lopez, Rincon-Cisneros, and Tapia-Amigon were all interacting with one another. Right after Rincon-Cisneros asked if Lopez was going to buy Tapia-Amigon a drink, Lopez asked the latter if he wanted to buy her a beer. She responded in the affirmative, thereby

indirectly encouraging—an act covered under section 24200.5(b)—Lopez to go ahead and buy her a drink. In short, there is no basis for reversal of this count; it is affirmed.

As to count 17, appellant only argues that Canongo-Amigon was "not described as a manager or owner" and, as such, Tapia-Amigon did not need "permission" to accept the drink from Lopez. (AOB, pp. 21-22.) Notably, appellant does not dispute that Canongo-Amigon, who operated the cash register, permitted Tapia-Amigon's actions. Appellant also concedes "it appears that Tapia was working as a bartender that evening." (AOB, p. 21.) In looking to rule 143, its language makes no reference to supervisorial approval. It prohibits an employee, such as Tapia-Amigon, from soliciting or accepting drinks that were purchased intended for his or her use or consumption. This is exactly what transpired. (RT at pp. 28-30; Findings of Fact, ¶ 18.) After Tapia-Amigon pointed to herself, signaling she wanted a beer, Lopez bought her a beer. Tapia-Amigon then made her way over to the employee side of the bar, where she retrieved and drank the beer. As outlined earlier, the acts and knowledge of employees are imputed to the employer. We conclude, therefore, that count 17 is supported by substantial evidence, and is affirmed.

Counts 18-23

Appellant challenges count 18, brought under section 25657(b), counts 19 and 20, brought under section 24200.5(b), count 21, brought under section 25657(a), as well as counts 22 and 23, brought under rule 143.

As to count 18, appellant does not appear to argue or contest it. In fact, appellant makes no mention of this count whatsoever. To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted

without any argument or authority for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing court. (*Atchley*, *supra*, 151 Cal.App.3d at p. 647.) In short, there is no basis for reversal of this count. Therefore, count 18 is affirmed.

As to count 19, appellant contends that Carnet's testimony was "not clear." (AOB, p. 22.) However, the decision below sustained count 19 on the basis of Mari's interactions with *Villanueva* on April 6, not Carnet. (Conclusions of Law, ¶ 13.) When discussing count 19, appellant only discusses Carnet, but makes no mention of Villanueva. Where a point is merely asserted without any argument or authority for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing court. (*Atchley*, *supra*, 151 Cal.App.3d at p. 647.) In short, there is no basis for reversal of this count. Therefore, count 19 is affirmed.

As to count 20, appellant again refers to Mari's act of solicitation. However, count 20 is with respect to *Rincon-Cisneros's* solicitation of Carnet. Aside from a brief discussion of Mari, there is no argument contesting Rincon-Cisneros's acts of solicitation. As with counts 18 and 19, because there is no basis for reversal, we must affirm count 20. (*Atchley*, *supra*, 151 Cal.App.3d at p. 647.)

Just as with counts 18-20, appellant provides no basis for reversing count 21. Appellant's discussion of count 21 consists of an incomplete sentence. (AOB, p. 23.) However, the decision below noted that count 21 duplicates count 15. (Conclusions of Law, ¶ 11, fn. 4.) Thus, the question is whether appellant can be disciplined for duplicative counts. In an analogous situation, the Department imposed discipline on a licensee who was found to have violated a license condition and a Department rule. There, the court held that "where a condition imposed on a license duplicates a

department rule, relevant statute or ordinance, the department may impose discipline for one or the other violation, but not for both." (*Cohan v. Department of Alcoholic Beverage Control* (1978) 76 Cal.App.3d 905, 911 [143 Cal.Rptr. 199].) Since count 15 was affirmed, we cannot also affirm count 21. Count 21 must be reversed.

As to count 23, appellant concedes that a rule 143 violation took place since "Rincon[-Cisneros] did ask for the drink." (AOB, p. 23.) Unrefuted evidence established that after Rincon-Cisneros successfully solicited a beer for herself from Carnet, she consumed the beer. This occurred five times in total. (Findings of Fact, ¶¶ 24-26; RT at pp. 218-221.) We thus conclude that count 23 is supported by substantial evidence and is therefore affirmed.

As to count 22, it appears to duplicate count 23, just as counts 15 and 21 were duplicative of one another. Count 22 charges that "respondent-licensee's agent or employee, [Gomez], permitted [Rincon-Cisneros] to accept … a drink which had been purchased … and intended for [her] consumption, in violation of [rule] 143." Count 23 charges that "respondent-licensee's agent or employee, [Rincon-Cisneros], solicited upon the licensed premises, the purchase … of a drink intended for [her] consumption, in violation of [rule] 143." But charging that one employee of the licensee permitted another employee to engage in unlawful acts is the same as directly charging that latter employee for the underlying unlawful acts:

> It is well settled that a pleading alleging that defendant committed a certain act is simply an allegation that in legal effect the defendant is responsible for the act -- i.e., that defendant through his agent committed the act or that defendant personally committed it. Either can be proved under an allegation that "defendant" committed the act.

(*Cooper v. State Bd. of Equalization* (1955) 137 Cal.App.2d 672, 679 [290 P.2d 914].)

Appellant's employee, Rincon-Cisneros, personally engaged in the unlawful acts. If substantial evidence also supports finding that Gomez permitted the actions charged under count 23, the only liability—as far as the instant case is concerned—lies with the appellant. Ultimately, no matter who committed the underlying acts, it is the "on-sale retail licensee" who bears responsibility under rule 143 and who is penalized for the violation by suspension or revocation of their license. Although counts 22 and 23 are phrased differently from each other, liability for both violations lies with the same person, appellant. In other words, counts 22 and 23 are duplicative. The Department's decision found two violations when there was only one. The Department may impose discipline for one or the other, but not both. Since count 23 was affirmed, we cannot affirm count 22 in addition. Count 22 must be reversed.

May 11, 2018

On May 11, 2018, Lopez and Villanueva returned to the licensed premises. After entering, they went to the bar counter. There, they encountered Rincon-Cisneros, who was identified as a bartender on duty that night. Villanueva was charged $5 for a 12-ounce bottle of Bud Light that he ordered for himself.

Count 24

Appellant challenges count 24, brought under section 25657(a). She argues the Department did not offer evidence that Rincon-Cisneros "was hired for the purpose" of anything save being a bartender. (AOB, p. 24.) Appellant alleges that, without more evidence, "a reasonable inference cannot be read into the single act of 'pushing' a drink." (AOB, p. 24.) However, establishing a section 25657 violation does not require proof that employees were hired for the specific purpose of soliciting drinks. (*Cooper*, *supra*, 137 Cal.App.2d at pp. 675-677.)

Appellant acknowledges that Lopez and Villanueva returned to the licensed premises on May 11th and saw Rincon-Cisneros working as a bartender that night. (AOB, p. 23.) After Lopez sat at the bar and ordered a beer from Rincon-Cisneros, she asked him to buy a beer for Tapia-Amigon and he did so. (RT at pp. 33-34.) After Tapia-Amigon finished the beer, Rincon-Cisneros asked her if she wanted another beer, to which Tapia-Amigon responded in the affirmative. (RT at p. 36.) As Rincon-Cisneros served a beer to Tapia-Amigon, Lopez testified that rather than asking Tapia-Amigon to pay, "Rincon Cisneros … looked at … me, expecting payment." (*Ibid*.) He paid, after noting that "Tapia made no attempt to pay for the beer." (*Ibid*.) In other words, Rincon-Cisneros actively encouraged the solicitation from start to finish. Count 24 is supported by substantial evidence and is therefore affirmed.

Counts 27-29

Appellant challenges count 27, brought under section 24200.5(b), as well as counts 28 and 29, brought under rule 143.

As to count 27, appellant's argument is that there is no evidence that Canongo-Amigon "permitted" Rincon-Cisneros to solicit Agent Villanueva. (AOB, p. 25.) In the decision below, the Department neither found nor concluded that Canongo-Amigon ever overheard these solicitations. The most Villanueva could testify was that Canongo-Amigon and Rincon-Cisneros were in the same general area, that is, the employee side of the bar. (RT at p. 182.) While it is not explicitly required that the solicitation be overheard, there must be some other evidence that Canongo-Amigon, who operated the register, was aware of or participated in the solicitation scheme.

Here, the testimonial evidence relied upon by the Department is lacking; Villanueva's testimony raises more questions than it answers. (See generally RT at

pp. 178-182.) He could not testify as to how much in change Canongo-Amigon gave to Rincon-Cisneros. His testimony only showed that Rincon-Cisneros placed an unknown amount of change into her pocket. After pocketing a portion of the change, Rincon-Cisneros returned $5 in change to Villanueva. It is hard to infer knowledge or permitting of a profit-sharing, solicitation scheme on Canongo-Amigon's part when it was Rincon-Cisneros who took the change and divided it herself. It is equally possible that Canongo-Amigon entrusted the change to Rincon-Cisneros to simply close the transaction as Rincon-Cisneros was also working that night. (RT at pp. 182-183.)

In sum, substantial evidence does not support finding that Canongo-Amigon permitted, much less was aware of, Rincon-Cisneros's solicitations. Count 27 turns on Canongo-Amigon's participation in the scheme. However, her knowledge of these solicitations is not supported by substantial evidence. For these reasons, we conclude that count 27 should be reversed.

As to count 29, appellant concedes that a rule 143 violation took place. In fact, she states "the evidence clearly supports the charge" that Rincon-Cisneros, "a bartender employee, solicited Agent Villanueva." (AOB, p. 26.) We agree. Unrefuted evidence, much of it outlined above, established that Rincon-Cisneros solicited and accepted three beers from Villanueva. (Findings of Fact, ¶¶ 29-31.) It also shows she consumed at least the first two of those beers. (RT at pp. 180-181.) We conclude that count 29 is supported by substantial evidence and is affirmed.

As to count 28, it appears to duplicate count 29, just as counts 22 and 23 were duplicative of one another. Count 28 charges that "respondent-licensee's agent or employee, [Canongo-Amigon], permitted [Rincon-Cisneros] to accept … a drink which had been purchased … and intended for [her] consumption, in violation of [rule] 143."

Count 29 charges that "respondent-licensee's agent or employee, [Rincon-Cisneros], solicited upon the licensed premises, the purchase … of a drink intended for [her] consumption, in violation of [rule] 143."

As with counts 22 and 23, which were also brought under rule 143, charging that one employee of the licensee permitted another employee to engage in unlawful acts is the same as directly charging that latter employee for the same underlying acts. (*Cooper*, *supra*, 137 Cal.App.2d at p. 679.) Although counts 28 and 29 are phrased differently from each other, liability for both violations ultimately lies with the same person, the appellant. The Department's decision found two violations when there was only one. We can affirm one or the other, but not both. Since count 29 was affirmed, we have no choice but to conclude that count 28 must be reversed.

May 18, 2018

On May 18, 2018, Carnet and Lopez returned to the licensed premises. Upon entering, they both approached the bar counter area. Rincon-Cisneros was identified as a bartender working that night. When Lopez ordered a 12-ounce bottle of Modelo beer, Rincon-Cisneros charged him $5 for the drink.

Count 34

Appellant challenges count 34, brought under section 25657(a). She argues, on appeal, that there is no evidence that Rincon-Cisneros was hired for the purpose of "anything save being a bartender." (AOB, p. 26.) Appellant's 'argument' here is little more than a summary of count 24, which she alleges is "striking[ly] similar" to count 34.

Again, establishing a section 25657 violation does not require proof that employees were hired for the specific purpose of soliciting drinks. (*Cooper*, *supra*, 137 Cal.App.2d at pp. 675-677.) Lopez testified that after arriving, he began speaking with

Tapia-Amigon who approached him on the patron side. As they began a conversation, Rincon-Cisneros asked Lopez if he was "going to invite her to [a beer]." (RT at pp. 39-40.) After Tapia-Amigon confirmed she wanted a beer, Lopez bought one for her and paid for the drink with a $20 bill to Rincon-Cisneros. The evidence thus shows that, while working as a bartender, Rincon-Cisneros encouraged Lopez to purchase a beer for Tapia-Amigon. Given that Tapia-Amigon is the daughter of Rincon-Cisneros's co-worker, Canongo-Amgion, it is unlikely this transaction was merely incidental. (RT at p. 26.) We conclude that count 34 is supported by substantial evidence and is affirmed.

Counts 38, 40-45

Appellant challenges counts 38, 41, and 42, brought under section 24200.5(b), count 40, brought under section 25657(b), count 43, brought under section 25657(a), as well as counts 44 and 45, brought under rule 143. As to these counts, appellant's primary argument is that because Carnet's "hearsay" testimony regarding the April 6 investigation—an entirely separate event—was "not reliable or trustworthy," it somehow impeaches the evidence regarding the events of May 18. (AOB, pp. 27-28.) Notably, appellant does not specifically point to Carnet's testimony regarding *this* visit in support of her argument.

Since the agent's testimony, if believed, is evidence of the solicitation activity, the issue is really one of credibility, and, as outlined earlier, the ALJ is the person who makes that determination. Moreover, both the Government Code and the Code of Regulations explicitly permit the use of hearsay in administrative hearings. In this case, the ALJ chose to accept the testimony of the agent, and our review of the record satisfies us that this was reasonable. The statements were admissible as administrative hearsay.

Carnet's unrefuted testimony as to May 18 (RT at pp. 222-226) established that Mari solicited him for a beer. When Carnet agreed to buy her a beer, Rincon-Cisneros was the bartender who processed the transaction. After Mari ordered a beer directly from Rincon-Cisneros, Rincon-Cisneros served Mari with a 12-ounce Modelo beer. Carnet paid for the beer by handing $20 to Rincon-Cisneros, who went to the register to make change. He testified that she gave him $5 of the change. Mari picked up and kept $10 of the change in Rincon-Cisneros's presence.

Rincon-Cisneros, while on the employee's side of the fixed bar, also solicited Carnet for beers. After he agreed to buy her a beer, Rincon-Cisneros obtained a 12-ounce Michelob Ultra from the employee's side of the bar. She charged him $15 for the beer, and he paid by handing her a $20 bill. As he paid, Canongo-Amigon, who was also on the employee side of the bar with Rincon-Cisneros, came over to get the money from Rincon-Cisneros. Canongo-Amigon obtained change, with $10 going to Rincon-Cisneros and $5 to Carnet. Rincon-Cisneros then proceeded to consume the beer. This sequence took place six additional times, for a total of seven solicitations.

As to counts 38 and 43, the evidence is not in dispute. While employed as a bartender that night, Rincon-Cisneros solicited Carnet for a beer seven times. Lopez's testimony established that he had been charged only $5 for a 12-ounce Michelob Ultra when he ordered for himself. (RT at pp. 37-38.) However, Rincon-Cisneros charged Carnet $15 for the same. A reasonable inference to be drawn from the price discrepancy of the beers is that Rincon-Cisneros was a participant in the drink solicitation scheme and conspiracy. Why else would she have charged Carnet $15 for each beer, and then take $10 of the change for herself?

As for Canongo-Amigon's awareness of the solicitation activity, the evidence established that she, Gomez, and Rincon-Cisneros were all occupying the employee's side of the bar together. In fact, Canongo-Amigon was close enough such that she overheard Rincon-Cisneros calling for Gomez, and then walked over to Rincon-Cisneros in place of Gomez. (RT at p. 224.)

Viewing this matter, as we must, in the light most favorable to the Department's decision, we conclude that substantial evidence supports the finding that Canongo-Amigon permitted Rincon-Cisneros to solicit Carnet. Accordingly, this participation, and therefore knowledge, is properly imputed to the appellant. We conclude that counts 38 and 43 are supported by substantial evidence and are affirmed.

Count 38, however, raises a duplicative issue as to count 42. Count 42 charges that "respondent-licensee's agent or employee, [Canongo-Amigon], permitted [Rincon-Cisneros], to solicit or encourage others … to buy [her] drinks … under a commission … scheme or conspiracy, in violation of … Section 24200.5(b)." Count 38 charges that "respondent-licensee's agent or employee, [Canongo-Amigon], permitted [Rincon-Cisneros] to solicit or encourage Agent Carnet … to buy her drinks … under a commission … scheme or conspiracy, in violation of … Section 24200.5(b)."

Charging that Canongo-Amigon permitted Rincon-Cisneros to solicit Carnet is duplicative of charging that Canongo-Amigon permitted Rincon-Cisneros to solicit others to buy her drinks. (*Cooper*, *supra*, 137 Cal.App.2d at p. 679.) Although these counts are phrased differently from each other, liability for both violations ultimately lies with the same person, the appellant. The Department's decision found two violations when there was only one. We can affirm one or the other, but not both. Since count 38 was affirmed, we have no choice but to conclude that count 42 must be reversed.

As to counts 40 and 41, appellant does not contest Carnet's testimony. To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or authority for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing court. (*Atchley*, *supra*, 151 Cal.App.3d at p. 647.) In short, there is no basis for reversal of these counts.

The unrefuted evidence shows Mari was allowed to solicit Carnet for a beer, that Rincon-Cisneros both received Mari's order and made change, and that Mari took $10 of the change in Rincon-Cisneros's presence. Again, this is the same $10 amount that Carnet testified Mari told him she earned for each beer she solicited at the licensed premises. If Canongo-Amigon overheard Rincon-Cisneros with Carnet from the bar area earlier, it is reasonable to infer that Rincon-Cisneros could overhear Mari and Carnet. It is also reasonable to infer that Rincon-Cisneros would have been on notice given that Mari ordered a beer directly from her, Rincon-Cisneros served her the beer, and Rincon-Cisneros was present when Mari took the $10 for herself. Therefore, counts 40 and 41 are affirmed.

As to counts 44 and 45, appellant does not raise any argument regarding Rincon-Cisneros soliciting Carnet for beers in Canongo-Amigon's presence. Where a point is merely asserted without any argument or authority for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing court. (*Atchley*, *supra*, 151 Cal.App.3d at p. 647.) As to count 45, which charges Rincon-Cisneros, as an employee of appellant, with soliciting drinks intended for her consumption, there is no basis for reversal. Therefore, count 45 is affirmed.

Count 44, however, raises a duplicative issue as to count 45. Count 44 charges that "respondent-licensee's agent or employee, [Canongo-Amigon], permitted [Rincon-Cisneros] to accept … a drink which had been purchased … and intended for [her] consumption, in violation of [rule] 143." Count 45 charges that "respondent-licensee's agent or employee, [Rincon-Cisneros], solicited upon the licensed premises, the purchase … of a drink intended for [her] consumption, in violation of [rule] 143."

The problem is that charging that one employee of the licensee permitted another employee to engage in unlawful acts is the same as directly charging that latter employee for the same underlying acts. (*Cooper*, *supra*, 137 Cal.App.2d at p. 679.) Although the counts are phrased differently from each other, liability for both violations ultimately lies with the same person, the appellant. The Department's decision found two violations when there was only one. We can affirm one or the other, but not both counts. Since count 45 was affirmed, we have no choice but to conclude that count 44 must be reversed.

May 25, 2018

On May 25, 2018, Villanueva and Lopez returned to the licensed premises. Upon entering, Villanueva went to the fixed bar counter. Rincon-Cisneros was identified as a bartender working at the counter.

Counts 49-51

Appellant challenges count 49, brought under section 25657(a), count 50, brought under section 24200.5(b), and count 51, brought under rule 143.

As to count 49, appellant argues that the Department did not offer evidence that Rincon-Cisneros "was hired for the purpose" of anything "save being a bartender." (AOB, p. 29.) Appellant contends that a violation of section 25657(a) "requires specific

evidence of employment for a sinister purpose." (*Ibid*.) Not only is this assertion presented without any support, establishing a section 25657 violation does not require proof that employees were hired for the specific purpose of soliciting drinks. (*Cooper*, *supra*, 137 Cal.App.2d at pp. 675-677.)

Unrefuted testimony showed that she was working as a bartender that night and that she successfully solicited Villanueva for a beer twice. (RT at pp. 183-188.) Appellant counters that being "sociable and nice to patrons" is not the same as being hired for "the purpose of encouraging solicitation" and that "bartenders are hired to encourage consumption of drinks." (AOB, p. 29.) This is a distinction without a difference. The picture that appellant attempts to paint still falls within the purview of section 25657. We conclude count 49 is supported by substantial evidence and is therefore affirmed.

As to count 50, appellant's primary contention is that the Department's evidence only consisted of "Villanueva's hearsay statements that a solicitation had occurred with respect to Rincon." (AOB, p. 29.) Since the agent's testimony, if believed, is evidence of the solicitation activity, the issue is really one of credibility, and, as outlined earlier, the ALJ is the person who makes that determination. Moreover, both the Government Code and the Code of Regulations explicitly permit the use of hearsay in administrative hearings "for the purpose of supplementing or explaining other evidence." (Gov. Code § 11513(d); Code Regs., tit. 2, § 7429(f)(4).) In this case, the ALJ chose to accept the testimony of the agent, and our review of the record satisfies us that this was reasonable. The statements were admissible as administrative hearsay.

The unrefuted evidence established that as part of Rincon-Cisneros's pattern of solicitation, that she took a commission on each beer. (Findings of Fact, ¶¶ 51-52; RT

at pp. 184-188.) For example, the second beer she solicited was a 12-ounce Michelob Ultra. As established earlier, the price for one 12-ounce Michelob Ultra is $5. However, when Villanueva paid for it with a $20 bill, he testified that Rincon-Cisneros only returned $5 in change to him and that she kept the rest of the change. We conclude that count 50 is supported by substantial evidence and is therefore affirmed.

As to count 51, appellant raises the same hearsay argument. We, again, reject that argument. Substantial evidence shows that Rincon-Cisneros solicited multiple beers from Villanueva, and that she consumed both beers. Notably, Rincon-Cisneros poured her first solicited beer into a plastic cup because "she did not want to be caught drinking on duty" as she believed police might be in the area. (Findings of Fact, ¶ 51.) Even she recognized that she solicited, accepted, and consumed a drink purchased for her consumption while she was working. Count 51 is, therefore, affirmed.

June 15, 2018

On June 15, 2018, Carnet, Lopez, and Villanueva returned to the licensed premises. After they entered, they went to the fixed bar, where they recognized Rincon-Cisneros on the employee side of the bar. She was identified as a bartender who was on duty that night. Agent Lopez ordered a 12-ounce bottle of Modelo beer, for which he was charged $5.

Counts 56-57

Appellant challenges count 56, brought under section 25657(a), and count 57, brought under rule 143. The unrefuted testimony established that after the agents' arrival, Rincon-Cisneros solicited Carnet for a beer from the employee side of the bar. (RT at pp. 227-228.) He agreed and handed her a $20 bill to buy a beer for her. Rincon-Cisneros handed the money to Gomez, who was also on duty as a bartender

that night. When Gomez returned with change, Rincon-Cisneros kept some of the change and gave $5 back to Carnet as change.

As to count 56, the appellant argues that the Department did not offer evidence that Rincon "was hired for the purpose" of anything save being a bartender. (AOB, p. 31.) Again, establishing a section 25657 violation does not require proof that employees were hired for the specific purpose of soliciting drinks. (*Cooper*, *supra*, 137 Cal.App.2d at pp. 675-677.) Appellant's claim that Rincon-Cisneros solicited the drink for herself, rather than for others, is immaterial. (AOB, p. 31.) Section 25657(a) does not limit or specify for whom the alcoholic beverage was solicited. It did not matter whether the drink was solicited for herself or for another. Substantial evidence shows that Rincon-Cisneros working as a bartender that night, and that she solicited a beer from Carnet while on duty. Count 56 is, therefore, affirmed.

As to count 57, appellant argues that there was no evidence Gomez permitted Rincon-Cisneros's solicitation of Carnet. As an initial matter, appellant's brief appears to have made a typo, referring to Tapia instead of Rincon-Cisneros. In her brief, appellant argues that, as written, count 57 "charged Rule 143 as a solicitation not as the acceptance of a drink by Rincon." (AOB, p. 31.) However, this is incorrect. As written in the First Amended Accusation, count 57 charges that "respondent-licensee's agent or employee, [Gomez], permitted [Rincon-Cisneros], an employee, to *accept* … a drink … purchased … intended for [her] consumption, in violation of [rule] 143." (Exh. 1, emphasis added.) Moreover, appellant concedes that "acceptance of a drink by Rincon" would be established, as shown by Carnet purchasing a beer for Rincon-Cisneros. (AOB, p. 31.) Substantial evidence shows that Rincon-Cisneros accepted a

drink purchased by Carnet, intended for her use, and that she consumed said drink. Therefore, count 57 is affirmed.

Overall, appellant's brief selectively attempts to explain away the circumstances relating to the drink solicitations and divert attention from the fact that her own bartenders were actively facilitating or involved in the illegal conduct at issue. It is one thing to distinguish a small number of counts. Here, however, the evidence is overwhelming. After review, this Board is hard-pressed to conclude anything other than that a pervasive solicitation scheme existed at these premises.

Appellant asks this Board to review the same set of facts and reach a different set of inferences and conclusions. This we cannot do. In sum, we affirm counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 29, 34, 38, 40, 41, 43, 45, 49, 50, 51, 56, and 57. Counts 21, 22, 27, 28, 42, and 44 are reversed.

II

PENALTY OF OUTRIGHT REVOCATION

Whether the penalty was excessive

The appellant contends the penalty of license revocation for a first-time drink solicitation violation is "unduly harsh and excessive." (AOB, p. 4.) Specifically, appellant argues that revocation is routinely imposed for all first-time solicitation violations, even though the penalty guidelines allow for penalty adjustment. (AOB, pp. 12-13.)

This Board may not "disturb" the Department's penalty determinations "unless there is a clear abuse of discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd*. (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633]; *Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 966 [103 Cal.Rptr. 455].) An abuse of discretion takes

place when a public official or agency acts arbitrarily or capriciously. (*Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 598 [113 Cal.Rptr.3d 610].) The possibility that reasonable minds may differ on the penalty only confirms "the conclusion that there was no abuse of discretion." (*Lake v. Civil Service Commission* (1975) 47 Cal.App.3d 224, 228 [120 Cal.Rptr. 452]; *Harris*, at p. 594.)

Rule 144 provides penalty guidelines for Department discipline. That rule states, 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.

(Cal. Code Regs., tit. 4, § 144, emphasis added.) The penalty guidelines also add:

> 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.)

The plain language of the penalty guidelines is permissive and leaves penalty determinations up to the Department's discretion. The guidelines list factors that *may* be considered in aggravation (such as a continuing course or pattern of wrongful conduct) or mitigation (such as "[p]ositive action by licensee to correct [the] problem" or length of licensure without prior disciplinary). (See generally Penalty Guidelines.) The Department has the discretion to issue penalties greater or less than the suggested penalty depending on those factors. However, presenting mitigating evidence does not *entitle* an appellant to a mitigated penalty.

Section 24200.5(b) mandates revocation for a violation of its provisions. Here, we affirm 12 counts brought under that section: counts 3, 5, 8, 10, 13, 14, 16, 19, 20, 38, 41, and 50. Similarly, rule 144 authorizes a default penalty of revocation for a violation of section 25657(a). Here, we affirm eight counts brought under that section: counts 4, 7, 15, 24, 34, 43, 49, and 56. Rule 144 also provides that the penalty for a violation of section 25657(b) ranges from a 30-day suspension up to revocation. Here, we affirm three counts brought under that section: counts 2, 18, and 40. Finally, the penalty for a violation of rule 143 is a 15-day suspension. Here, we affirm nine counts brought under that rule: counts 6, 9, 12, 17, 23, 29, 45, 51, and 57.

In light of the whole record, the penalty is not excessive. Revocation would have been justified based on a single violation of section 24200.5(b) or 25657(a). Of the

counts brought by the Department under those sections, we affirm twenty of those counts.

Even if a stayed revocation or suspension were reasonable, it was within the Department's discretion to find that an aggravated penalty was warranted. Appellant concedes "it can reasonably be argued [she] did deserve an aggravated penalty because the accusation included a greater amount of solicitation counts than the average case." (AOB, p. 6.)

Appellant raises several more arguments, but they do not change the calculus. First, her disciplinary history in no way mandates a lesser penalty. As stated above, mitigation is discretionary. Even a lengthy period of discipline-free licensure does not guarantee a mitigated penalty. In the instant case, appellant's license was issued on November 28, 2017. This means she was licensed for only four months before the first violation took place—an unimpressive track record at best.

Appellant also argues that, "[n]otwithstanding the language of the statutes and Department-created Penalty Guideline[,] the Department customarily does not outright revoke on first-time solicitation cases." (AOB, p. 5.) However, disagreement with the penalty does not mean an abuse of discretion by the Department has taken place. Although outright revocation may be harsh, the court has stated:

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

(*Rice v. Alcoholic Beverage Control Appeals Bd*. (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].)

Finally, appellant argues in the closing brief that the Department is not always "required to 'revoke' under Sections 24200.5(b) and 25657(a)." (Appellant's Closing Brief, p. 9 (ACB).) Indeed, in outlining the penalty determination, the decision below noted both section 24200.5(b) and 25657(a) may allow for some form of stayed revocation. (Decision, p. 17.) However, that the Department may issue a stayed revocation is quite a different proposition from the Department *must* issue a stayed revocation here. Again, as appellant concedes, rule 144 grants the Department considerable discretion and flexibility on the penalty determination. (ACB, p. 11.) The Board is not empowered to reach a contrary conclusion from that of the Department if the underlying decision is reasonable. The volume of counts affirmed in this decision speaks for itself. We conclude that revocation is entirely consistent with rule 144.

Whether the penalty violates due process

Appellant next argues the manner in which the Department accumulated the counts and issued its penalty against her was "overkill" and resulted from unreasonable, capricious, and arbitrary abuse of discretion. (AOB, p. 6.) Specifically, she contends the penalty must be reversed as it was "the product of the Department's unnecessarily and unreasonably long investigation enforcement program," unlawful under *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1] (*Walsh*). (AOB, p. 14.) In sum, her contention is that the Department's "action in conducting such a long and multiple-day investigation was … a violation of due process, since it led to a permanent 'taking' of Appellant's license and livelihood." (AOB, p. 34.) These arguments fall flat.

Appellant contends that *Walsh* applies here because both instances involved the Department conducting multiple investigations over a continuous period of time—this

case involving drink solicitation, and *Walsh* involving fair pricing requirements of wineries. (AOB, p. 13.)

In *Walsh*, the California Supreme Court reviewed a case in which the Department accumulated evidence of "recurring sales of distilled spirits below established minimum retail prices, each sale constituting a different but essentially identical violation, before it filed its accusation charging the licensee with the whole series of violations and assessing concomitant cumulative penalties." (*Walsh*, *supra*, at p. 98.) There, the statute involved did not provide for suspension or revocation, but each offense after the first was punishable by a $1,000 fine. With the penalties at issue being monetary in nature, their accumulation resulted in a total fine of $9,250—the sum of ten separate pricing fines. (*Id*. at p. 99.) The court found this strategy improper and at odds with the purpose of the pricing statute:

> [S]ection 24744.1[, the fair trade statute at issue,] is not intended merely to exact tribute for the general fund or, by the imposition of insurmountable financial burdens, to punish or eliminate a licensee who is in default. [Citation.] Rather the purpose of the statute is to compel, through the duress of monetary penalties compliance by all licensee with the fair trade provision enacted by the Legislature. The statute thus requires administrative practices which induce conformance with rather than avoidance of the retail price maintenance provisions. The statute is, moreover, in character intended to serve as a notice or warning as it provides a relatively light penalty for the initial violation with the threat of more severe penalties should the licensee thereafter fail to conform.

(*Id.* at p. 102.) The court concluded that the Department had acted improperly by accumulating enough violations to drive the licensee into bankruptcy. (*Id*. at p. 104.)

Here, *Walsh* is inapposite. Appellant presents no evidence that the accumulation of violations led to a more severe penalty. Moreover, unlike *Walsh*, the appellant here did not incur a separate, cumulative penalty for each individual count. Appellant fails to argue otherwise.

The appellant also takes issue with the fact that appellant "was never notified of the investigations despite the fact the … investigation ran from March [to] June 15, 2018." (AOB, p. 33.) However, the *Walsh* court does not require that the Department always notify licensees immediately following the first violation of any statute. In fact, the court concluded:

> The particular vice in the instant case … lies in the subjective determination by the department that it would seek a penalty beyond that provided for a first violation in light of the licensee's previous good record. We recognize that in order to fortify its evidence of a violation to be later charged in an accusation the department may deem it prudent to obtain evidence of more than one sale in technical violation of the statute before filing an accusation. The gathering of such supportive evidence would not in itself, of course, constitute arbitrary or capricious conduct.

(*Walsh*, *supra*, at p. 105.) Thus, it was not the accumulation of multiple violations, but the "imposition of cumulative penalties" for each of those successive violations that the court found to be a denial of due process. (See *id*. at p. 106 [noting that cumulative fines resulted in "de facto revocation of the license."].) If anything, *Walsh* would approve of the meticulousness of the Department's investigation. For solicitation violations—which often involve ambiguous dialogue and discreet exchange of money—it is prudent to obtain evidence of multiple transactions in violation of the statute in order to establish a pattern of conduct and ensure that the initial violations were not simply a misunderstanding or the rogue conduct of a disgruntled employee. (See *Walsh*, *supra*, at p. 105.) In the instant case, the Department's investigational strategy did not violate due process; if anything, it promoted it by ensuring prosecution was based on solid factual evidence.

This Board is wary of substituting its judgment for that of the Department regarding when an investigation has reached the point where an accusation should be

filed, unless the further visits can be shown to be unreasonable, arbitrary or capricious. (See *Dirty Dan's, Inc.* (2012) AB-9155, at pp. 4-6.) No such evidence has been presented. Instead, the appellant repeatedly asserts, without support, that the Department's multi-day investigation was unreasonable, arbitrary, and capricious. In the absence of any evidence that the Department intentionally prolonged the investigation for an improper purpose, it is inappropriate for the Board to infringe upon the Department's discretion in its conduct of an investigation.

Whether the penalty violates equal protection

Lastly, appellant argues that the Department's enforcement of the drink solicitation statutes and subsequent revocation of her license violates equal protection. The appellant contends that "she was not treated equally as other similarly situated license who violate Section 24200.5(b), and other solicitation statutes." (AOB, p. 35.) Specifically, she alleges that "the Department treated Appellant differently because of the large number of solicitation [c]ounts; a large number created by the Department's arbitrary use of its investigatory powers." (AOB, p. 35.)

Appellant believes the Department singled her unlawfully out for disparate, harsher treatment. This has no basis in the record. However, what the record does reflect is that appellant's penalty was justified by the long list of solicitation-related violations sustained below and affirmed here. By appellant's logic, "equal treatment" would have required only license suspension, *regardless* of the facts on the ground here.

The Board's review is limited by the California constitution and by statute. The Board "shall not receive evidence in addition to that considered by the department." (Cal. Const., art. XX, § 22.) Additionally, "[r]eview by the board of a decision of the department shall be limited to the questions whether the department has proceeded

without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in light of the whole record. (*Ibid*.; see also Bus. & Prof. Code, § 23084.)

It is outside the jurisdiction of this Board to rule on the constitutionality of a statute. The California Constitution states:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

(Cal. Const., art. III, § 3.5.) Section 3.5 includes the Appeals Board:

> In its stricter connotation, an "administrative agency" is a governmental body, other than a court or legislature, invested with power to prescribe rules or regulations or to adjudicate private rights and obligations. [Citations.] While the [Alcoholic Beverage Control] Appeals Board exercises "judicial" power [citation], it is clearly an agency within the executive branch of government and falls within both of the foregoing definitions.

(Applicability of California Constitution Article III, Section 3.5, 62 Ops.Cal.Atty.Gen. 788 (1979), at p. 8.)

This Board possesses the authority and, when appropriate, the duty to rule that a statute is unconstitutional as applied in a given case. We have, for instance, previously ruled that the Department's investigative procedures can, under the facts of an individual

case, violate constitutionally guaranteed rights. (See, e.g., *Hussainmaswara* (2014) AB-9402, at pp. 9-22 [holding "inspection" of licensed premises violated constitutional guarantees against warrantless searches].)

Appellant is asking us to determine if the Department's investigatory procedures—resulting in a large number of solicitation counts and her license revocation—renders those very enforcement actions void as outside the Department's jurisdiction. In other words, this Board cannot affirm or give effect to an administrative decision that is the product of unconstitutional conduct, but must reverse it because such unconstitutional conduct by the administrative agency is beyond its jurisdiction.

The problem is that appellant has failed to establish that the Department's conduct was unconstitutional. She does not specify the suspect classification that supposedly took place. Moreover, appellant does not cite to any legal authority in support of her position, nor does she make specific citations to the record. When an appellant merely asserts a point without argument or support, this Board may treat such contentions as waived or forfeited. (*Atchley*, *supra*, 151 Cal.App.3d at p. 647 ["Where a point is merely asserted by appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court."]; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 [183 Cal.Rptr.3d 654] ["It is the responsibility of the appellant … to support claims of error with meaningful argument and citation to authority. [Citations.] When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration. [Citations.] In addition, citing cases [or statutes] without any discussion of their application to the present case results in forfeiture."].)

Although appellant's argument is mostly conjecture, she does cite to prior decisions of this Board. While prior decisions may be persuasive authority, they are not binding. (See *Bankamerica Corp. v. United States* (1983) 462 U.S. 122 [103 S.Ct. 2266] ["There is … no rule of administrative stare decisis."].) To the extent those cases might be relevant, there is no meaningful argument as to how those cases ought to bear on the facts of the instant case. In fact, appellant's discussion of those prior decisions is little more than a short, factual summary of each case. Her brief merely summarizes superficial details, such as how many counts were involved and the outcome of each appeal. (AOB, pp. 36-38.) There is no detailed discussion of the specific facts or the Board's legal reasoning in those decisions. Consequently, it remains unclear whether, and to what extent, the appellants in those prior cases were similarly situated as the appellant here. In short, appellant fails to provide a basis for reversal.

Another problem with appellant's reliance on these prior decisions is that her reliance is selective. She only cites to decisions that are consistent with her preferred outcome in the instant case. Her argument would have been much stronger if, for example, she cited to prior decisions in which a similarly situated licensee had their license revoked and then distinguished those cases from the instant case.

Appellant states that the Department's decision to revoke her license violates her equal protection rights. Appellant, however, does not show what kind of suspect classification took place. Nor did she establish that the appellants in the prior Board decisions were similarly situated as the appellant here. The difference in the penalty outcome here was not based on an impermissible singling out of the appellant; it was based on a record replete with ongoing violations that spanned several months. In short, we affirm the Department's decision.

III

REQUEST FOR A REMAND

Finally, appellant argues the instant case should be remanded on the issue of penalty. She contends remand is necessary to determine whether there is evidence that the "Department intentionally prolonged the investigation for the purpose of obtaining a more severe penalty." (AOB, p. 39.) Appellant accuses the Department of wanting to "destroy" her business. (AOB, p. 14.) According to her, fairness requires a new hearing because—whether due to ineffective representation by her previous attorney or unavailability of evidence at the hearing below—she was unable to satisfactorily argue about the penalty. (AOB, p. 4.)

Review by this Board is limited by the constitution to the record on appeal. Where an appeal is filed from a department decision, "the board shall not receive evidence in addition to that considered by the department." (Cal. Const., art. XX, § 22.) However, the Board may review, among other questions, "[w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced." (Bus. & Prof. Code, § 23084.) In such instances, the proper remedy is remand for reconsideration in light of the additional evidence. (Bus. & Prof. Code, § 23085.) Even if the criteria is met, however, we are not required to remand the matter. (See Bus. & Prof. Code, § 23085 ["In appeals where the board finds that there is relevant evidence … it *may* enter an order remanding the matter to the department for reconsideration"], emphasis added.)

The Board's rules outline the procedure for bringing the Board's attention to such evidence. Specifically, rule 198 states:

> When the board is requested to remand the case to the department for reconsideration upon the ground that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the department, the party making such request must, in the form of a declaration or affidavit, set forth:
>
> (a) The substance of the newly-discovered evidence;
>
> (b) Its relevancy and that part of the record to which it pertains;
>
> (c) Names of witnesses to be produced and their expected testimony;
>
> (d) Nature of any exhibits to be introduced;
>
> (e) A detailed statement of the reasons why such evidence could not, with due diligence, have been discovered and produced at the hearing before the department. Merely cumulative evidence shall not constitute a valid ground for remand.

(Code Regs., tit. 4, § 198.)

"Reasonable diligence" is not defined in section 23084. However, the "reasonable diligence" standard for the introduction of new evidence also appears in the Code of Civil Procedure:

> The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes[:]
>
> [¶ . . . ¶]
>
> 4. Newly discovered evidence, material for the party making the application, which he could not, with *reasonable diligence*, have discovered and produced at the trial.

(Code Civ. Proc., § 657, emphasis added.)

There are numerous cases defining "reasonable diligence" in this context. The burden, for example, is on the moving party: "[I]t is incumbent on the moving party to show that he has exercised reasonable diligence to discover before the trial the evidence upon which he relies." (*Pierce v. Nash* (1954) 126 Cal.App.2d 606, 620 [272 P.2d 938];

see also *Slemons v. Paterson* (1939) 14 Cal.2d 612, 616 [96 P.2d 125] ["It does not appear from plaintiffs' affidavit that they made any effort whatever to obtain the evidence prior to the trial"]; *Edwards v. Floyd* (1950) 96 Cal.App.2d 361, 362 [215 P.2d 117] [general averment of diligence insufficient]; *Foster v. National Ice Cream Co.* (1916) 29 Cal.App. 484, 484-485 [156 P. 985].)

Moreover, the exercise of "reasonable diligence" must take place before the trial; it is not enough to commence an investigation after the fact:

> In order to obtain a new trial because of newly discovered evidence, the applicant must show that he used reasonable diligence to discover it prior to the trial and that he failed to discover it and did not, in fact, know of it in time to produce it, or in time to apply for a continuance in order that he might produce it, at the trial.

(*Pollard v. Rebman* (1912) 162 Cal. 633, 636-637 [124 P. 235].) Ultimately, the determination is fact-specific. "Diligence is a relative term. It is incapable of exact definition, and depends upon the particular circumstances of each case." (*Parker v. Southern Pac. Co.* (1928) 204 Cal. 609, 618 [269 P. 622]; see also *Heintz v. Cooper* (1894) 104 Cal. 668 [38 P. 511].)

While aforementioned cases address "reasonable diligence" in the context of civil litigation rather than the administrative context, we see no reason to disregard over a century of case law thoroughly analyzing and defining the term. We therefore evaluate appellant's "reasonable diligence" on the criteria outlined above.

Upon review, we conclude that appellant falls well short of meeting the criteria above. Appellant fails to specify the substance of any newly-discovered evidence. That is because they have no such evidence on hand. All that she describes is the *nature* of the evidence she would like to like to discover upon remand. (See, e.g., AOB, p. 4 ["evidence which would show Department abuse of discretion in Appellant's case

based on prior relevant … decisions."].) Appellant does not specify if the potential evidence is testimonial or documentary in nature. Her brief does not identify any specific witnesses or documents. Most critically, she provides no explanation at all as to why such evidence could not have been produced at the hearing below. There is not even a cursory statement as to how appellant acted with diligence, much less a detailed one as specified by rule 198. There is simply no basis for concluding that appellant made any reasonable effort whatsoever.

While the kind of evidence appellant seeks, if it exists, is relevant to the instant case, relevancy alone does not require remand. As courts have written, "even weak and discredited evidence may meet the test of relevancy if it tends to prove some fact if believed." (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 839 [284 Cal.Rptr. 839].) If relevance alone required remand, then "trial courts … would be compelled to remand every case to the administrative tribunal each time some posthearing evidence, no matter how weak or discredited, was presented on the question of punishment." (*Ibid*.)

Appellant argues that a remand is necessary because of ineffective representation by her previous attorney at the hearing below. Specifically, she contends that her prior attorney "did not recommend a penalty at the hearing, and probably did not have a clue as to the nature of [the Department's] hearings." (AOB, p. 7.) Appellant alleges that, as a result, she "may have received an excessive and harsh penalty." (*Ibid*.) However, a subjective belief that prior representation was ineffective is not a basis for remand—especially when such assertions are presented without any support. While appellant was free to change legal representation, this does not excuse her from the consequences of that choice.

Appellant also argues that a remand is necessary because the kind of evidence she seeks was "unavailable" at the time of the hearing below. (AOB, p. 4.) But she misstates the inquiry. The inquiry does not turn on whether the evidence was produced at the hearing; it turns on whether the evidence could not be produced *despite reasonable diligence* on appellant's part. Since the appellant failed to provide any reason why the evidence could not, with due diligence, have been discovered and produced at the hearing below, our inquiry ends here.

Absent evidence to the contrary, the Board must presume the Department acted properly. (See Evid. Code, § 664.) Ultimately, appellant's claim rests on little more than the unsupported belief that somewhere in the Department, someone must have had improper motives against her and her business.

By framing her request as broadly as she does, appellant is essentially asking this Board to remand the case so she can engage in a fishing expedition. Appellant argues the evidence she seeks justifies remand. However, conjecture does not constitute evidence, much less a proper basis for granting remand. Furthermore, *a*ppellant does not cite to any authority requiring this Board to grant remand despite the absence of reasonable diligence on her part. We therefore reject appellant's request.

ORDER

With regard to counts 21, 22, 27, 28, 42, and 44, the decision of the Department is reversed. Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 29, 34, 38, 40, 41, 43, 45, 49, 50, 51, 56, and 57 are affirmed, as is the penalty of revocation.[6]

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[6] 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.

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 APPEALS BY: BRENDA OCEGUERA SANCHEZ DBA: MONA LISA 703 S OXNARD BLVD. OXNARD, CA 93030-7146 ON-SALE BEER AND WINE - PUBLIC PREMISES - LICENSE Respondent(s)/Licensee(s) under the Alcoholic Beverage Control Act.	VENTURA DISTRICT OFFICE File: 42-587660 Reg: 19088732 AB: 9868

CERTIFICATION

I, Yuri Jafarinejad, 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 May 15, 2020, 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:

BRENDA OCEGUERA SANCHEZ
MONA LISA
703 S. OXNARD BLVD.
OXNARD, CA 93030-7146

ON-SALE BEER AND WINE PUBLIC PREMISES - LICENSE

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

VENTURA DISTRICT OFFICE

File: 42-587660

Reg: 19088732

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 February 21, 2020. 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 April 6, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: February 24, 2020

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Brenda Oceguera Sanchez dba Mona Lisa 703 S. Oxnard Blvd. Oxnard, California 93030-7146 Respondent	File: 42-587660 Reg.: 19088732 License Type: 42 Word Count: 39,000 & 8,000 Reporter: Savauna Winn & Lisa Berryhill Kennedy Court Reporters
On-Sale Beer and Wine Public Premises License	**PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Ventura, California, on August 28-29, 2019.

John P. Newton, Attorney, represented the Department of Alcoholic Beverage Control.

David Martinez and Monty S. Gill, attorneys-at-law, represented respondent Brenda Oceguera Sanchez, who was present.

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

(1) on five separate dates, she employed or permitted various women to solicit or encourage others to buy them drinks in the licensed premises under a commission, percentage, salary, or other profit sharing scheme in violation of California Business and Professions Code section 24200.5(b);[1]

(2) on five separate dates, she employed various women for the purpose of procuring or encouraging the purchase or sale of an alcoholic beverage, or paid them a percentage or commission for procuring or encouraging the purchase or sale of an alcoholic beverage, in the licensed premises in violation of section 25657(a);

(3) on three separate dates, she employed or knowingly permitted various women to loiter in or about the licensed premises for the purpose of begging or soliciting patrons to purchase alcoholic beverages for them in violation of section 25657(b); and

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

(4) on six separate dates, she permitted various women to solicit the purchase or sale of any drink inside the licensed premises, or to accept any drink purchased or sold there, a portion of which was intended for the consumption or use of such employee, in violation of rule 143.[2]

As is typically the case with b-girl violations, these counts overlap to some degree. (Exhibit 1.)

Additionally, the Department seeks to discipline Respondent's license on the grounds that, on May 18, 2018, May 25, 2018, and June 15, 2018, she permitted a patron (directly or with the assistance of an employee) to: (1) possess cocaine for the purposes of sale upon the licensed premises in violation of California Health and Safety Code section 11351 and (2) sell, furnish, or offer to sell or furnish cocaine upon the licensed premises in violation of California Health and Safety Code section 11352. The Department also alleged that, between the dates of May 18, 2018 and June 15, 2018, she knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon the licensed premises. (Exhibit 1.)

Finally, the Department seeks to discipline the Respondent's license on the grounds that, on June 15, 2018, the Respondent purchased alcoholic beverages for resale from a retailer who did not hold a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license in violation of Business and Professions Code section 23402. (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 August 29, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on April 11, 2019 and a first amended accusation on August 7, 2019. At the hearing, the Department moved to amend a number of counts by interlineation. This motion was granted. The Department also moved to dismiss count 58. This motion was also granted.

2. The Department issued a type 42, on-sale beer and wine public premises license to the Respondent for the above-described location on November 28, 2017 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondent's license.

---

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

March 30, 2018
(Counts 1-14)

4. On March 30, 2018, Supv. Agent R. Carnet, Agent A. Lopez, and Agent A. Villanueva entered the Licensed Premises. Agent Lopez went to the bar counter and ordered a Modelo beer, for which he was charged $5. Maria Rincon-Cisneros, Marina Conongo-Amigon, Luis "Liliana" Santos-Zavaleta,[3] and Cindy Tapia-Amigon were the bartenders working at the time.

5. A woman identified only as Mari asked Supv. Agent Carnet to buy her a beer. He agreed and Mari ordered a beer from Canongo-Amigon. He gave $20 to Canongo-Amigon, who obtained some change from the register. She gave $5 of the change to him and $10 to Mari.

6. Mari subsequently asked him to buy her another beer. He agreed and she ordered a beer from Canongo-Amigon. Supv. Agent Carnet paid with a $20 bill. Canongo-Amigon took the money and obtained some change. She gave $5 of the change to him and $10 to Mari.

7. Mari solicited Supv. Agent Carnet three more times. Each solicitation was the same as the previous two, with Canongo-Amigon giving $10 of the change to Mari and $5 to Supv. Agent Carnet.

8. Mari solicited Supv. Agent Carnet two more times. Both times, Santos-Zavaleta was the bartender whom Supv. Carnet paid for the beers. Santos-Zavaleta took the money and obtained some change. He gave $10 of the change to Mari and $5 to Supv. Agent Carnet.

9. Mari asked Agent Lopez if he wanted to talk to one of her friends. He said that he did and she called over an unidentified woman (Jane Doe). Doe asked Agent Lopez if he would buy her a beer. He said that he would and she ordered a beer from Canongo-Amigon served Doe a bottle of Bud Light, which Agent Lopez paid for with $20 bill. Canongo-Amigon gave him $15 in change and asked if it was his first time at the Licensed Premises. He said that it was. Doe consumed her beer, then left.

10. Mari subsequently asked Agent Lopez if he would buy her a beer. He said that he would and she ordered a beer from Canongo-Amigon. Canongo-Amigon served a Modelo beer to Mari. Agent Lopez paid for the beer with a $20 bill. Canongo-Amigon gave him $5 in change.

---

[3] Santos-Zavaleta was transgender and used the pronoun, "she."

11. Later, Santos-Zavaleta asked Agent Lopez to buy her a beer. Agent Lopez agreed and Santos-Zavaleta served herself a beer. Agent Lopez handed $15 to Santos-Zavaleta, who placed the money in the register. She did not give Agent Lopez any change.

12. Santos-Zavaleta solicited a second beer from Agent Lopez. He agreed and she obtained a beer for herself. Agent Lopez handed $15 to Santos-Zavaleta, who placed it in the register. Agent Lopez did not receive any change.

13. Rincon-Cisneros asked Agent Villanueva if he would buy her a beer. He said that he would and handed her a $20 bill. She obtained a bottle of beer for herself, which she consumed. She handed him a $5 bill from her pocket.

14. Rincon-Cisneros solicited a second beer from him. He agreed and handed her a $20 bill. She gave him $5 in change from her pocket and obtained a bottle of beer for herself.

15. Later, Rincon-Cisneros asked Agent Villanueva to buy another beer for her. Agent Villanueva said that he would and handed her a $20 bill. Rincon-Cisneros took the money to Gomez, who placed it in the register and gave her $15 in change. Rincon-Cisneros pocketed the $10 bill and gave the $5 to Agent Villanueva. She obtained and consumed a beer.

April 6, 2018
(Counts 15-23)

16. On April 6, 2018, Agent Lopez, Agent Villanueva, and Supv. Agent Carnet returned to the Licensed Premises. They entered around 11:00 p.m. and went to the bar counter. Agent Lopez ordered a beer from one of the bartenders, Rincon-Cisneros. Rincon-Cisneros served the beer to him and charged him $5.

17. Tapia-Amigon, who was working behind the bar counter, began talking to Agent Lopez. Rincon-Cisneros asked him if he would buy Tapia-Amigon a beer. He asked Tapia-Amigon if she wanted a beer. She said that she did and he agreed. Tapia-Amigon obtained a beer from behind the counter. Agent Lopez paid Tapia-Amigon with a $20 bill. She took the money to the register and returned with $5 in change, which she gave to Agent Lopez.

18. Tapia-Amigon asked Agent Lopez if he wanted another beer. He said that he did. She then pointed to herself, indicating that she wanted a beer as well. He agreed and Tapia-Amigon obtained two Bud Light beers. She served one to Agent Lopez and kept one for herself. Agent Lopez paid by handing Tapia-Amigon a $20 bill. She took it to the register and came back with some money, which she placed in a jar on the employee side of the bar counter. She did not give Agent Lopez any change.

19. Agent Lopez told Tapia-Amigon that he was looking for someone to party with. She asked him what he was looking for, then asked him if he wanted coke. He said that he did. Tapia-Amigon looked around, and said that she did not see anyone.

20. Mari, who was working behind the bar counter, asked Agent Villanueva if he would buy her a beer. He agreed and gave her a $20 bill, which she gave to Rincon-Cisneros. Rincon-Cisneros took the money to the register and retuned with $15 in change. She gave the change to Mari, who pocketed $10 before she gave the remaining $5 to Agent Villanueva. Rincon-Cisneros obtained a beer and served it to Mari.

21. Mari subsequently asked Agent Villanueva if he would buy her a second beer. He agreed. Mari asked him if he wanted another beer as well. He said that he did and gave her a $20 bill. Mari handed the bill to Rincon-Cisneros, who took it to the register. Rincon-Cisneros gave Mari a $10 bill, then obtained two beers and served them to Agent Villanueva and Mari. Agent Villanueva did not receive any change.

22. Mari asked Supv. Agent Carnet to buy her a beer. He agreed and she ordered a beer from Rincon-Cisneros. Rincon-Cisneros served the beer to her, which Supv. Agent Carnet paid for with a $20 bill. Rincon-Cisneros obtained some change, giving $10 of it Mari and $5 to Supv. Agent Carnet.

23. Mari solicited two more beers from Agent Carnet. Rincon-Cisneros served both beers to Mari. Both times, Supv. Agent Carnet paid with a $20 and Rincon-Cisneros gave $10 of the change to Mari and $5 to Supv. Agent Carnet.

24. Supv. Agent Carnet struck up a conversation with Rincon-Cisneros. Rincon-Cisneros asked him to buy her a beer. He agreed. She obtained a bottle of beer for herself, which Supv. Agent Carnet paid for by giving her a $20 bill. Rincon-Cisneros gave the money to Arreola-Gomez. Arreola-Gomez made change, giving $10 to Rincon-Cisneros and $5 to Supv. Agent Carnet.

25. Rincon-Cisneros solicited a second beer from Supv. Agent Carnet. He agreed and she obtained a bottle of beer for herself. Supv. Agent Carnet paid her with a $20 bill. She took the money to Arreola-Gomez, who obtained change from the register. Arreola-Gomez gave $10 of the change to Rincon-Cisneros and $5 to Supv. Agent Carnet.

26. Rincon-Cisneros solicited three more beers from Supv. Agent Carnet. Each of the three solicitations occurred in the same manner as the previous two, with Arreola-Gomez giving $10 of the change to Rincon-Cisneros and $5 to Supv. Agent Carnet.

May 11, 2018
(Counts 24-29)

27. On May 11, 2018, Agents Lopez and Villanueva entered the Licensed Premises. They went to the bar counter and ordered two beers from Rincon-Cisneros. Agent Lopez handed her a $20 bill. Rincon-Cisneros asked him if he was going to buy a beer for Tapia-Amigon. He asked Tapia-Amigon if she wanted him to buy her a beer. She said that she did. Rincon-Cisneros served the beers to them, then told Agent Lopez that they would cost $25. He handed her another $20 bill, which she took to the register. She gave him $15 in change.

28. Rincon-Cisneros subsequently asked Tapia-Amigon if she wanted another beer. She said that she did. Rincon-Cisneros obtained a beer and served it to her, then looked at Agent Lopez. He interpreted this to mean that she wanted him to pay. He handed Rincon-Cisneros a $20, which she took to the register. She returned and gave him $5 in change.

29. Rincon-Cisneros asked Agent Villanueva if he would buy her a beer. He agreed and gave her a $20 bill. Rincon-Cisneros took the money to Canongo-Amigon, who was working the register. Canongo-Amigon gave Rincon some change, who pocketed it. She returned $5 of the change to Agent Villanueva. Canongo-Amigon obtained a Michelob Ultra and served it to Rincon-Cisneros, who consumed it.

30. Rincon-Cisneros asked Agent Villanueva to buy her another beer. He said that he would and ordered a beer for himself. Agent Villanueva handed a $20 bill to Rincon-Cisneros, who gave it to Canongo-Amigon. Canongo-Amigon gave Rincon-Cisneros some change, which she pocketed. Rincon-Cisneros obtained two beers, one of which she served to Agent Villanueva and other of which she consumed.

31. Rincon-Cisneros solicited a third beer from Agent Villanueva. Once again, he handed her a $20 bill, which she took to Canongo-Amigon. Canongo-Amigon gave her some change, a portion of which she pocketed. The remaining $5 she gave to Agent Villanueva. Rincon-Cisneros obtained two beers, serving one to Agent Villanueva and consuming the other.

32. Before leaving the Licensed Premises, Agent Lopez ordered and was served a Michelob Ultra beer. He was charged $5 for it.

May 18, 2018
(Counts 30-46)

33. On May 18, 2018, Agent Lopez returned to the Licensed Premises, this time with Supv. Agent Carnet. He entered, went to the bar counter, and ordered a beer from Rincon-Cisneros. She served it to him.

34. Agent Lopez began talking to Tapia-Amigon, who was sitting on the patron's side of the bar counter. Rincon-Cisneros asked him if he was going to buy Tapia-Amigon a beer. He asked Tapia-Amigon if she wanted one and she said that she did. He told Rincon-Cisneros that he would and she obtained a beer. Agent Lopez paid her with a $20 bill. She handed the money to Luis Arreola-Gomez, who placed it in the register. He gave some change to Rincon-Cisneros, who handed $5 to Agent Lopez.

35. Tapia-Amigon introduced Agent Lopez to a woman identified only as Crystal. Crystal asked him if he would buy her a beer. He said that he would and she ordered a beer from Canongo-Amigon. Canongo-Amigon served a Michelob Ultra beer to Crystal. Agent Lopez paid with a $20 bill. Canongo-Amigon obtained $15 in change. She gave $5 of the change to Agent Lopez and $10 to Crystal. Crystal left the Licensed Premises shortly thereafter.

36. Agent Lopez ordered a beer for himself. Rincon-Cisneros obtained two beers and served them to him and Tapia-Amigon. He paid with a $20 bill and did not receive any change.

37. Tapia-Amigon subsequently asked Agent Lopez to buy her a beer. He agreed and she ordered a beer from Rincon-Cisneros. Rincon-Cisneros obtained a beer and served it to Tapia-Amigon. Agent Lopez paid with a $20 bill. Rincon-Cisneros took the money, handed it to Canongo-Amigon, who placed it in the register and obtained some change. Canongo-Amigon handed the change to Rincon-Cisneros, who gave $5 to Agent Lopez.

38. Tapia-Amigon solicited another beer from Agent Lopez. He agreed and she ordered a beer from Rincon-Cisneros, who served it to her. Agent Lopez paid Rincon-Cisneros with a $20. Once again, Canongo-Amigon operated the register. Agent Lopez received $5 in change.

39. Agent Lopez asked Tapia-Amigon if she knew where he could get some coke. She replied that she did not see anyone inside the Licensed Premises who could sell him coke. Subsequently, a male entered, greeted Tapia-Amigon, and sat down at the other end of the bar counter. Tapia-Amigon told Lopez that this man was someone he could ask. Agent Lopez asked Tapia-Amigon to talk to him and she called him over.

40. Tapia-Amigon told the man that Agent Lopez was looking for some coke or meth. The man made a phone call, then exited.

41. Tapia-Amigon stated that she knew someone from the bar across the street and asked Agent Lopez if he wanted to go over there. They did, but could not find anyone. When they returned to the Licensed Premises, Tapia-Amigon spotted Juan Barajas-Segoviano. Tapia-Amigon told Barajas-Segoviano that Agent Lopez was looking to buy coke. Agent Lopez said that he wanted $20 worth. Barajas said that he only had $50 quantities. Agent Lopez agreed and they went to the restroom. Agent Lopez handed Barajas-Segoviano a $50 bill. Barajas-Segoviano exited the Licensed Premises.

42. Barajas-Segoviano returned. Tapia-Amigon told them to go to the restroom. They did not. Instead, Barajas-Segoviano held out his hand. Tapia-Amigon grabbed a bag of white powder (exhibit 3) from him and handed it to Agent Lopez. Agent Lopez and Barajas-Segoviano exchanged phone numbers

43. Meanwhile, Supv. Agent Carnet sat down at the bar counter. He saw Mari, who asked him to buy her a beer. He agreed and she ordered a beer from Rincon-Cisneros. Rincon-Cisneros obtained a beer and served it to Mari. Supv. Agent Carnet paid with a $20 bill. Rincon-Cisneros took the money to the register and obtained some change. She gave $10 to Mari and $5 to Supv. Agent Carnet.

44. Rincon-Cisneros asked Supv. Agent Carnet if he would buy her a beer. He agreed and gave her a $20 bill. She obtained a beer for herself and gave the money Canongo-Amigon, who obtained some change. Canongo-Amigon gave Rincon-Cisneros $10 of the change and the remaining $5 to Supv. Agent Carnet.

45. Rincon-Cisneros asked Supv. Agent Carnet to buy her another beer. He agreed. Supv. Agent Carnet gave $20 to Rincon-Cisneros, who gave it to Canongo-Amigon, who obtained some change. Canongo-Amigon gave $10 of the change to Rincon-Cisneros and $5 to Supv. Agent Carnet. Rincon-Cisneros obtained a beer for herself, which she consumed.

46. Rincon-Cisneros solicited five more beers that night from Supv. Agent Carnet. Each of the five solicitations took place in substantially the same manner as the first two.

47. At the end of the night, exhibit 3 was transported back to the office and booked into evidence.

May 25, 2018
(Counts 47-51)

48. Barajas-Segoviano called Agent Lopez and asked if he was going to be at the Licensed Premises. Agent Lopez said that he was. Barajas-Segoviano called a second time and asked if Agent Lopez was going to be at the Licensed Premises or the bar across the street. Agent Lopez stated that he was going to be at the Licensed Premises. Barajas-Segoviano asked how much Agent Lopez wanted.

49. On May 25, 2018, Agent Lopez and Agent Villanueva returned to the Licensed Premises. Barajas-Segoviano was waiting outside. Agent Lopez told him that he needed to use the restroom. The went inside the restroom of the Licensed Premises. Barajas-Segoviano handed Agent Lopez a bindle (exhibit 4) with a white powder inside. They exited the restroom.

50. Agent Lopez went to the bar counter, where Tapia-Amigon was sitting on the patron's side. Agent Lopez thanked her for introducing him to Barajas-Segoviano.

51. Agent Villanueva took a seat at the bar counter. Rincon-Cisneros, who was working behind the bar counter, asked him to buy her a beer. He said that he would. She asked him if he wanted a beer as well and he said he did. Agent Villanueva gave Rincon-Cisneros $40 to cover the cost of his beer, her beer, and a beer each for Agent Villanueva and Barajas-Segoviano. Rincon-Cisneros took the money to the register and returned with $10 in change. She obtained and served the beers, keeping one for herself. Rincon-Cisneros poured her beer into a plastic cup, explaining that she believed police were in the area and she did not want to be caught drinking on duty.

52. Rincon-Cisneros asked him to buy her a second beer. He agreed and gave her a $20 bill. She placed the money in the register and gave him $5 in change. She obtained a can of beer for herself.

53. At the end of the night, exhibit 4 was transported back to the office and booked into the evidence locker.

June 15, 2018
(Counts 52-58)

54. On June 15, 2018, Agent Lopez, Agent Villanueva, and Supv. Agent Carnet returned to the Licensed Premises. They entered and ordered beers from Rincon-Cisneros, the bartender.

55. Santos-Zavaleta was sitting on the patron's side of the bar counter. Agent Lopez waved her over. Santos-Zavaleta asked Agent Lopez if he would buy her a beer. He agreed and she ordered a beer from Arreola-Gomez. Arreola-Gomez obtained a beer and served it to Santos-Zavaleta. Agent Lopez paid with a $20 bill. He returned and placed $5 in front of Agent Lopez and $10 in front of Santos-Zavaleta, who picked it up. Arreola-Gomez was in a position to observe this.

56. Agent Lopez texted Barajas-Segoviano and let him know that he was at the Licensed Premises. Barajas-Segoviano came and went to the restroom. Agent Lopez followed. Barajas-Segoviano showed Agent Lopez a white bindle. (Exhibit 5.) Agent Lopez gave Barajas-Segoviano $50 in exchange for the bindle.

57. Supv. Agent Carnet sat down at the bar counter. Rincon-Cisneros, the bartender, greeted him. She subsequently asked him if he would buy her a beer. He agreed and she obtained a beer for herself. He paid her with a $20 bill, which she gave to Arreola-Gomez. He obtained some change and gave it to Rincon-Cisneros. She gave $5 of the change to Supv. Agent Carnet and began to consume the beer.

58. Exhibit 5 was transported back to the office and booked into evidence. Agent Lopez used a NIK test (a field test) on the substance inside the bindle. It gave a presumptive positive for cocaine.

59. The substances purchased on May 18, 2018 (exhibit 3), May 25, 2018 (exhibit 4), and June 15, 2018 were transported to the Forensic Services Bureau of the Ventura County Sheriff's Department for analysis. Arsenio Ricafrente, a forensic scientist employed by the sheriff's department, analyzed two items (lab items number 3 and 4), but did not analyze the remaining items (lab items numbers 1, 2, and 5).

60. Agent Lopez testified that the lab item number corresponded to the exhibits as follows: (1) item 1 corresponded to exhibit 3; (2) item 2 corresponded to exhibit 4; (3) item 3 corresponded to exhibit 5; and (4) items 4 and 5 related to other individuals.

61. With respect to lab item number 3, Ricafrente conducted a preliminary test, then used infrared spectroscopy to test it. It tested positive for methamphetamine. With respect to lab item number 4, Ricafrente used two presumptive tests as well as infrared spectroscopy, gas chromatography, and mass spectrometry. It tested positive for cocaine.

62. Ricafrente prepared an report detailing his analysis. (Exhibit 6.) The results of his analysis—item 3 tested positive for methamphetamine and item 4 tested positive for cocaine—are set forth in the report. He signed the report on July 31, 2018.

63. Arreola-Gomez was present on June 15, 2018 when various agents entered, issued citations, and interviewed people. He did not recognize any of the agents who were there that night. He did not recall seeing any of those agents at the Licensed Premises in March.

64. At some point, Arreola-Gomez learned that agents have visited the Licensed Premises in March, April, May, and June. He recalled those visits because he recognized the agents' cover story.

65. Arreola-Gomez testified that, on March 30, 2018, Rincon-Cisneros was a patron. He recalled that one of the agents purchased a beer for her at the same time he purchased a beer for himself. The agent paid with a $20 bill. Arreola-Gomez took the $10 in change and placed it on the bar counter. He did not see what happened to it after that.

66. Arreola-Gomez denied that he permitted any patrons to solicit beers. He indicated that he was not aware of any patrons soliciting beers. He always gives change to the customer who pays him. He does so by putting the change on the bar counter. If a patron leaves the money on the counter, he concludes that it has been left as a tip.

67. He has not split change between two people, nor has he seen Rincon-Cisneros do so. Beers cost $5 each. All employees have been told not to overcharge for beers.

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

CONCLUSIONS OF LAW

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

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 24200.5(b) provides that the Department shall revoke a license "[i]f the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy."

4. Section 25657(a) provides that it is unlawful "[f]or any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the

purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises."

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

6. 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 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 section 24200.5(b), section 25657(a), section 25657(b), and rule 143 alleged in counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 34, 38, 40, 41, 42, 43, 44, 45, 49, 50, 51, 56, and 57. (Findings of Fact ¶¶ 4-18, 20-27, 29-33, 43-46, 49, 51-52, 54 & 57.)

8. With respect to Mari (counts 2-3 & 13-14), on March 30, 2018, Mari solicited a beer from Agent Lopez. Marina Canongo-Amigon collected a $10 surcharge for this beer, indicating that she was aware of the solicitation. Additionally, Mari solicited seven beers from Supv. Agent Carnet. Canongo-Amigon, who served five of these beers, and Luis "Liliana" Santos-Zavaleta, who served two of them, paid a $10 commission directly to Mari in connection with each of these beers. (Findings of Fact ¶¶ 4-15.)

9. Also on March 30, 2018, Santos-Zavaleta (counts 4-6), who was working as a bartender, solicited two beers for her own consumption. In connection with this solicitation, Santos-Zavaleta collected a $10 surcharge. (Findings of Fact ¶¶ 4-15.)

10. Finally, on March 30, 2018, Maria Rincon-Cisneros (counts 7-10 & 12) Rincon-Cisneros, who was working as a bartender, solicited three beers from Agent Villanueva. In each case, a $10 surcharge was imposed on the price of drink, which Rincon-Cisneros kept for herself. (Findings of Fact ¶¶ 4-15.)

11. On April 6, 2018, Rincon-Cisneros (counts 15 & 20-23[4]), who was working as a bartender, solicited five beers from Supv. Agent Carnet. In connection with each beer, Rincon-Cisneros was given a $10 commission. (Findings of Fact ¶¶ 17 & 24-26.)

12. On April 6, 2018, Cindy Tapia-Amigon (counts 16-17), while working as a bartender, solicited a beer for herself from Agent Lopez. In connection with this solicitation, she imposed a $10 surcharge. (Finding of Fact ¶ 18.)

13. Also on April 6, 2018, Mari (counts 18-19), who was working behind the bar counter, solicited two beers from Agent Villanueva. A $10 surcharge was imposed on each beer, which was given to Mari. (Findings of Fact ¶¶ 20-23.)

14. On May 11, 2018, Rincon-Cisneros (count 24, 27, 28 & 29), Rincon-Cisneros, who was working as a bartender, solicited a beer for Tapia-Amigon. Later that same night, she solicited and accepted three beers from Agent Villanueva. In each case, a $10 surcharge was imposed on the price of drink, which Rincon-Cisneros kept for herself. (Findings of Fact ¶¶ 27 & 29-32.)

15. On May 18, 2018, Rincon-Cisneros (counts 34, 38 & 42-45), who was working as a bartender, solicited Supv. Agent Carnet seven times. Each time she received a $10 commission. (Findings of Fact ¶¶ 33 & 44-46.)

16. Also on May 18, 2018, Mari (counts 40-41) solicited a beer from Supv. Agent Carnet. Rincon-Cisneros, the bartender, paid Mari a $10 commission in connection with this beer. (Findings of Fact ¶¶ 33 & 43.)

17. On May 25, 2018, Rincon-Cisneros (counts 49-51), who was working as a bartender, solicited and accepted three beers from Agent Villanueva. In each case, a $10 surcharge was imposed on the price of drink, which Rincon-Cisneros kept for herself. (Findings of Fact ¶¶ 49 & 51-52.)

18. Finally, on June 15, Rincon-Cisneros (counts 56-57), the bartender, solicited a beer from Supv. Agent Carnet. A $10 surcharge was imposed in connection with this drink and at least part of the money went to Rincon-Cisneros. (Findings of Fact ¶¶ 54 & 57.)

19. Cause for suspension or revocation of the Respondent's license does **not** exist for the violations of section 24200.5(b), section 25657(a), section 25657(b), and rule 143 alleged in counts 1, 11, 25, 26, 35, 36, 37, 39, 54, and 55. (Findings of Fact ¶¶ 4-15, 27-28, 33-38 & 54-55.)

---

[4] Counts 15 and 21 duplicate each other.

20. On March 30, 2018, there is no evidence that Jane Doe (count 1) was loitering about the Licensed Premises The evidence only established that she was sitting at the bar counter when Agent Lopez entered, that she solicited one beer, then she left. Additionally, there is no evidence any employee was aware of the solicitation (Mari, who called Doe over, was not an employee). (Finding of Fact ¶ 9.)

21. Also on March 30, 2018, there is no evidence that Luis Arreola-Gomez (count 11) solicited, procured, or encouraged the purchase of any alcoholic beverages. (Findings of Fact ¶¶ 4-15.)

22. With respect to count 25, section 24200.5(b) requires that the drink solicited be for the person who solicited it. Accordingly, the drink solicited by Rincon-Cisneros on May 11, 2018 for Tapia-Amigon, although a violation of section 25657(a) as described above, does not violate section 24200.5(b). The second drink served to Tapia-Amigon also does not violate this section since neither she nor Rincon-Cisneros solicited it—she simply ordered a beer which Agent Lopez paid for. (Finding of Fact ¶ 27.)

23. With respect to count 26, rule 143 prohibits an employee from accepting a drink which has been purchased at the Licensed Premises and intended for the employee. Although Tapia accepted two drinks, both of which were purchased at the Licensed Premises, there is no evidence that she was working at the time. Although the evidence established that Tapia-Amigon was working at the Licensed Premises on March 30, 2018 and April 6, 2018, the evidence only established that she was present as a customer on May 11, 2018. Specifically, she sat on the customer side of the bar counter the entire night. There is no evidence that she took orders, served drinks, or otherwise served customers. (Findings of Fact ¶¶ 27-28.)

24. With respect to count 35, there is no violation of section 24200.5(b) for the first two beers served to Tapia-Amigon on May 18, 2018 since that section requires that the drink solicited be for the person who solicited it. Rincon-Cisneros (as alleged in this count) solicited the first drink, while no one solicited the second—Tapia-Amigon simply ordered it from Rincon-Cisneros. The third and fourth drinks, however, were directly solicited by Tapia-Amigon for herself and a surcharge was imposed in connection with both of them, a clear violation of section 24200.5(b). The problem is that there is no section 24200.5(b) count which alleges that Tapia-Amigon solicited any drinks. (Findings of Fact ¶¶ 33-34 & 36-38.)

25. With respect to counts 36 & 39, section 25657(a) and rule 143 require that the person soliciting or accepting the drink be an employee. Thus, although Tapia-Amigon accepted the third and fourth drinks, both of which had been sold at the Licensed Premises, there is no evidence that she was working at the time. Although the evidence established that Tapia-Amigon was working at the Licensed Premises on April 6, 2018, the evidence only

established that she was present as a customer on May 18, 2018. Specifically, she sat on the customer side of the bar counter the entire night. There is no evidence that she took orders, served drinks, or otherwise served customers. (Findings of Fact ¶¶ 33-34 & 36-38.)

26. With respect to count 37, there is no evidence that Crystal was loitering about the Licensed Premises. The evidence only established that she came over, solicited one beer, then left. Since a commission was paid in connection with this solicitation, it violates section 24200.5(b). However, that section was not pled. (Finding of Fact ¶ 35.)

27. With respect to counts 54-55, section 25657(a) requires that the person who soliciting the drink be an employee. Rule 143 also applies only to employees. There is no evidence that, on June 15, 2018, Santos-Zavaleta was employed at the Licensed Premises. Although there is such evidence relating to March 30, 2018, on June 15, 2018 the only evidence indicated that she was a customer—she sat on the customer side of the bar counter, she did not take orders, she did not serve drinks, nor did she otherwise serve customers. (Findings of Fact ¶¶ 54-55.)

28. Section 24200.5(a) provides that the Department shall revoke a license "[i]f a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises." It further provides that "[s]uccessive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission."

29. Health and Safety Code section 11351 makes it a felony to possess for purposes of sale any controlled substance

(1) specified in
    (a) subdivision (b), (c), or (e) of section 11054,
    (b) paragraph (14), (15), or (20) of subdivision (d) of section 11054,
    (c) subdivision (b) or (c) of section 11055, or
    (d) subdivision (h) of section 11056, or
(2) classified in Schedule III, IV, or V which is a narcotic drug.

30. Health & Safety Code section 11352 makes it a felony to transport, import into this state, sell, furnish, administer, or give away, or offer to transport, import into this state, sell, furnish, administer, or give away, or attempt to import into this state or transport any controlled substance

(1) specified in
  (a) subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054,
  (b) paragraph (14), (15), or (20) of subdivision (d) of Section 11054,
  (c) subdivision (b) or (c) of Section 11055, or
  (d) subdivision (h) of Section 11056, or
(2) classified in Schedule III, IV, or V which is a narcotic drug,

unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state.

31. Cause for suspension or revocation of the Respondent's license does **not** exist for the violations of Health & Safety Code sections 11351 and 11352 alleged in counts 30, 31, 32, 33, 47, 48. (Findings of Fact ¶¶ 39-42, 48-50, 56 & 59-62.)

32. With respect to counts 30, 31, 32, and 33, on May 18, 2018, when Agent Lopez asked Tapia-Amigon, who was present at the Licensed Premises as a patron, where he could get some coke, she took him across the street to another bar. Later, when Juan Barajas-Segoviano arrived, she pointed him out to Agent Lopez. They negotiated the sale of some cocaine in the restroom and Agent Villanueva paid him. Barajas-Segoviano left. When he returned, he had a substance which he attempted to hand to Agent Villanueva. Tapia-Amigon told them to go to the restroom, then interceded to pass the substance to Agent Lopez. The substance was never tested and there is no evidence that it was cocaine. (Findings of Fact ¶¶ 39-42 & 59-62.)

33. With respect to counts 47 and 48, on May 25, 2018, Agent Lopez and Barajas-Segoviano negotiated the sale of cocaine by text outside the Licensed Premises. When Agent Lopez arrived at the Licensed Premises, Barajas-Segoviano was waiting for him. The actual transaction only took place inside the Licensed Premises because Agent Lopez asked Barajas-Segoviano to go inside. Tapia-Amigon, who was present as a patron, only learned of the transaction after the fact when Agent Lopez told her about it. Additionally, the substance was never tested and there is no evidence that it was cocaine. (Findings of Fact ¶¶ 48-50 & 59-62.)

34. With respect to counts 52 and 53, on June 15, 2018, Agent Lopez texted Barajas-Segoviano that he was at the Licensed Premises. Barajas-Segoviano arrived and they went to the restroom, where the sale of cocaine took place. There is no evidence that anyone else—much less any employee—was aware of the transaction. The substance was later tested and determined to be cocaine. (Findings of Fact ¶¶ 56 & 58-62.)

35. Cause for suspension or revocation of the Respondent's license does **not** exist for the violation of section 24200(a) alleged in count 46. (Findings of Fact ¶¶ 39-42, 48-50 & 56.) There is no evidence that any employee was aware of the negotiations for the sale of cocaine on May 25, 2018 or June 15, 2018. In both cases, the negotiations took place outside the Licensed Premises and outside the presence of any employees. Furthermore, no employees were aware of the sale on either date. With respect to May 18, 2018, Tapia-Amigon was aware of the negotiation and the sale and, on May 25, 2018, she was advised of the sale after the fact. However, she was not working on either date—she was present as a patron. As such, there is no basis for attributing her knowledge to the Respondent.

36. Section 23402 provides that no retail on-sale or off-sale licensee, except a daily on-sale general licensee holding a license issued pursuant to Section 24045.1, shall purchase alcoholic beverages for resale from any person except a person holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license.

37. During the course of the hearing, the Department requested that count 58, the only count alleging a violation of section 23402, be dismissed. This motion was granted.

PENALTY

The Department requested that the Respondent's license be revoked based on the pervasive and open drink solicitations. A number of different women, many of them employees, were soliciting drinks and many employees were involved in paying commissions to the solicitors whether they were employees or not. The Respondent did not recommend a penalty in the event that the accusation were sustained.

Section 24200.5(b) mandates revocation for a violation of its provisions, although this has been construed to include some form of stayed revocation. Rule 144 provides that the penalty for a violation of section 25657(a) is revocation (which also includes stayed revocation), the penalty for a violation of section 25657(b) ranges from a 30-day suspension up to revocation, while the penalty for a violation of rule 143 is a 15-day suspension.

The Department is correct. An aggravated penalty is warranted based on the large number of solicitation conducted openly with the involvement of employees on both sides of the transactions. The penalty recommended herein complies with rule 144.

ORDER

Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 34, 38, 40, 41, 42, 43, 44, 45, 49, 50, 51, 56, and 57 are sustained. With respect to these violations, the Respondent's on-sale beer and wine public premises license is hereby revoked.

Counts 1, 11, 25, 26, 30, 31, 32, 33, 35, 36, 37, 39, 46, 47, 48, 52, 53, 54, 55, and 58 are dismissed.

Dated: December 9, 2019

Matthew G. Ainley
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

By: Scott A Appelwick

Date: 2/21/20