

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

AB-9809

File: 40-291032; Reg: 18087026

CLAUDIO MOYENA,
dba El Rinconcito
1633 East Florence Avenue,
Los Angeles, CA 90001,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 7, 2019
Los Angeles, CA

ISSUED NOVEMBER 19, 2019

Appearances: *Appellant:* Victor Sherman, of the Law Offices of Victor Sherman,
as counsel for Claudio Moyena,

Respondent: Joseph J. Scoleri III, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Claudio Moyena, doing business as El Rinconcito, appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking his license because he employed or permitted individuals to engage in solicitation activity at the licensed premises in violation of Business and Professions Code sections 24200.5(b) and 25657(a)-(b).

¹The decision of the Department under Government Code section 11517(c), dated April 26, 2019, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ) dated September 24, 2018.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on January 11, 1994. There is one instance of prior departmental discipline against the license in 2015, which also involved solicitation violations.

On June 5, 2018, the Department filed a 32-count accusation against appellant charging that, on four separate occasions (February 16, 2017, October 12, 2017, October 19, 2017, and November 3, 2017), appellant employed or permitted individuals to engage in solicitation activity in violation of sections 24200.5(b), 25657(a), and 25657(b).²

At the two-day administrative hearing, held from August 22-23, 2018, documentary evidence was received, and testimony concerning the violation was presented by Department Agents Alberto Lopez, Jason Groff, and Robert Garcia, and Supervising Agent of the Department's Special Operations Unit, Ricardo Carnet. Appellant presented no witnesses.

Testimony established that on October 12, 2017, Agents Lopez and Carnet entered the licensed premises in an undercover capacity and sat down at the bar. They ordered a bucket containing six beer bottles and paid the bartender \$15 (or \$2.50 each) for the beer.

The agents began speaking to a woman, Bernardino Lorenzo Alvarado, who was sitting near them. Alvarado finished her drink and called over a different bartender,

² The accusation also alleged violations of Health and Safety Code sections 11351, 11352, 11378, and 11379 (possession of a controlled substance for purpose of sale or offer to furnish or sell a controlled substance). However, since these counts were ultimately dismissed by the Department, they are not discussed herein. Likewise, the facts of the alleged solicitations that were dismissed by the Department are omitted.

Araceli Azpitarte. Alvarado ordered a beer from Azpitarte who served him a can of Bud Light. Alvarado looked at Agent Lopez and nodded. Believing that she wanted him to pay for the beer, Agent Lopez handed \$20 to Azpitarte. Azpitarte rang up the sale and returned with some change, which she set down in front of Alvarado.

Alvarado gave Agent Lopez \$10 of the change and kept the rest. Agent Lopez testified that he did not know where Azpitarte was when he received his change from Alvarado.

Alvarado later ordered a second beer from Azpitarte, and again, Azpitarte served Alvarado a can of Bud Light beer. Agent Lopez gave Azpitarte a \$20 bill. Azpitarte rang up the sale and gave the change to Alvarado. Alvarado kept an unknown amount of money and gave \$10 to Agent Lopez.

Alvarado then asked Agent Carnet if he would buy her a beer. After he agreed, Alvarado ordered a beer from a different bartender, Aracely. Aracely served Alvarado a Bud Light which Agent Carnet paid for with a \$20 bill. Aracely obtained \$18 in change and gave \$10 to Agent Carnet and \$8 to Alvarado.

Agent Carnet moved down the bar counter and was approached by Martha Esqueda Rodriguez, who was acting as a waitress. Agent Carnet, Rodriguez, and Azpitarte began to speak to one another. During this conversation, Rodriguez asked if Agent Carnet would buy them drinks. He agreed and asked Azpitarte if she wanted a beer. Azpitarte said she did and asked Rodriguez for her order. Azpitarte then obtained a Modelo for herself and an O'Doul's non-alcoholic beer for Rodriguez. Agent Carnet gave Azpitarte \$20 for the drinks. Azpitarte did not give Agent Carnet any change but did give \$8 to Rodriguez.

Agent Carnet indicated that he and Agent Lopez had to leave. Rodriguez asked him if he would buy her another beer. He agreed and Azpitarte served Rodriguez a Modelo. Again, Agent Carnet paid with a \$20 bill which Azpitarte accepted. Azpitarte returned and placed some change on the counter, then left to help other customers. When Rodriguez picked up the money, Agent Carnet asked her for his change. Rodriguez just laughed.

Agents Lopez and Carnet returned to the licensed premises on October 19, 2018. They sat at a table and ordered a bucket of beers from the waitress, Rodriguez. Rodriguez served them six beers and charged them \$15.

A woman named Izela Munoz approached and spoke to Agent Carnet before sitting down. Munoz asked Agent Carnet if he would buy her a beer. Agent Carnet agreed, and Munoz called Rodriguez over and ordered a beer. Agent Carnet gave Rodriguez \$20, which Rodriguez took to the bar. Rodriguez returned with some change, as well as a Bud Light which she served to Munoz. Rodriguez gave Munoz \$8 and gave \$10 to Agent Carnet.

Munoz then brought another woman, Gladys Lopez Orrellana, to the table. Agent Lopez recognized Orrellana, as he had previously seen her working at the licensed premises as a waitress. Munoz asked Agent Lopez if he would buy Orrellana a beer. Agent Lopez asked Orrellana if she wanted a beer and she replied that she did. Orrellana went to the bar counter and returned with a beer. Agent Lopez gave her a \$20 bill and she gave him \$10 in change. Orrellana consumed her beer, then resumed working as a waitress.

A third woman identified only as "Hennessey" approached and spoke to Munoz. Munoz asked Agent Lopez if he would buy Hennessey a drink. Agent Lopez asked Hennessey if she wanted a drink and she said that she did. Agent Lopez called Rodriguez over and Hennessey ordered a drink. Rodriguez went to the bar and returned with a can of O'Doul's non-alcoholic beer. Agent Lopez paid with a \$20 bill and Rodriguez gave him \$10 in change by placing it on the table. Agent Lopez also ordered an O'Doul's non-alcoholic beer for himself and was charged \$2.

Hennessey later called Orrellana over and ordered a Bud Light. Orrellana went to the bar counter, spoke to Azpitarte, and obtained a can of Bud Light. She served the Bud Light to Hennessey. Agent Lopez paid by handing a \$20 bill to Orrellana. Orrellana gave Agent Lopez \$10 in change and handed \$8 to Hennessey.

Hennessey subsequently asked if Agent Lopez would buy her another beer. Agent Lopez agreed, and ordered an O'Doul's from Orrellana. Orrellana went to the bar counter and spoke to Azpitarte. Orrellana returned with a can of Bud Light and a can of O'Doul's. Orrellana told Agent Lopez that the Bud Light was for her and the O'Doul's was for Hennessey. Agent Lopez paid Orrellana with a \$20 bill but did not receive any change. However, Orrellana handed \$8 to Hennessey.

Rodriguez returned after a bit and asked Agent Carnet if he would buy her a drink. He agreed, and Rodriguez went to the counter and returned with a clear plastic cup containing a red liquid. Agent Carnet gave Rodriguez a \$20 bill and she provided him with \$10 in change. Agent Carnet asked Rodriguez what was in the cup and Rodriguez replied that it was cranberry juice.

In front of Rodriguez, Munoz asked Agent Carnet if he would buy her a beer. He agreed and she ordered a beer from Rodriguez. Rodriguez went to the bar counter and returned with a beer, which she served to Munoz. Again, Agent Carnet paid with a \$20 bill and received \$10 in change. Rodriguez gave \$8 to Munoz.

After Munoz finished her beer, she asked Agent Carnet to buy her another one. Munoz called Rodriguez over and ordered another beer. Rodriguez went to the bar counter and returned with a Bud Light, which she served to Munoz. Agent Carnet received \$10 in change from the \$20 he gave to Rodriguez, while Munoz received \$8.

Finally, as Agents Carnet and Lopez prepared to leave, Rodriguez approached and asked Agent Carnet if he would buy her another drink. He agreed, and Rodriguez obtained a clear plastic cup with a red liquid inside, which Rodriguez said was cranberry juice. Agent Carnet paid \$20 for Rodriguez's drink and only received \$10 in change.

The administrative law judge (ALJ) submitted his proposed decision on September 24, 2018, sustaining counts 9, 10, 11, 12, 13, 14, 20, 21, 22, 23, and 24 and dismissing counts 1, 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, 19, 25, 26, 27, 28, 29, 30, 31, and 32. The ALJ recommended that the license be revoked.

On November 30, 2018, in its Notice Concerning Proposed Decision, the Department advised the parties that the Department had considered, but did not adopt, the proposed decision and that it would decide the matter pursuant to section 11517(c)(2)(E).³

³ Section 11517, subdivision (c)(2)(E) permits the Department to reject the proposed decision — as it initially did here — and decide the case upon the record, including the transcript of the hearing.

On February 1, 2019, in its notice pursuant to Government Code Section 11517(c)(2)(E)(i), the parties were invited to submit written argument to the Department regarding the findings of fact, determination of issues, and penalty recommendations in the proposed decision. Counsel for both appellant and the Department submitted written argument in response. On April 26, 2019, the Director issued his decision under Government Code Section 11517(c), sustaining and dismissing the same counts proposed by the ALJ and ordering revocation of the license.

Appellant then filed a timely appeal raising the following issues: 1) The ALJ did not proceed in a manner required by law when he denied appellant's motion to continue the administrative hearing; 2) the Department's findings are not supported by substantial evidence since there is no evidence that appellant had knowledge of the solicitation violations; 3) the term "loiter" in section 25657(b) is too vague or ambiguous to be enforced; 4) the counts involving solicitation of a non-alcoholic beverage should be reversed; 5) the Department erred by not using the "clear and convincing" evidence standard, and; 6) the penalty is excessive.

DISCUSSION

I

ISSUE CONCERNING APPELLANT'S MOTION TO CONTINUE

Appellant contends the ALJ erred when it denied appellant's motion to continue the administrative hearing. (AOB, at pp. 1-3.) It maintains it was denied due process and an opportunity to present a defense as a result of not being able to investigate the accusation and speak to witnesses. (*Ibid.*)

Government Code section 11524 allows an ALJ to grant a continuance for good cause. The “power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law.

[Citation.]” (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [272 Cal.Rptr. 602].) One court offered the following guidance:

In exercising the power to grant continuances in an administrative proceeding, an administrative law judge must be guided by the same principles applicable to continuances generally in adjudicative settings: continuances should be granted sparingly, nay grudgingly, and then only on a proper and adequate showing of good cause. In general, a continuance for a short and certain time is less objectionable than a continuance for a long and uncertain time, and there must be a substantial showing of necessity to support a continuance into the indefinite future. But the factors that influence the granting or denying of a continuance in any particular case are so varied that the judge must necessarily exercise a broad discretion. Since it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding, the determination of a request for a continuance must be based upon the facts and circumstances of the case as they exist at the time of the determination.

(*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App4th 332, 342-343 [56 Cal.Rptr.2d 774] (citations omitted).) A refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

As a preliminary matter, the Board believes it was entirely reasonable for appellant to request a continuance given the number of counts in the accusation as well as the number of individuals implicated in the alleged solicitation scheme. It is

understandable that appellant would want to investigate the allegations against him and speak to witnesses to determine what, if any, information they had to provide. The Board also notes that, in its experience, continuances are routinely granted to the Department when one of its witnesses is unavailable. (See e.g. *Garfield Beach CVS, LLC and Longs Drug Stores California, LLC*, AB-9770, at p. 6 [reviewing ALJ's continuance of a hearing where the minor decoy failed to appear and later testified that she never received a subpoena].)

Nevertheless, appellant is not entitled to an automatic continuance merely because the accusation is extensive and there is significant evidence to gather before the hearing. Appellant must still establish "good cause" to justify a continuance, and on appeal, demonstrate that the ALJ abused his discretion in denying his motion to continue. As explained below, appellant has done neither.

Here, appellant maintains that, "[w]ith just weeks before the hearing and at least 15 witnesses to contact, the denial of a continuance was the denial of due process." (AOB, at p. 3.) Appellant's contention, however, is not supported by the record. The record indicates that appellant had approximately six weeks to contact witnesses and prepare his defense.⁴ Other than conclusory statements, appellant makes no showing that six weeks was not enough time to contact witnesses or investigate the Department's allegations.

Further, appellant failed to show in his motion or appeal why he specifically needed an additional 90 days to prepare his defense (e.g. he contacted witnesses who

⁴ The Notice of Hearing was sent by the Administrative Hearing Officer on July 9, 2018, setting a hearing date of August 22 & 23, 2018, approximately six weeks later.

were on vacation, out of town, etc.). Finally, even if the ALJ erred in denying the continuance, appellant has not shown that the error resulted in a “miscarriage of justice” (i.e., that appellant would have discovered additional evidence that could have changed the outcome of the hearing). (Cal. Const., art. 6, § 13.) In fact, appellant has not given this Board any reason to believe he would have presented evidence other than what he already presented at the hearing.⁵ The Board sees no error.

II

ISSUE CONCERNING APPELLANT’S KNOWLEDGE OF SOLICITATION

Appellant contends that the Department’s findings are not supported by substantial evidence since there is no evidence that it “had actual knowledge of and willfully consented to the alleged [solicitation] activity.” (AOB, at p. 4.)

Appellant’s contention that the Department was required to prove actual knowledge of the solicitation activities is without merit. It is well-established that an employee’s knowledge of solicitation activities is imputed to the licensee. (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.

⁵ In fact, at oral argument, appellant’s counsel repeatedly stated that he sought to speak with additional witnesses to establish that appellant had no “actual knowledge” of the solicitation activity at the licensed premises. However, as explained in section II, *infra*, there is no requirement that appellant have “actual knowledge” of solicitation for the misconduct to be imputed to him. This tends to show that the outcome at the hearing would have been the same.

527] [“The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee.”].)

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 for that conduct to be imputed to appellant. On appeal, the Board will uphold the Department’s findings so long as those findings are supported by substantial evidence. (See *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] [“When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department.”].)

Here, there is sufficient evidence vis-à-vis Agents Lopez and Carnet’s testimony that appellant’s employees, Azpitarte, Aracely, Rodriguez, and Orrellana, at various times, either solicited the undercover agents or had knowledge of another’s solicitation of the undercover agents while working at the licensed premises. Therefore, the Department’s conclusions that appellant’s employees’ knowledge and/or conduct is imputed to appellant is reasonable. The result is that the Department’s decision must stand, as this Board is prohibited from reweighing the evidence or exercising independent judgment to reach a contrary result.

III

ISSUES CONCERNING INTERPRETATIONS OF LAW AND STANDARD OF PROOF

Appellant contends the term “loiter” in section 25657(b) is too vague or ambiguous to be enforced (AOB, at pp. 5-6); the counts involving solicitation of a non-

alcoholic beverage should be reversed (*id.* at pp. 6-11), and; the Department erred by not using the “clear and convincing” evidence standard. (*Id.* at pp. 11-12.) These issues will be discussed together.

The Board’s scope of review is limited; it may only review a Department’s decision based upon “insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion.” (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 95, [84 Cal.Rptr. 113].) However, in each of his above contentions, appellant asks this Board to step outside its permissible scope of review, and: 1) invalidate section 25657(b) as vague and ambiguous; 2) interpret the word “drink” in rule 143 and section 24200.5 as only “alcoholic drinks”, and; 3) negate the “preponderance of evidence standard” in revocation cases in favor of the “clear and convincing” standard. Yet, appellant fails to cite any authority that allows the Board to nullify or re-write statutes or regulations or impose a new evidentiary standard in revocation cases. Absent this express authority, the Board cannot act.

Nevertheless, even if this Board had the authority to grant appellant his requested relief, it would still decline to do. First, regarding the term loiter in section 25657(b), the Board rejected a similar void for vagueness argument in *Pacheco* (2014) AB-9371. There, the Board stated that the term loitering could not be isolated from the solicitation activity, as appellant attempts to do here. Instead, “[b]ecause the statute uses the language ‘loitering for the purpose of,’ it is impossible for us to accept a definition of loitering that requires conduct entirely devoid of purpose.” (*Ibid.*) As such, the prohibited activities of section 25657(b) are not simply loitering in a bar but loitering in a bar in order to solicit drinks. It is the solicitation that is the crux of section

25657(b), not the loitering. Appellant's vagueness argument is, therefore, rejected.

Second, appellant goes to great lengths to convince the Board that a reading of "drinks" in rule 143 and section 24200.5(b) includes only "alcoholic drinks." However, appellant completely misses the first tenet of statutory construction, which is: "[i]f the plain language of a statute or regulation is clear and unambiguous, our task is at an end and there is no need to resort to the canons of construction or extrinsic aids to interpretation." (*Butts v. Board of Trustees of California State University* (2014) 225 Cal.App.4th 825, 838 [170 Cal.Rptr.3d 604, 614].) Here, the plain language of rule 143 and section 24200.5(b) says "drinks," not "alcoholic drinks." Further, the fact that the legislature only used "drinks" in section 24200.5(b) but used "alcoholic beverages" in section 25657 supports this interpretation. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 [81 Cal.Rptr.2d 471, 477, 969 P.2d 564, 571] ["Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning."].) Therefore, the term "drinks" clearly and unambiguously includes "all" drinks, including non-alcoholic drinks.

Finally, appellant's contention that a "clear and convincing" evidentiary standard should be used in revocation cases is without merit. Evidence Code section 115 clearly states that "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115, emphasis added.) Appellant points to no law requiring a higher burden of proof for the revocation of an alcoholic beverage license. (See e.g., Cal. Fam. Code, § 7821 [requiring clear and convincing evidence in proceedings to terminate a parent's custody rights].) As such,

the Department did not err by using the preponderance of the evidence standard to sustain counts 9, 10, 11, 12, 13, 14, 20, 21, 22, 23, and 24.

IV

ISSUE CONCERNING PENALTY

Finally, appellant contends the penalty of revocation is excessive. (AOB, at pp. 12-18.)

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

Rule 144 provides that "[d]eviation from [the Penalty Guidelines] is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.)

The following Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

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.

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

Illegal Solicitation of Alcoholic Beverages:

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

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

In the instant matter, the Department devotes several paragraphs to a discussion of the penalty:

PENALTY

The Department requested that the Respondent's license be revoked, noting that the Respondent has been disciplined for these types of violations in the past. The Respondent did not recommend a penalty in the event that the accusations were sustained, but he noted that there was little evidence that the Respondent or his employees were aware of the alleged activity.

Section 24200.5 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 of 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.

Three women solicited a number of drinks on two different nights. One of the women was an employee who solicited drinks on both nights; the other two were paid commissions directly by one of the bartenders. As to the dismissed counts listed below, the Department failed to provide evidence that the conduct observed met all of the elements required under Section 24200.5(b), section 25657(a), section 25657(b), and Rule 143. Given that the Respondent had been disciplined for such conduct in the past, an aggravated penalty is warranted. The penalty recommended herein complies with rule 144.

(Decision, at p. 12.)

Here, appellant argues that the penalty of revocation is too harsh⁶ and that the Department failed to consider appellant's mitigating evidence. (AOB, at p. 19.) While the Board is sympathetic to the fact that the licensed premises is appellant's sole source of income, that fact alone does not make outright revocation is unreasonable.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse. Section 24200.5 clearly mandates revocation of a license for allowing solicitation activity. Likewise, rule 144 requires revocation for a violation of section 25657(a). Appellant has not demonstrated the Department abused

⁶ Part of appellant's excessive penalty argument is that the sanction of revocation constitutes an excessive fine under the Eighth Amendment. (AOB, at pp. 12-16.) As discussed in section III, *supra*, this Board does not have the authority to invalidate statutes and/or regulations, or muse on the constitutionality of the entire penalty guidelines promulgated by the State Legislature and the Department. Appellant's arguments are best suited for another time, place, and audience.

its discretion in ordering revocation, as opposed to stayed revocation. The penalty must, therefore, stand.

ORDER

The decision of the Department is affirmed.⁷

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

⁷ 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 ACCUSATION
AGAINST:**

Claudio Moyeda
dba El Rinconcito
1633 E. Florence Ave.
Los Angeles, California 90001

Licensee(s).

File No.: 40-291032

Reg. No.: 18087026

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department April 26, 2019, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on August 22, 2018, and August 23, 2018, before Administrative Law Judge Matthew G. Ainley, and the written arguments of the parties adopts the following decision.

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

- (1) on four separate dates, he employed or permitted nine different 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 three separate dates, he employed two different 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 four separate dates, he employed or knowingly permitted six different 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 two separate dates, he permitted Martha Esqueda Rodriguez 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, the counts overlap to some degree. (Exhibit 1.)

Additionally, the Department seeks to discipline Respondent's license on the grounds that, on February 16, 2017, he permitted a patron 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. (Exhibit 1.)

Finally, the Department seeks to discipline Respondent's license on the grounds that, on February 16, 2017, he permitted a patron to: (1) possess methamphetamine for the purposes of sale upon the licensed premises in violation of California Health and Safety Code section 11378 and (2) sell, furnish, or offer to sell or furnish methamphetamine upon the licensed premises in violation of California Health and Safety Code section 11379. (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 23, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on June 5, 2018. At the hearing, the Department moved to correct some of the counts. First, in between counts 25 and 26 is a stray count labeled "Count 10." The Department moved to dismiss this count; the Respondent did not object. Accordingly, the motion was granted. The Department also moved to correct the dates listed in counts 26, 27, and 28 such that they alleged violations on November 3, 2017. The Respondent did not object and this motion was also granted.
2. The Department issued a type 40, on-sale beer license to the Respondent for the above-described location on January 11, 1994 (the Licensed Premises).

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

3. The Respondent's license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
8/19/2015	15082926	BP §§ 24200.5(b), 25657(a) & 25657(b)	Rev. stayed w/60-day susp.
5/4/1994	94029884	BP §§ 24200.5(b), 25657(a) & 25657(b); 4 CCR §§ 143.3; & PC § 303a	30-day susp. w/10 days stayed

The foregoing disciplinary matters are final. (Exhibits 3-4.) Reg. #15082926 was pled for the purposes of aggravation; reg. #94029884 was not.

February 16, 2017
(Counts 1-6)

4. On February 16, 2017, Agents Lopez, Groff, and Garcia went to the Licensed Premises.

5. Before they entered, a man standing outside who identified himself as Jimmy asked them if they needed any "white." White is a slang term for cocaine. Agent Lopez told him that they would talk later and entered the Licensed Premises.

6. Agent Lopez, Agent Groff, and Agent Garcia sat down at a table near the restrooms. A waitress approached them and they ordered a bucket of beers. A bucket consists of six beers. Agent Groff paid \$15 for the beers, i.e., \$2.50 each. The waitress informed them that beers were two for one until 10:00 p.m.³

7. A woman identified only as Karen approached and asked if she could sit with them. They said that she could. Karen went to the restroom, returned, and said, "You didn't get my beer for me?" Agent Lopez said that they had not. Karen called the waitress over and ordered a beer. The waitress told her that she had to go to the bar counter.

8. Karen told Agent Lopez that her beer cost \$10 and he gave her a \$20 bill. Karen took the money to the counter and spoke to the bartender. Karen returned to the table with a can of Bud Light beer. Karen gave Agent Lopez \$8 in change. She also placed some money under her beer, which she consumed.

³ The Department did not file any counts alleging a free-goods violation.

9. The agents exited. Jimmy called out to them. Jimmy and another man were standing near each other. Agent Groff asked the man what he had. The man said that he had some "white," a slang term for cocaine. There were no employees around when the man contacted them, although there was a security guard just inside the door. The man entered the Licensed Premises. Agent Lopez followed and stood at the door. He saw the man talking to a security guard; they stopped when they saw him.

10. Agent Lopez and Jimmy spoke to each other at the threshold of the door. Jimmy said that he had some crystal and pulled out a clear plastic baggy. Agent Lopez asked him how much it would cost; Jimmy said that it cost \$20. Agent Lopez pointed out that security was nearby; Jimmy told him not to worry. Jimmy told Agent Lopez to go into the restroom. Agent Lopez did so and Jimmy followed.

11. Inside the restroom, Jimmy handed a baggy containing methamphetamine to Agent Lopez. Agent Lopez asked how much it would cost. Jimmy said that it would cost \$20. (Exhibits 5 & 13.) There were no employees inside the restroom. Agent Lopez testified that Jimmy made a point of not letting security personnel see them.

12. A second male came outside and whistled at Agent Groff. The man said that he had what Agent Groff wanted. They walked to a point approximately 15 feet away from the door. Agent Groff gave the man \$20 and the man gave him small bag containing cocaine. (Exhibits 12 & 14.)

October 12, 2017
(Counts 7-15)

13. Agent Lopez went to the Licensed Premises two more times, but he did not see any violations. On October 12, 2017, he returned to the Licensed Premises with Supervising Agent Carnet. They entered and sat down at the bar counter. They ordered a bucket of beers from one of the bartenders, Aracely. She served them six bottles of Bud Light beer, for which they paid \$15, i.e., \$2.50 each. They asked that she switch out four of the Bud Lights for four Modelo beers, which she did.

14. The agents began speaking to Bernardino Lorenzo Alvarado, who was sitting near them. Alvarado finished her drink and called over another bartender, Araceli Azpitarte. Alvarado ordered a beer and Azpitarte served her a can of Bud Light. Alvarado looked at Agent Lopez and nodded. Believing that she wanted him to pay for the beer, he handed \$20 to Azpitarte. She rang up the sale and returned with some change. She placed the change down on the bar counter in front of Alvarado. Alvarado gave Agent Lopez \$10 of the change and kept the rest. Agent Lopez did not know where Azpitarte was at the time.

15. Alvarado subsequently ordered a second beer from Azpitarte. Azpitarte served Alvarado a can of Bud Light. Agent Lopez paid with a \$20 bill. Azpitarte rang up the sale and gave the change to Alvarado. Alvarado kept an unknown amount of the change and gave \$10 to Agent Lopez..

16. Alvarado asked Supv. Agent Carnet if he would buy her a beer.⁴ He said that he would and she ordered a beer from Aracely. Aracely served Alvarado a Bud Light. Supv. Agent Carnet paid with a \$20 bill. Aracely obtained \$18 in change, giving \$10 to him and \$8 to Alvarado.

17. Supv. Agent Carnet moved down the bar counter a bit. He was approached by Martha Esqueda Rodriguez, who was acting as a waitress. Supv. Agent Carnet, Rodriguez, and Azpitarte began to speak to one another. During this conversation, Rodriguez asked Supv. Agent Carnet if he would buy them drinks. He agreed and asked Azpitarte if she wanted a beer; she said that she did. Rodriguez placed her order with Azpitarte, who obtained two drinks, an O'Doul's non-alcoholic beer for Rodriguez and a Modelo for herself. Supv. Agent Carnet paid with a \$20 bill, but did not receive any change. Azpitarte gave \$8, however, to Rodriguez. Both women consumed their drinks, then returned to their duties.

18. Rodriguez subsequently asked him to buy both of them another drink. He agreed and asked Azpitarte if she wanted a beer. She said that she did. Rodriguez placed her order; Azpitarte obtained an O'Doul's for Rodriguez and a Modelo for herself. Supv. Agent Carnet paid with a \$20 bill. Azpitarte did not give him any change, but did give \$8 to Rodriguez.

19. Supv. Agent Carnet indicated that they needed to leave. Rodriguez asked him if he would buy her another beer. He agreed. Azpitarte served a Modelo to Rodriguez. Supv. Agent Carnet paid with a \$20 bill. Azpitarte returned and placed some change on the counter, then left to help other customers. Rodriguez picked up the money. Supv. Agent Carnet asked Rodriguez for his change; she laughed.

October 19, 2017
(Counts 16-24)

20. On October 19, 2017, Supv. Agent Carnet and Agent Lopez returned to the Licensed Premises. They entered and sat at a table. They ordered a bucket of beers from the waitress, Rodriguez. Rodriguez served them six beers and charged them \$15.

⁴ Agent Lopez testified that the report indicated that Alvarado did not solicit any drinks from Supv. Agent Carnet; rather, she simply ordered one. He further testified that he agreed with this statement in the report. Supv. Agent Carnet's testimony that she solicited a drink from him is given greater weight than that of Agent Lopez since he was directly involved in the conversation and the transaction and Agent Lopez was not.

21. Izela Munoz approached and spoke to Supv. Agent Carnet before sitting down. Munoz asked Supv. Agent Carnet if he would buy her a beer. He agreed. Munoz called Rodriguez over and ordered a beer. Supv. Agent Carnet paid by giving \$20 to Rodriguez. Rodriguez went to the bar counter and returned with a Bud Light, which she served to Munoz. Rodriguez gave \$10 in change to Supv. Agent Carnet and \$8 to Munoz.

22. Munoz subsequently brought another woman, Gladys Lopez Orrellana, to the table. Agent Lopez had seen Orrellana working as a waitress on October 12, 2017.

23. Munoz asked Agent Lopez if he would buy Orrellana a beer. Agent Lopez asked Orrellana if she wanted a beer; she said that she did. Orrellana went to the bar counter and returned with a beer. Agent Lopez gave her a \$20 bill and she gave him \$10 in change. Orrellana consumed her beer, then resumed working as a waitress.

24. A woman identified only as Hennessey approached and spoke to Munoz. Munoz asked Agent Lopez if he would buy Hennessey a drink. He asked Hennessey if she wanted him to do so and she said that she did. Agent Lopez called over Rodriguez and Hennessey ordered a drink. Rodriguez went to the bar counter and returned with a can of O'Doul's, a non-alcoholic beer. Agent Lopez paid with a \$20 bill. Rodriguez gave him \$10 in change by placing it on the table.

25. Agent Lopez ordered an O'Doul's. He was charged \$2 for it.

26. Hennessey called Orrellana over and ordered a Bud Light. Orrellana went to the bar counter, spoke to Azpitarte, and obtained a can of Bud Light. She served the beer to Hennessey. Agent Lopez paid by handing a \$20 bill to Orrellana. Orrellana gave him \$10 in change and handed \$8 to Hennessey.

27. Hennessey subsequently asked him if he would buy her another one. Agent Lopez said that he would and she ordered an O'Doul's from Orrellana. Orrellana went to the bar counter and spoke to Azpitarte. Orrellana returned with a can of Bud Light and a can of O'Doul's. Orrellana said that the Bud Light was for her and the O'Doul's was for Hennessey. Agent Lopez paid Orrellana with a \$20 bill. He did not receive any change, but Orrellana handed \$8 to Hennessey.⁵

28. Rodriguez returned after a bit and asked Supv. Agent Carnet to buy her a drink. He agreed. Rodriguez went to the counter and returned with a red liquid in a clear plastic cup. Supv. Agent

⁵ Hennessey's third solicitation (described in this paragraph), was not charged in the accusation. Count 17 alleged that Rodriguez, not Orrellana, permitted Hennessey's solicitation (not Orrellana), while count 18 requires that the drink solicited be alcoholic.

Carnet paid by giving Rodriguez a \$20 bill. She gave him \$10 in change. Supv. Agent Carnet asked what was in the cup; Rodriguez replied that it was cranberry juice.

29. In front of Rodriguez, Munoz asked Supv. Agent Carnet if he would buy her a beer. He agreed and she ordered a beer from Rodriguez. Rodriguez went to the bar counter, returned with a beer, and served it to Munoz. Supv. Agent Carnet paid with a \$20 bill and received \$10 in change. Rodriguez gave \$8 to Munoz.

30. Munoz finished her beer and asked him to buy her another one. Munoz called over Rodriguez and ordered a beer. Rodriguez went to the bar counter and returned with a Bud Light, which she served to Munoz. Carnet paid with a \$20 bill; Rodriguez gave him \$10 in change and gave \$8 to Munoz.

31. As Supv. Agent Carnet and Agent Lopez prepared to leave, Rodriguez approached and asked Supv. Agent Carnet if he would buy her another drink. He agreed. Rodriguez obtained a clear plastic cup with a red liquid inside it. Rodriguez stated that the liquid was cranberry juice. Supv. Agent Carnet paid with a \$20 bill and obtained \$10 in change.

November 3, 2017
(Counts 25-32)

32. On November 3, 2017, Supv. Agent Carnet and Agent Lopez returned to the Licensed Premises. They entered and sat down at the bar counter. They ordered two Modelo beers from Azpitarte. Azpitarte served them four beers, stating that beers were two for one.⁶ They paid by giving Azpitarte \$10.

33. Orrellana, who was working as a waitress, began speaking to Agent Lopez. She ordered a beer for herself and told Agent Lopez that it would cost \$10. He paid by giving Orrellana a \$20 bill; she gave him \$10 in change. Orrellana returned to her waitressing duties.

34. Munoz sat down next to the agents. She asked Agent Lopez if he wanted her to bring a friend over. He asked whom she meant; she pointed to Gonzalia Barraza. He said yes and Barraza joined them. Munoz told Barraza to ask for one. Barraza ordered a beer from Azpitarte, who served her a Bud Light. Agent Lopez asked Barraza if she had ordered the beer and if she wanted it. She said that she did. Agent Lopez paid Azpitarte with a \$20 bill and she gave him \$18 in change. Munoz told Agent Lopez that \$8 of the change was for Barraza. Barraza took \$8, leaving him with \$10.

⁶ See footnote 3, *supra*.

35. Munoz and Supv. Agent Carnet had a conversation during which she ordered a beer from Azpitarte. Supv. Agent Carnet asked Munoz if the beer was for her. She said that it was. He asked if she wanted him to pay for it. She said she did. Azpitarte served Bud Light beer to Munoz. Supv. Agent Carnet paid with a \$20 bill; Azpitarte returned \$18 in change by placing it on the bar counter. Munoz picked up the entire amount in front of Azpitarte, took \$8, and gave \$10 to Supv. Agent Carnet.

36. Agent Lopez noticed Andrea Rivera, who asked him if he would buy her a beer. He said that he would. Rivera ordered a beer from Claudio Moyeda, who served her a Bud Light. Agent Lopez paid by giving a \$20 bill to Moyeda; Moyeda returned \$18 in change to him.

37. Munoz ordered a beer from Moyeda, who served it to her. Supv. Agent Carnet asked Munoz if she wanted him to pay for that beer. She said that he did; he gave Moyeda a \$20 bill. Moyeda placed some change down on the bar counter. In front of Moyeda, Munoz picked up all of the money, took \$8 for herself, and gave \$10 to Supv. Agent Carnet.

38. 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. 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.

8. 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.

9. Health & Safety Code section 11378 makes it a felony to possess for sale a controlled substance that meets any of the following criteria:

- (1) The substance is classified in Schedule III, IV, or V and is not a narcotic drug, except the substance specified in subdivision (g) of Section 11056.
- (2) The substance is specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d).

- (3) The substance is specified in paragraph (11) of subdivision (c) of Section 11056.
- (4) The substance is specified in paragraph (2) or (3) of subdivision (f) of Section 11054.
- (5) The substance is specified in subdivision (d), (e), or (f), except paragraph (3) of subdivision (e) and subparagraphs (A) and (B) of paragraph (2) of subdivision (f), of Section 11055.

10. Health & Safety Code section 11379 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 which is

- (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056,
- (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d),
- (3) specified in paragraph (11) of subdivision (c) of Section 11056,
- (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or
- (5) specified in subdivision (d) or (e), except paragraph (3) of subdivision (e), or specified in subparagraph (A) of paragraph (1) of subdivision (f), of Section 11055

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

11. 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 9, 10, 11, 12, 13, 14, 20, 21, 22, 23, and 24. (Findings of Fact ¶¶ 13, 16-21 & 28-31.)

12. On October 12, 2017, Bernardina Alvarado (counts 9 and 10) solicited a beer from Supv. Agent Ricardo Carnet. She was paid a commission therefor directly by the bartender, Aracely. Additionally, Martha Esqueda Rodriguez (counts 11, 12, and 13), who was working as a waitress, solicited and accepted an O'Doul's non-alcoholic beverage from Supv. Agent Carnet. Rodriguez received a commission directly from the bartender, Araceli Azpitarte, in connection with these drinks. Rodriguez (count 14) also solicited a beer on behalf of Azpitarte. (Findings of Fact ¶¶ 13 & 16-19.)

13. On October 19, 2017, Izela Munoz (counts 20 and 21) solicited three beers, one of them in front of Rodriguez. In connection with all three solicitations, Rodriguez paid a commission to Munoz. Additionally, Rodriguez (counts 22, 23, and 24), an employee, solicited and accepted two drinks, both cranberry juice, from Supv. Agent Carnet. (Findings of Fact ¶¶ 20-21 & 28-31.)

14. Cause for suspension or revocation of the Respondent's license does **not** exist for the violations of section 24200.5(b), section 25657(a), and section 25657(b) alleged in counts 1, 2, 7, 8, 15, 16, 17, 18, 19, 25, 26, 27, 28, 29, 30, 31, and 32. (Findings of Fact ¶¶ 4, 6-8, 13-15, 20, 22-27 & 32-37.)

15. On February 16, 2017, Karen (counts 1 and 2) solicited a drink from Agent Lopez, but there is no evidence that she was employed at the Licensed Premises or that any employee of the Licensed Premises was aware of her solicitation. Since Karen purchased the beer at the bar counter out of the agents' presence, there is no evidence that she was paid a commission for the purchase of the beer. Rather, the evidence established that she kept a portion of the money Agent Lopez had handed to her. (Findings of Fact ¶¶ 4 & 6-8.)

16. On October 12, 2017, there was no evidence that Alvarado (counts 7 and 8) solicited any beers from Agent Lopez. Rather, the evidence established that Alvarado simply ordered two beers from Azpitarte, the bartender. Although Azpitarte returned the change to Alvarado instead of Agent Lopez, there is no evidence that she saw Alvarado retain some of the money for herself. Additionally, there is no evidence that Azpitarte (count 15) solicited any drinks—she only received drinks solicited by someone else. (Findings of Fact ¶¶ 13-15.)

17. On October 19, 2017, Orrellana (counts 16 & 19) did not solicit any beers from Agent Lopez. Of the two beers she consumed, Munoz solicited the first one (a solicitation which was not charged) and Orrellana obtained the second one without asking. Also on October 19, 2017, Hennessey (counts 17 and 18) did not solicit the first two drinks served to her. The first one, a non-alcoholic beer, was solicited on Hennessey's behalf by Munoz. The second one, a beer, Hennessey ordered without asking anyone first. The third one, an O'Doul's non-alcoholic beer, she solicited from Agent Alberto Lopez. Orrellana, the waitress, paid Hennessey a commission in connection with this solicitation. However, this solicitation was not alleged in the accusation. (Findings of Fact ¶¶ 20 & 22-27.)

18. On November 3, 2017, neither Orrellana (counts 25 and 26), Barraza (counts 27 and 28), nor Munoz (counts 31 and 32) solicited any drinks. Rather, they simply ordered drinks for themselves. There can be no violation of these provisions without a solicitation, regardless of whether a surcharge was imposed (Orrellana) or the woman took a portion of the change (Barraza and Munoz). Although Rivera (counts 29 and 30) solicited a beer, there is no evidence that the Respondent or any of his employees were aware of it. There also is no evidence that a commission was paid to Rivera. (Findings of Fact ¶¶ 32-37.)

19. 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 3 and 4. First, the evidence established that all discussions about the cocaine and the subsequent sale took place

outside the Licensed Premises. Second, the evidence established that all discussions about the cocaine and the subsequent sale took place outside the presence of any of the Respondent's employees. Third, although the seller came out of the Licensed Premises immediately before the sale, there is no evidence that the Respondent or any of its employees were aware that the man had cocaine in his possession while he was inside the Licensed Premises. (Findings of Fact ¶¶ 4-5, 9 & 12.)

20. Cause for suspension or revocation of the Respondent's license does **not** exist for the violations of Health & Safety Code sections 11378 and 11379 alleged in counts 5 and 6. There is no evidence that the Respondent or any of its employees were aware of Jimmy's conversations with the agents outside the Licensed Premises. Next, there is no evidence that the Respondent or any of its employees were aware that Jimmy had methamphetamine in his possession or that he sold the methamphetamine to Agent Alberto Lopez. In fact, the evidence established that Jimmy made an effort to ensure that the sale took place outside the presence of the Respondent's employees. (Findings of Fact ¶¶ 4 & 9-11.)

PENALTY

The Department requested that the Respondent's license be revoked, noting that the Respondent has been disciplined for these types of violations in the past. The Respondent did not recommend a penalty in the event that the accusations were sustained, but he noted that there was little evidence that the Respondent or his employees were aware of the alleged activity.

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.

Three women solicited a number of drinks on two different nights. One of the women was an employee who solicited drinks on both nights; the other two were paid commissions directly by one of the bartenders. As to the dismissed counts listed below, the Department failed to provide evidence that the conduct observed met all of the elements required under Section 24200.5(b), section 25657(a), section 25657(b), and Rule 143. Given that the Respondent had been disciplined for such conduct in the past, an aggravated penalty is warranted. The penalty recommended herein complies with rule 144.

Claudio Moyeda
Db: El Rinconcito
40-291032; 18087026
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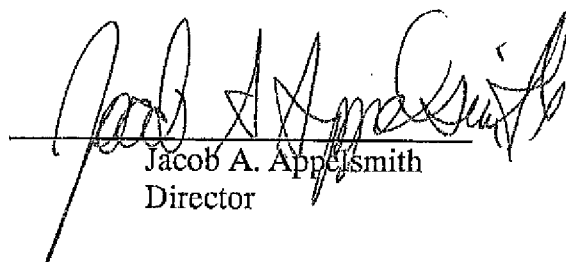
ORDER

Counts 9, 10, 11, 12, 13, 14, 20, 21, 22, 23, and 24 are sustained. With respect to these violations, the Respondent's on-sale beer license is hereby revoked.

Counts 1, 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, 19, 25, 26, 27, 28, 29, 30, 31, and 32 are dismissed.

Sacramento, California

Dated: April 26, 2019



Jacob A. Appel Smith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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

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

CLAUDIO MOYEDA
EL RINCONCITO
1633 E. FLORENCE AVE.
LOS ANGELES, CA 90001

ON-SALE BEER - LICENSE

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

CERRITOS DISTRICT OFFICE

File: 40-291032

Reg: 18087026

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION

To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: November 30, 2018



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Claudio Moyeda	}	File: 40-291032
dba El Rinconcito	}	
1633 E. Florence Ave.	}	Reg.: 18087026
Los Angeles, California 90001	}	
	}	License Type: 40
Respondent	}	
	}	Word Count: 40,000 & 20,000
	}	
	}	Reporter:
	}	Dorothy Simpson
	}	California Reporting
	}	
<u>On-Sale Beer License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on August 22, 2018 and August 23, 2018.

Colleen R. Villarreal, Attorney, represented the Department of Alcoholic Beverage Control.

Victor Sherman, attorney-at-law, represented respondent Claudio Moyeda, who was present.

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

- (1) on four separate dates, he employed or permitted nine different 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 three separate dates, he employed two different 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 four separate dates, he employed or knowingly permitted six different women to loiter in or about the licensed premises for the purpose of begging or soliciting

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

patrons to purchase alcoholic beverages for them in violation of section 25657(b); and

- (4) on two separate dates, he permitted Martha Esqueda Rodriguez 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, the counts overlap to some degree. (Exhibit 1.)

Additionally, the Department seeks to discipline Respondent's license on the grounds that, on February 16, 2017, he permitted a patron 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. (Exhibit 1.)

Finally, the Department seeks to discipline Respondent's license on the grounds that, on February 16, 2017, he permitted a patron to: (1) possess methamphetamine for the purposes of sale upon the licensed premises in violation of California Health and Safety Code section 11378 and (2) sell, furnish, or offer to sell or furnish methamphetamine upon the licensed premises in violation of California Health and Safety Code section 11379. (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 23, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on June 5, 2018. At the hearing, the Department moved to correct some of the counts. First, in between counts 25 and 26 is stray count labeled "Count 10." The Department moved to dismiss this count; the Respondent did not object. Accordingly, the motion was granted. The Department also moved to correct the dates listed in counts 26, 27, and 28 such that they alleged violations on November 3, 2017. The Respondent did not object and this motion was also granted.
2. The Department issued a type 40, on-sale beer license to the Respondent for the above-described location on January 11, 1994 (the Licensed Premises).

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

3. The Respondent's license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
8/19/2015	15082926	BP §§ 24200.5(b), 25657(a) & 25657(b)	Rev. stayed w/60-day susp.
5/4/1994	94029884	BP §§ 24200.5(b), 25657(a) & 25657(b); 4 CCR §§ 143.3; & PC § 303a	30-day susp. w/10 days stayed

The foregoing disciplinary matters are final. (Exhibits 3-4.) Reg. #15082926 was pled for the purposes of aggravation; reg. #94029884 was not.

February 16, 2017
(Counts 1-6)

4. On February 16, 2017, Agent Alberto Lopez, Agent Jason Groff, and Agent Garcia went to the Licensed Premises.

5. Before they entered, a man standing outside who identified himself as Jimmy asked them if they needed any "white." White is a slang term for cocaine. Agent Lopez told him that they would talk later and entered the Licensed Premises.

6. Agent Lopez, Agent Groff, and Agent Garcia sat down at a table near the restrooms. A waitress approached them and they ordered a bucket of beers. A bucket consists of six beers. Agent Groff paid \$15 for the beers, i.e., \$2.50 each. The waitress informed them that beers were two for one until 10:00 p.m.³

7. A woman identified only as Karen approached and asked if she could sit with them. They said that she could. Karen went to the restroom, returned, and said, "You didn't get my beer for me?" Agent Lopez said that they had not. Karen called the waitress over and ordered a beer. The waitress told her that she had to go to the bar counter.

8. Karen told Agent Lopez that her beer cost \$10 and he gave her a \$20 bill. Karen took the money to the counter and spoke to the bartender. Karen returned to the table with a can of Bud Light beer. Karen gave Agent Lopez \$8 in change. She also placed some money under her beer, which she consumed.

9. The agents exited. Jimmy called out to them. Jimmy and another man were standing near each other. Agent Groff asked the man what he had. The man said that he had some

³ The Department did not file any counts alleging a free-goods violation.

“white,” a slang term for cocaine. There were no employees around when the man contacted them, although there was a security guard just inside the door. The man entered the Licensed Premises. Agent Lopez followed and stood at the door. He saw the man talking to a security guard; they stopped when they saw him.

10. Agent Lopez and Jimmy spoke to each other at the threshold of the door. Jimmy said that he had some crystal and pulled out a clear plastic baggy. Agent Lopez asked him how much it would cost; Jimmy said that it cost \$20. Agent Lopez pointed out that security was nearby; Jimmy told him not to worry. Jimmy told Agent Lopez to go into the restroom. Agent Lopez did so and Jimmy followed.

11. Inside the restroom, Jimmy handed a baggy containing methamphetamine to Agent Lopez. Agent Lopez asked how much it would cost. Jimmy said that it would cost \$20. (Exhibits 5 & 13.) There were no employees inside the restroom. Agent Lopez testified that Jimmy made a point of not letting security personnel see them.

12. A second male came outside and whistled at Agent Groff. The man said that he had what Agent Groff wanted. They walked to a point approximately 15 feet away from the door. Agent Groff gave the man \$20 and the man gave him small bag containing cocaine. (Exhibits 12 & 14.)

October 12, 2017
(Counts 7-15)

13. Agent Lopez went to the Licensed Premises two more times, but did not see any violations. On October 12, 2017, he returned to the Licensed Premises with Supervising Agent Carnet. They entered and sat down at the bar counter. They ordered a bucket of beers from one of the bartenders, Aracely. She served them six bottles of Bud Light beer, for which they paid \$15 i.e., \$2.50 each. They asked that she switch out four of the Bud Lights for four Modelo beers, which she did.

14. The agents began speaking to Bernardino Lorenzo Alvarado, who was sitting near them. Alvarado finished her drink and called over another bartender, Araceli Azpitarte. Alvarado ordered a beer and Azpitarte served her a can of Bud Light. Alvarado looked at Agent Lopez and nodded. Believing that she wanted him to pay for the beer, he handed \$20 to Azpitarte. She rang up the sale and returned with some change. She placed the change down on the bar counter in front of Alvarado. Alvarado gave Agent Lopez \$10 of the change and kept the rest. Agent Lopez did not know where Azpitarte was at the time.

15. Alvarado subsequently ordered a second beer from Azpitarte. Azpitarte served Alvarado a can of Bud Light. Agent Lopez paid with a \$20 bill. Azpitarte rang up the

sale and gave the change to Alvarado. Alvarado kept an unknown amount of the change and gave \$10 to Agent Lopez.

16. Alvarado asked Supv. Agent Carnet if he would buy her a beer.⁴ He said that he would and she ordered a beer from Aracely. Aracely served Alvarado a Bud Light. Supv. Agent Carnet paid with a \$20 bill. Aracely obtained \$18 in change, giving \$10 to him and \$8 to Alvarado.

17. Supv. Agent Carnet moved down the bar counter a bit. He was approached by Martha Esqueda Rodriguez, who was acting as a waitress. Supv. Agent Carnet, Rodriguez, and Azpitarte began to speak to one another. During this conversation, Rodriguez asked Supv. Agent Carnet if he would buy them drinks. He agreed and asked Azpitarte if she wanted a beer; she said that she did. Rodriguez placed her order with Azpitarte, who obtained two drinks, an O'Doul's non-alcoholic beer for Rodriguez and a Modelo for herself. Supv. Agent Carnet paid with a \$20 bill, but did not receive any change. Azpitarte gave \$8, however, to Rodriguez. Both women consumed their drinks, then returned to their duties.

18. Rodriguez subsequently asked him to buy both of them another drink. He agreed and asked Azpitarte if she wanted a beer. She said that she did. Rodriguez placed her order; Azpitarte obtained an O'Doul's for Rodriguez and a Modelo for herself. Supv. Agent Carnet paid with a \$20 bill. Azpitarte did not give him any change, but did give \$8 to Rodriguez.

19. Supv. Agent Carnet indicated that they needed to leave. Rodriguez asked him if he would buy her another beer. He agreed. Azpitarte served a Modelo to Rodriguez. Supv. Agent Carnet paid with a \$20 bill. Azpitarte returned and placed some change on the counter, then left to help other customers. Rodriguez picked up the money. Supv. Agent Carnet asked Rodriguez for his change; she laughed.

October 19, 2017
(Counts 16-24)

20. On October 19, 2017, Supv. Agent Carnet and Agent Lopez returned to the Licensed Premises. They entered and sat at a table. They ordered a bucket of beers from the waitress, Rodriguez. Rodriguez served them six beers and charged them \$15.

⁴ Agent Lopez testified that the report indicated that Alvarado did not solicit any drinks from Supv. Agent Carnet; rather, she simply ordered one. He further testified that he agreed with this statement in the report. Supv. Agent Carnet's testimony that she solicited a drink from him is given greater weight than that of Agent Lopez since he was directly involved in the conversation and the transaction and Agent Lopez was not.

21. Izela Munoz approached and spoke to Supv. Agent Carnet before sitting down. Munoz asked Supv. Agent Carnet if he would buy her a beer. He agreed. Munoz called Rodriguez over and ordered a beer. Supv. Agent Carnet paid by giving \$20 to Rodriguez. Rodriguez went to the bar counter and returned with a Bud Light, which she served to Munoz. Rodriguez gave \$10 in change to Supv. Agent Carnet and \$8 to Munoz.

22. Munoz subsequently brought another woman, Gladys Lopez Orrellana, to the table. Agent Lopez had seen Orrellana working as a waitress on October 12, 2017.

23. Munoz asked Agent Lopez if he would buy Orrellana a beer. Agent Lopez asked Orrellana if she wanted a beer; she said that she did. Orrellana went to the bar counter and returned with a beer. Agent Lopez gave her a \$20 bill and she gave him \$10 in change. Orrellana consumed her beer, then resumed working as a waitress.

24. A woman identified only as Hennessey approached and spoke to Munoz. Munoz asked Agent Lopez if he would buy Hennessey a drink. He asked Hennessey if she wanted him to do so and she said that she did. Agent Lopez called over Rodriguez and Hennessey ordered a drink. Rodriguez went to the bar counter and returned with a can of O'Doul's, a non-alcoholic beer. Agent Lopez paid with a \$20 bill. Rodriguez gave him \$10 in change by placing it on the table.

25. Agent Lopez ordered an O'Doul's. He was charged \$2 for it.

26. Hennessey called Orrellana over and ordered a Bud Light. Orrellana went to the bar counter, spoke to Azpitarte, and obtained a can of Bud Light. She served the beer to Hennessey. Agent Lopez paid by handing a \$20 bill to Orrellana. Orrellana gave him \$10 in change and handed \$8 to Hennessey.

27. Hennessey subsequently asked him if he would buy her another one. Agent Lopez said that he would and she ordered an O'Doul's from Orrellana. Orrellana went to the bar counter and spoke to Azpitarte. Orrellana returned with a can of Bud Light and a can of O'Doul's. Orrellana said that the Bud Light was for her and the O'Doul's was for Hennessey. Agent Lopez paid Orrellana with a \$20 bill. He did not receive any change, but Orrellana handed \$8 to Hennessey.⁵

28. Rodriguez returned after a bit and asked Supv. Agent Carnet to buy her a drink. He agreed. Rodriguez went to the counter and returned with a red liquid in a clear plastic cup. Supv. Agent Carnet paid by giving Rodriguez a \$20 bill. She gave him \$10 in

⁵ Hennessey's third solicitation (described in this paragraph), was not charged in the accusation. Count 17 alleged that Rodriguez, not Orrellana, permitted Hennessey's solicitation (not Orrellana), while count 18 requires that the drink solicited be alcoholic.

change. Supv. Agent Carnet asked what was in the cup; Rodriguez replied that it was cranberry juice.

29. In front of Rodriguez, Munoz asked Supv. Agent Carnet if he would buy her a beer. He agreed and she ordered a beer from Rodriguez. Rodriguez went to the bar counter, returned with a beer, and served it to Munoz. Supv. Agent Carnet paid with a \$20 bill and received \$10 in change. Rodriguez gave \$8 to Munoz.

30. Munoz finished her beer and asked him to buy her another one. Munoz called over Rodriguez and ordered a beer. Rodriguez went to the bar counter and returned with a Bud Light, which she served to Munoz. Carnet paid with a \$20 bill; Rodriguez gave him \$10 in change and gave \$8 to Munoz.

31. As Supv. Agent Carnet and Agent Lopez prepared to leave, Rodriguez approached and asked Supv. Agent Carnet if he would buy her another drink. He agreed. Rodriguez obtained a clear plastic cup with a red liquid inside it. Rodriguez stated that the liquid was cranberry juice. Supv. Agent Carnet paid with a \$20 bill and obtained \$10 in change.

November 3, 2017
(Counts 25-32)

32. On November 3, 2017, Supv. Agent Carnet and Agent Lopez returned to the Licensed Premises. They entered and sat down at the bar counter. They ordered two Modelo beers from Azpitarte. Azpitarte served them four beers, stating that beers were two for one.⁶ They paid by giving Azpitarte \$10.

33. Orrellana, who was working as a waitress, began speaking to Agent Lopez. She ordered a beer for herself and told Agent Lopez that it would cost \$10. He paid by giving Orrellana a \$20 bill; she gave him \$10 in change. Orrellana returned to her waitressing duties.

34. Munoz sat down next to the agents. She asked Agent Lopez if he wanted her to bring a friend over. He asked whom she meant; she pointed to Gonzalia Barraza. He said yes and Barraza joined them. Munoz told Barraza to ask for one. Barraza ordered a beer from Azpitarte, who served her a Bud Light. Agent Lopez asked Barraza if she had ordered the beer and if she wanted it. She said that she did. Agent Lopez paid Azpitarte with a \$20 bill and she gave him \$18 in change. Munoz told Agent Lopez that \$8 of the change was for Barraza. Barraza took \$8, leaving him with \$10.

⁶ See footnote 3, *supra*.

35. Munoz and Supv. Agent Carnet had a conversation during which she ordered a beer from Azpitarte. Supv. Agent Carnet asked Munoz if the beer was for her. She said that it was. He asked if she wanted him to pay for it. She said she did. Azpitarte served Bud Light beer to Munoz. Supv. Agent Carnet paid with a \$20 bill; Azpitarte returned \$18 in change by placing it on the bar counter. Munoz picked up the entire amount in front of Azpitarte, took \$8, and gave \$10 to Supv. Agent Carnet.

36. Agent Lopez noticed Andrea Rivera, who asked him if he would buy her a beer. He said that he would. Rivera ordered a beer from Claudio Moyeda, who served her a Bud Light. Agent Lopez paid by giving a \$20 bill to Moyeda; Moyeda returned \$18 in change to him.

37. Munoz ordered a beer from Moyeda, who served it to her. Supv. Agent Carnet asked Munoz if she wanted him to pay for that beer. She said that he did; he gave Moyeda a \$20 bill. Moyeda placed some change down on the bar counter. In front of Moyeda, Munoz picked up all of the money, took \$8 for herself, and gave \$10 to Supv. Agent Carnet.

38. 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. 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.

8. 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.

9. Health & Safety Code section 11378 makes it a felony to possess for sale a controlled substance that meets any of the following criteria:

- (1) The substance is classified in Schedule III, IV, or V and is not a narcotic drug, except the substance specified in subdivision (g) of Section 11056.
- (2) The substance is specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d).
- (3) The substance is specified in paragraph (11) of subdivision (c) of Section 11056.

- (4) The substance is specified in paragraph (2) or (3) of subdivision (f) of Section 11054.
- (5) The substance is specified in subdivision (d), (e), or (f), except paragraph (3) of subdivision (e) and subparagraphs (A) and (B) of paragraph (2) of subdivision (f), of Section 11055.

10. Health & Safety Code section 11379 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 which is

- (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056,
- (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d),
- (3) specified in paragraph (11) of subdivision (c) of Section 11056,
- (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or
- (5) specified in subdivision (d) or (e), except paragraph (3) of subdivision (e), or specified in subparagraph (A) of paragraph (1) of subdivision (f), of Section 11055

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

11. 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 9, 10, 11, 12, 13, 14, 20, 21, 22, 23, and 24. (Findings of Fact ¶¶ 13, 16-21 & 28-31.)

12. On October 12, 2017, Bernardina Alvarado (counts 9 and 10) solicited a beer from Supv. Agent Ricardo Carnet. She was paid a commission therefor directly by the bartender, Aracely. Additionally, Martha Esqueda Rodriguez (counts 11, 12, and 13), who was working as a waitress, solicited and accepted an O'Doul's non-alcoholic beverage from Supv. Agent Carnet. Rodriguez received a commission directly from the bartender, Araceli Azpitarte, in connection with these drinks. Rodriguez (count 14) also solicited a beer on behalf of Azpitarte. (Findings of Fact ¶¶ 13 & 16-19.)

13. On October 19, 2017, Izela Munoz (counts 20 and 21) solicited three beers, one of them in front of Rodriguez. In connection with all three solicitations, Rodriguez paid a commission to Munoz. Additionally, Rodriguez (counts 22, 23, and 24), an employee, solicited and accepted two drinks, both cranberry juice, from Supv. Agent Carnet. (Findings of Fact ¶¶ 20-21 & 28-31.)

14. Cause for suspension or revocation of the Respondent's license does not exist for the violations of section 24200.5(b), section 25657(a), and section 25657(b) alleged in counts 1, 2, 7, 8, 15, 16, 17, 18, 19, 25, 26, 27, 28, 29, 30, 31, and 32. (Findings of Fact ¶¶ 4, 6-8, 13-15, 20, 22-27 & 32-37.)

15. On February 16, 2017, Although Karen (counts 1 and 2) solicited a drink from Agent Lopez, there is no evidence that she was employed at the Licensed Premises or that any employee of the Licensed Premises was aware of her solicitation. Since Karen purchased the beer at the bar counter out of the agents' presence, there is no evidence that she was paid a commission for the purchase of the beer. Rather, the evidence established that she kept a portion of the money which Agent Lopez had handed to her. (Findings of Fact ¶¶ 4 & 6-8.)

16. On October 12, 2017, there was no evidence that Alvarado (counts 7 and 8) solicited any beers from Agent Lopez. Rather, the evidence established that Alvarado simply ordered two beers from Azpitarte, the bartender. Although Azpitarte returned the change to Alvarado instead of Agent Lopez, there is no evidence that she saw Alvarado retain some of the money for herself. Additionally, there is no evidence that Azpitarte (count 15) solicited any drinks—she only received drinks solicited by someone else. (Findings of Fact ¶¶ 13-15.)

17. On October 19, 2017, Orrellana (counts 16 & 19) did not solicit any beers from Agent Lopez. Of the two beers she consumed, Munoz solicited the first one (a solicitation which was not charged) and Orrellana obtained the second one without asking. Also on October 19, 2017, Hennessey (counts 17 and 18) did not solicit the first two drinks served to her. The first one, a non-alcoholic beer, was solicited on Hennessey's behalf by Munoz. The second one, a beer, Hennessey ordered without asking anyone first. The third one, an O'Doul's non-alcoholic beer, she solicited from Agent Alberto Lopez. Orrellana, the waitress, paid Hennessey a commission in connection with this solicitation. However, this solicitation was not alleged in the accusation. (Findings of Fact ¶¶ 20 & 22-27.)

18. On November 3, 2017, neither Orrellana (counts 25 and 26), Barraza (counts 27 and 28), nor Munoz (counts 31 and 32) solicited any drinks. Rather, they simply ordered drinks for themselves. There can be no violation of these provisions without a solicitation, regardless of whether a surcharge was imposed (Orrellana) or the woman took a portion of the change (Barraza and Munoz). Although Rivera (counts 29 and 30) solicited a beer, there is no evidence that the Respondent or any of his employees were aware of it. There also is no evidence that a commission was paid to Rivera. (Findings of Fact ¶¶ 32-37.)

19. 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 3 and 4. First, the evidence established that all discussions about the cocaine and the subsequent sale took place outside the Licensed Premises. Second, the evidence established that all discussions about the cocaine and the subsequent sale took place outside the presence of any of the Respondent's employees. Third, although the seller came out of the Licensed Premises immediately before the sale, there is no evidence that the Respondent or any of its employees were aware that the man had cocaine in his possession while he was inside the Licensed Premises. (Findings of Fact ¶¶ 4-5, 9 & 12.)

20. Cause for suspension or revocation of the Respondent's license does **not** exist for the violations of Health & Safety Code sections 11378 and 11379 alleged in counts 5 and 6. There is no evidence that the Respondent or any of its employees were aware of Jimmy's conversations with the agents outside the Licensed Premises. Next, there is no evidence that the Respondent or any of its employees were aware that Jimmy had methamphetamine in his possession or that he sold the methamphetamine to Agent Alberto Lopez. In fact, the evidence established that Jimmy made an effort to ensure that the sale took place outside the presence of the Respondent's employees. (Findings of Fact ¶¶ 4 & 9-11.)

PENALTY

The Department requested that the Respondent's license be revoked, noting that the Respondent has been disciplined for these types of violations in the past. The Respondent did not recommend a penalty in the event that the accusation were sustained, but noted that there was little evidence that the Respondent or his employees were aware of the alleged activity.

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.

This case involved a large number of counts which the Department seemed not to understand. Section 24200.5(b), section 25657(a), section 25657(b), and rule 143 all prohibit the *solicitation* of drinks. Yet the majority of the counts alleged in the accusation did not involve any solicitations whatsoever. It is unclear why the Department filed these counts. Nevertheless, three women solicited a number of drinks on two different nights. One of the women was an employee who solicited drinks on both dates; the other two were paid commissions directly by one of the bartenders. Given that the

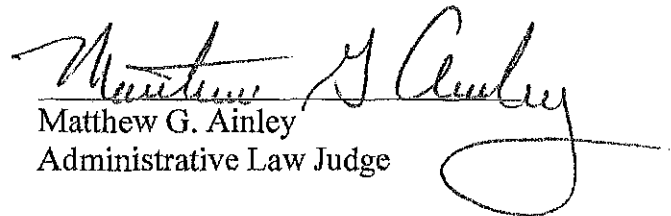
Respondent had been disciplined for such conduct in the past, an aggravated penalty is warranted. The penalty recommended herein complies with rule 144.

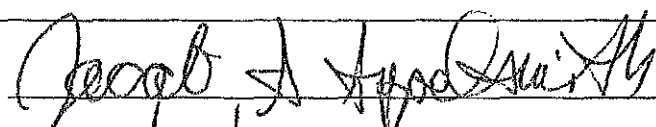
ORDER

Counts 9, 10, 11, 12, 13, 14, 20, 21, 22, 23, and 24 are sustained. With respect to these violations, the Respondent's on-sale beer license is hereby revoked.

Counts 1, 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, 19, 25, 26, 27, 28, 29, 30, 31, and 32 are dismissed.

Dated: September 24, 2018


Matthew G. Ainley
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>11/28/18</u>