

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

AB-9918

File: 40-542902; Reg: 19088770

LATINO SPORTS BAR, INC.,
dba Latino Sports Bar
2938½ Durfee Avenue
El Monte, CA 91732-3518,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: January 14, 2022
Telephonic

ISSUED JANUARY 19, 2022

Appearances: *Appellant:* Armando H. Chavira, as counsel for Latino Sports Bar, Inc.,

Respondent: John P. Newton, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Latino Sports Bar, Inc., doing business as Latino Sports Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ revoking its license because appellant permitted the following activities within the premises: drink solicitation activity, and loitering for that purpose, in violation of

¹ The decision of the Department, dated June 1, 2021, is set forth in the appendix.

Business and Professions Code section 25657, subdivisions (a) and (b);² employees soliciting alcoholic beverages for their own consumption, in violation of California Code of Regulations, title 4, section 143 (rule 143);³ the sale of a controlled substance, to wit: methamphetamine, in violation of Business and Professions Code section 24200.5,

² Section 25657 provides that 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.

(Bus. & Prof. Code, § 25657.)

³ Rule 143 provides:

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.

(Cal. Code Regs., tit. 4, § 143.)

subdivisions (a) and (b),⁴ and Health and Safety Code section 11379,⁵ and possession of a controlled substance for sale, to wit: methamphetamine, in violation of Health and Safety Code section 11378.⁶

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on June 12, 2014. There is no record of prior departmental discipline against the license.

The Department filed an 18-count accusation against appellant on April 25, 2019. A first amended accusation, adding a 19th count, was filed on June 15, 2020. Administrative hearings were held on July 8, 2020, September 23, 2020, and February 16, 2021. Documentary evidence was received and testimony concerning the violations charged was presented by Department Agents Oscar Zapata, Gilbert Castillo, William

⁴ Section 24200.5, subdivisions (a) and (b) provide, in relevant part:

. . . the department shall revoke a license upon any of the following grounds:

(a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises. . . .

(b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy.

(Bus. & Prof. Code §24200.5, subd. (a) & (b).)

⁵ 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 that meets specified criteria.

⁶ Health & Safety Code section 11378 makes it a felony to possess for sale a controlled substance that meets specified criteria.

Pinney, Charlotte Clark, and Hayley Gonzalman; and Los Angeles County Sheriff Senior Criminologists, Aaron Lewis and Rachel Redmond.

Testimony on appellant's behalf was presented by Darvin Cardoza, appellant's son and weekend manager at the premises; bartender Amalia Azucena Duarte Cruz; employee Cristina Raquel Jiron; and Maria Isabel Morales and Atanacio Morales, co-owners of the premises.

Testimony established that on five separate occasions in 2018, the premises was visited by undercover Department agents in plain clothes to conduct an investigation in response to a local police department complaint that drink solicitation activity was occurring at the premises.

Counts 1 and 3-5:

On May 25, 2018, Department Agents Castillo and Hernandez entered the premises and went to the bar where Agent Castillo ordered two 12-ounce bottles of Modelo beer from a female bartender. He paid \$5 per beer. The agents then went to a table and sat down.

The agents were approached by a female individual who introduced herself as Ofelia. They engaged in conversation, then Ofelia asked Agent Castillo if he would buy her a beer. He agreed, and suggested that they go together to the bar to get it. She did not like that suggestion, so he gave her \$10 which she took to the bar and obtained a 12-ounce can of Bud Light beer. No evidence was presented regarding how much money Ofelia paid for her beer or whether Agent Castillo received any change.

On June 24, 2018, Agents Castillo, Hernandez and Pinney returned to the premises in plain clothes and sat at a table. Agent Castillo went to the bar and ordered three 12-ounce bottles of Modelo beer from a female bartender. He paid her \$4 for

each beer, then returned to the table with the beers. He observed Ofelia sitting and speaking with patrons, obtaining money from them, getting beer from the bar, and returning to their tables with beer.

The agents were approached by a female later identified as Martha Solis Tapia (Tapia) who asked if they would like another round of beers. Agent Castillo ordered three 12-ounce bottles of Modelo beer from her. She obtained the beer from one of the bartenders and brought it back to the agents. Agent Pinney gave Tapia \$12 which she gave to the bartender. Tapia was seen taking orders from customers and serving them beers.

A security guard was observed by Agent Castillo, later identified as Raul Salcedo Rodriguez (Rodriguez), positioned at the back door. Later, as the agents exited through that door, Agent Castillo asked Rodriguez if he knew anyone from whom he could purchase cocaine. Rodriguez told Castillo to wait. Rodriguez went back into the premises and motioned for someone to come over. Agent Castillo observed Tapia come over to Rodriguez in response, and overheard Rodriguez telling her that Castillo wanted cocaine. She replied, "I don't know them," and walked away. Rodriguez told the agents that Tapia didn't have any more cocaine.

Counts 2 and 6-7:

On August 17, 2018, Agents Castillo and Pinney entered the licensed premises in a plain clothes capacity. At the bar, Agent Castillo ordered two 12-ounce bottles of Modelo beer from one of the female bartenders. He paid her \$5 for each beer.

Agent Castillo observed Tapia assisting the bartenders, putting up decorations behind the bar and throughout the premises. When he asked one of the bartenders why they were putting up decorations he was told it was for a co-worker's birthday.

Later, while the agents were seated at the bar, Agent Pinney observed Tapia entering the employees-only area side of the bar, and doing something behind the bar. No employees asked her to leave, in spite of a sign indicating "NOTICE EMPLOYEES ONLY." (Exhs. A & K.)

The agents went to a table near the center of the premises. Agent Castillo observed Tapia waiting on customers, taking drink orders, and obtaining and serving beers. Tapia asked the agents if they wanted more beer. Agent Castillo said no, but asked her for a gram of cocaine. She asked who told him to ask her. Agent Castillo said he knew she was friends with Rodriguez. Tapia said she didn't have cocaine, but had \$20 worth of crystal (street vernacular for methamphetamine). Agent Castillo gave her \$20, and she handed him a small black plastic baggy containing methamphetamine which he put in his pocket.

The baggy was transported by Agent Castillo to the Monrovia District office where it was photographed (exh. 2), weighed and tested. The 0.5 grams resulted in a presumptive positive for methamphetamine and was secured in an evidence locker under Daily Report #18-02-064.

Counts 8-12:

On October 12, 2018, Agent Castillo returned to the premises with three other agents. Two agents remained outside, while Agents Castillo and Pinney entered the premises in a plain clothes capacity. They went to the bar and ordered two 12-ounce bottles of Modelo beer, for which they paid \$5 each.

Agent Castillo observed Tapia talking with customers and assisting them with the purchase of their beers. Later, she greeted the agents and asked if they wanted more beer but they declined. Later, Agent Castillo called Tapia over to the table and asked

for another \$20 worth of crystal meth. She asked if he was police, and Agent Castillo asked if she forgot he was friends with Rodriguez. Tapia went to the bar, spoke to a customer, then returned with a small plastic baggy. Castillo gave her \$20 and put the baggy in his pocket.

Tapia asked Agent Castillo if he would buy her a beer. He agreed, and ordered one for himself. He gave Tapia \$15 — \$10 for her beer and \$5 for his — and he received no change. Later, he asked Tapia her name, to which she replied, “Lourdes.”

Subsequently, the agents departed the premises and took the baggy to the Monrovia District Office where it was photographed, weighed and tested. (Exhs. 3A & 3B.) The 0.7 grams tested presumptively positive for methamphetamine and was secured in an evidence locker under DR# 18-02-064.

On October 17, 2018, Agent Castillo transported the two black baggies and their contents from DR# 18-02-064 to the Los Angeles County Sheriff’s Department (LASD) Crime Laboratory in Downey for further testing. They were labeled with receipt numbers L038712 and L038713. (Exhs. 10 & 11.)

Counts 1, 2, and 13-19:

On October 19, 2018, at approximately 8:00 p.m., Agents Castillo, Pinney and Hernandez entered the licensed premises in a plain clothes capacity and went to the bar. Additional agents waited outside. Tapia was observed sitting at the bar speaking to a patron. Agent Castillo ordered a bucket of six Modelo beers, for which he paid \$27, and they took them to a table.

Later, Agent Castillo went to the restroom and on his way back spoke to Tapia. Subsequently, she joined the agents at their table. Agent Castillo offered her one of their Modelo beers but she declined. Tapia asked Agent Castillo to buy her a Bud Light

beer and he agreed. He asked her how much and she said \$10, which he gave her. Tapia obtained the beer from the bartender Wendy then returned to the table with the beer.

Agent Castillo asked Tapia if he could buy more methamphetamine from her. She asked how much he wanted and he said \$20 worth. Tapia went to speak to a customer at the bar and returned with a black plastic bindle which she placed on the table. Agent Castillo picked it up and put it in his pocket, then paid her with a \$20 bill which was pre-marked with the initials "GC." (Exh. 8.) Tapia put the \$20 in her pocket.

Later, Tapia introduced the agents to her friend⁷ and asked if she could join them. The agents agreed. Tapia asked Agent Castillo if he would buy her friend a beer and he agreed. He ordered a Bud Light beer from Tapia, and paid her \$10. Tapia obtained the beer from the bartender and handed it to her friend, who drank the beer.

The arrest team waiting outside then entered the premises. They asked all uninvolved persons to leave, including the undercover agents. Tapia was arrested and taken into custody. She was found to be in possession of narcotics and the marked \$20 bill given to her by Agent Castillo. It was later discovered that Tapia gave a false name during booking.

The evidence seized during the arrest and the bindle given to Agent Castillo were transported to the Monrovia District Office where they were catalogued, photographed, weighed, and tested under DR# 18-02-064. Some of the suspected narcotics tested positive for methamphetamine and others tested positive for cocaine.

⁷ The friend was not identified by name in the record.

The evidence was subsequently transported to the LASD Crime Lab where the tests were confirmed. (Exhs. 4-7; 12-14.)

The administrative law judge (ALJ) issued a proposed decision on March 30, 2021, sustaining counts 1 through 2 and 6 through 18, dismissing counts 3 through 5, and recommending that the license be revoked. The Department adopted the proposed decision in its entirety on May 21, 2021, and issued a certificate of decision eleven days later.

Appellant then filed a timely appeal contending: (1) there was no substantial evidence that Martha Tapia was appellant's employee or agent; (2) there was no substantial evidence that appellant or its employees ever observed, overheard or in any way participated in any solicitation activities; (3) there was no substantial evidence that appellant had knowledge that Martha Tapia possessed or sold drugs; (4) substantial evidence is lacking to support that proper chain of custody requirements were followed in handling the drug evidence; (5) the ALJ committed mistakes of law in ruling on appellant's hearsay objections during the administrative hearing; and (6) the penalty is excessive. Issues one through three will be discussed together.

DISCUSSION

I

SUBSTANTIAL EVIDENCE OF EMPLOYMENT OR AGENCY & APPELLANT'S KNOWLEDGE

Appellant contends there was no substantial evidence that Martha Tapia was appellant's employee or agent. (AOB at pp. 6-20.) It contends there was no substantial evidence that appellant had knowledge that Martha Tapia possessed or sold drugs or

that appellant or its employees ever observed, overheard or in any way participated in any solicitation activities. (*Ibid.*)

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

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

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

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101

Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212

Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the

Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at p. 114.)

The Board has heard and rejected the “not an employee” argument many times and has found again and again that the employment status of individuals engaged in prohibited activity is of no consequence where, as here, the thrust of the rule or law is to protect public welfare and morals. (See *Funtastic, Inc.* (1998) AB-6920; *Clubary* (2011) AB-9098.) If a licensee could escape all liability for the actions of individuals in its premises simply by labeling them “independent contractors” or “self employed,” we have no doubt it would become the go-to defense in a multitude of cases and lead to absurd results.

In the instant case, Ms. Tapia appeared to be acting as a waitress — taking orders, serving drinks, collecting money, and clearing tables — she is, accordingly, appellant’s agent. Even though appellant argues that she was not an employee, she had the implied authority to act on appellant’s behalf, and her conduct gave the impression that she was empowered to act on the principal’s account. This implied authority, arising out of Ms. Tapia’s actions, makes her appellant’s agent, regardless of her technical employment status. By contrast, the ALJ found that substantial evidence did not support the claim that Ofelia was acting as an employee. Consequently, counts 3 through 5 were dismissed.

Decisions of both this Board and higher courts have consistently found that a licensee may be held liable for the actions of its agents or employees.

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. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].)

It is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Indeed, earlier in *Laube*, the court observed that the ALJ's factual findings — notably not subject to review on appeal — include:

[T]he element of the licensee's knowledge of illegal and improper activity on his or her premises; this knowledge may be either actual knowledge or constructive knowledge imputed to the licensee from the knowledge of his or her employees.

(*Laube, supra*, 2 Cal.App.4th at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123].) The *Laube* court noted:

A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh, supra*, 2 Cal.App.4th 364, 367.) Importantly, as the court of appeals observed in *McFaddin*:

It is not necessary for a licensee to knowingly allow its premises to be used in a prohibited manner in order to be found to have permitted its use. . . . Further, the word "permit" implies no affirmative act. It involves no intent. It is mere passivity, *abstaining from preventative action*.

(*McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1389-1390 [257 Cal.Rptr. 8], internal quotations omitted, emphasis in original.)

The policy reasons for this general rule (that licensees are vicariously liable for — and responsible for preventing — foreseeable misconduct by individuals in the licensed premise) are evident. Without it, a licensee could escape discipline simply by maintaining a practiced state of ignorance. It would defy reason and the mandate of the State Constitution (which authorizes the Department to suspend or revoke a license when continuation of the license would be contrary to public welfare or morals) to interpret the law in a manner that rewards licensees for distancing themselves from the operation of their premises or allows licensees to escape responsibility for reasonably foreseeable activity in their premises.

Appellant contends there was no substantial evidence that appellant had knowledge that Martha Tapia possessed or sold drugs, or that appellant or its employees ever observed, overheard or in any way participated in any solicitation activities. (AOB at pp. 6-20.) These contentions were rejected by the ALJ, with the exception of counts 3 through 5, which were dismissed as noted above. The ALJ found appellant's witnesses to be not credible and we agree.

In sustaining the remaining counts, the ALJ made the following findings regarding counts 1 through 2, and 6 through 18:

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 1,^[fn.] 8, 9, 10, 13, 14, and 15.^[fn.] (Findings of Fact ¶¶ 2, 6, 8, 10-12, 14-15, 17, 20, 21 and 27.) With respect to these counts there was ample evidence of Tapia's employment. The agents credibly testified to observing Tapia conducting typical waitressing duties, including, but not limited to, waiting on customers, taking patron orders, serving them drinks, walking and

remaining behind the fixed bar, which was restricted to employees only, as well as storing her purse behind the fixed bar. There was evidence of a scheme and commission paid when the agents purchased their 12-ounce beers for the price of \$4 or \$5 and were charged \$10 for Tapia's beers.

¶ . . . ¶

16. With respect to count 2, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) on the basis that, between on or about August 17, 2018, and October 19, 2018, on numerous occasions, the Respondent-Licensee knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the Licensed Premises, in violation of Business and Professions Code section 24200.5(a) As an employee, Tapia's actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 2, 10-13, 17, 20, 22, 28-36.)

17. With respect to counts 6, 7, 11, 12, 16, and 17, 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) on the basis that on August 17, 2018, October 12, 2018, and October 19, 2018, the Respondent's agent or employee, Martha Solis Tapia, possessed and sold, furnished or offered to sell or furnish, within the premises, a controlled substance, to-wit: methamphetamine, in violation of Health and Safety Code sections 11378 and 11379. As an employee, Tapia's actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 2, 10-13, 14-18, 20, 22, 29, 32, 33, and 36.)

18. With respect to counts 18 and 19, cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) on the basis that, on October 19, 2018, Respondent-Licensee's agent or employee, Martha Solis Tapia, possessed, and possessed for the purpose of sale, within the Licensed Premises, a controlled substance, to-wit: cocaine, in violation of Health and Safety Code sections 11350 and 11351. As an employee, Tapia's actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 2, 20, 24-31, 34-36.)

(Conclusions of Law, ¶¶ 7-18.)

We have carefully reviewed the extensive record in the matter, consisting of over 900 pages, and we find no error in the decision's findings or conclusions. The decision

is amply supported by substantial evidence and the Board cannot reweigh the evidence to reach a contrary conclusion.

II

CHAIN OF CUSTODY

Appellant contends substantial evidence is lacking to support that proper chain of custody requirements were followed in handling the drug evidence. (AOB at pp. 20-24.)

In spite of appellant's stated dissatisfaction with the procedure used by the Department and LASD, a very tight chain of custody was demonstrated at the administrative hearing. Rather than pointing out any actual breaks in that chain, appellant complains about the Department's labeling system, and the fact that two different names were attached to the exhibits: Maria de Lourdes Torres on exhibits 10 and 11, and Martha Solis Tapia on exhibits 12, 13, and 14. These are simply two of the names given to authorities by the individual we refer to as "Tapia" throughout this opinion — not evidence of an error.

The California supreme court has noted,

[c]hain of custody is indeed a necessary showing for physical evidence to be admitted. But the trial court decides the admissibility of physical evidence based on challenges to the chain of custody, and, once admitted, any minor defects in the chain of custody go to its weight.

(*People v. Lucas* (2014) 60 Cal.4th 153, 285 [177 Cal.Rptr.3d 378], citing *People v. Diaz* (1992) 3 Cal.4th 495, 559 [11 Cal.Rptr.2d 353].)

In *People v. Wallace*, the supreme court addressed a criminal matter in which the chain of custody for a pair of socks was "far from perfect," but "disagree[d] with the defendant that these shortcomings rendered the admission of the socks an abuse of

the trial court's discretion." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1061 [81 Cal.Rptr.3d 651], citing *People v Williams* (1997) 16 Cal.4th 153, 196 [66 Cal.Rptr.2d 123].) The court went on to quote *People v. Diaz*:

The burden is on the party offering the evidence to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. . . . The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. . . . Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.

(*Wallace, supra*, at p. 1061, citing *Diaz, supra*, at p. 559.)

The ALJ has broad discretion to determine the admissibility of evidence. Here, appellant has merely speculated about the possibility of a break in the chain of custody, and cites no authority to support the claim that it was an abuse of discretion for the ALJ to admit the evidence seized by the Department. Furthermore, appellant cites no statutory or case law to support its claim that a strict criminal law standard should apply in an administrative matter, and we know of none. To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [126 Cal.Rptr.2d 178]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [21 Cal.Rptr.2d 834] [reviewing court may disregard contentions unsupported by citation to the record].)

Appellant omits the fact that a very strict chain of custody was established at the administrative hearing, and has simply raised the "barest speculation" that something untoward occurred. The ALJ, however, made a specific finding that there was evidence

of a proper chain of custody of the narcotics/controlled substances by the Department and the LASD Crime Lab. (Finding of Fact, ¶ 36.)

The Department — through witness testimony — established a chain of custody sufficient to justify the ALJ's admission of the evidence under the standard articulated by the Supreme Court in *Lucas*, *Wallace* and *Diaz*, *supra*. We find no error in the admission of that evidence or the chain of custody.

III

HEARSAY OBJECTIONS

Appellant contends the ALJ committed mistakes of law in ruling on appellant's hearsay objections during the administrative hearing.

The administrative hearsay exception, described in the Government Code and the Code of Regulations, allows admission of hearsay evidence in administrative hearings for the limited purpose of supplementing or explaining other properly admitted evidence. Where the party opposing admission has timely objected to the administrative hearsay, the proponent may not rely on it as proof. Improper reliance on administrative hearsay may result in prejudicial error.

The relevant portion of section 1200 of the Evidence Code states:

(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(Evid. Code § 1200, subd. (a) and (b).)

A statement that is offered for some purpose other than to prove the fact stated therein is not hearsay. (*Smith v. Whittier* (1892) 95 Cal. 279, 293-294.)

The Government Code, however, notes that an administrative hearing:

[N]eed not be conducted according to technical rules relating to evidence or witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Gov. Code § 11513, subd. (c).) Evidentiary standards in an administrative hearing are therefore more relaxed than in more formal proceedings.

Appellant fails to support the proposition that the ALJ erred in the hearsay rulings. (AOB 7-13.) 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. When a point is asserted without argument and authority for the proposition, “it is deemed to be without foundation and requires no discussion by the reviewing court.” (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) Conclusory statements by appellant, that the ALJ committed errors, are not sufficient to establish that she erred in her hearsay rulings.

A judge's ruling on evidence admissibility is reviewed for abuse of discretion. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805 [38 Cal.Rptr.3d 98].) The California Supreme Court has defined abuse of discretion as an “. . . arbitrary determination, capricious disposition or whimsical thinking.” (*Harris v. Superior Court* (1977) 19 Cal.3d 786, 796 [140 Cal.Rptr. 318].)

We have reviewed the entire record in regards to the statements objected to by appellant and find that it did not constitute an abuse of discretion, nor was it arbitrary or capricious for the ALJ to allow their admission.

IV

PENALTY

Appellant contends the penalty is excessive. (AOB at p. 25.)

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].) “Abuse of discretion’ in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]” (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq.*), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), 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.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the

licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.)

The 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.

(Cal. Code Regs., tit. 4, § 144.)

The ALJ made the following observations in regards to the penalty:

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as rule 144. Section 24200.5(b) mandates revocation for a violation of its provisions. This mandate is satisfied by a stayed revocation^[fn.] as well as an outright revocation.^[fn.] The penalty recommended for a violation of section 25657(a) is revocation, and for a violation of section 25657(b) the penalty ranges from a 30-day suspension up to revocation. The penalty for a violation of rule 143 is a 15-day suspension. Revocation is also the recommended penalty for a violation of section 24200.5 and any health and safety code section violations with sales transactions on the licensed premises. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

Aggravation is warranted for the continuing course of multiple drink solicitations and illegal drug violations openly conducted by Respondent's

employee in the Licensed Premises in the presence of all staff, including the acting manager, Mr. Cardoza, who admitted managing the premises from a chair and/or position at the register the majority of the night. The only evidence of mitigation was Mr. Morales' cooperation in the investigation on October 19, 2018. In weighing and balancing the aggravation and mitigation, the penalty recommended herein complies with rule 144.

(Decision, at pp. 24-25.)

As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. 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 of discretion. Appellants have not established that the penalty of revocation in this matter constitutes an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁸

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

⁸ This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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

APPENDIX

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

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

LATINO SPORTS BAR, INC.
LATINO SPORTS BAR
2938-1/2 DURFEE AVENUE
EL MONTE, CA 91732-3518

ON-SALE BEER - LICENSE

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

MONROVIA DISTRICT OFFICE

File: 40-542902

Reg: 19088770

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 May 21, 2021. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after July 12, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: June 1, 2021

RECEIVED

JUN 01 2021

Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Latino Sports Bar, Inc.
Db: Latino Sports Bar
2938-1/2 Durfee Avenue
El Monte, California 91732-3518

Respondent

} File: 40-542902
}
} Reg.: 19088770
}
} License Type: 40
}
} Word Counts: 31,625; 29,029;
} 34,005
} i-Depo Reporters:
} Court Reporters:
} Miranda Perez (7/8/20)
} Sharon Cahn (9/23/20)
} Doris Bailey (2/16/21 by video) and
} Video Hosts: Kevin FitzSimons and
} Shaz Hassan (2/16/21)
}
} **PROPOSED DECISION**

On-Sale Beer License

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on July 8, 2020 and September 23, 2020, and by video conference on February 16, 2021.

John Newton, attorney, represented the Department of Alcoholic Beverage Control (the Department).

Armando Chavira, attorney, represented Respondent Latino Sports Bar, Inc. Also present were Atanacio Morales, the Respondent's corporate president (on July 8, 2020 and February 16, 2021), and Maria Isabel Morales, the Respondent's corporate secretary (on all three hearing dates).

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

- (1) On or about May 25, 2018 and on or about October 19, 2018, on numerous occasions, Respondent-Licensee(s) permitted women to solicit or encourage others, directly or indirectly to buy them drinks in the licensed premises under a commission, percentage, salary or other profit-sharing plan, scheme or

- conspiracy, in violation of Business and Professions Code section 24200.5(b);¹ (Count 1) and
- (2) On or about August 17, 2018 and on or about October 19, 2018, on numerous occasions, Respondent-Licensee(s) knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the licensed premises, in violation of section 24200.5(a); (Count 2) and
 - (3) On May 25, 2018, Respondent-Licensee employed upon the licensed on-sale premises, Ofelia, for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or paid such person a percentage or commission for procuring or encouraging the purchase or sale of alcoholic beverages, on the licensed premises, in violation of section 25657(a); (Count 3) and
 - (4) On October 12, 2018, and October 19, 2018, Respondent-Licensee employed upon the licensed on-sale premises, Martha Solis Tapia, for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or paid such person a percentage or commission for procuring or encouraging the purchase or sale of alcoholic beverages, on the licensed premises, in violation of section 25657(a); (Counts 8 and 13) and
 - (5) On May 25, 2018, Respondent-Licensee employed or knowingly permitted Ofelia to loiter in or about the licensed premises for the purpose of begging or soliciting patrons or customers in such premises to purchase alcoholic beverages for her in violation of section 25657(b); (Count 4) and
 - (6) On October 12, 2018 and October 19, 2018, Respondent-Licensee employed or knowingly permitted Martha Solis Tapia to loiter in or about the licensed premises for the purpose of begging or soliciting patrons or customers in such premises to purchase alcoholic beverages for her in violation of section 25657(b); (Counts 9 and 14) and
 - (7) On May 25, 2018, Respondent-Licensee permitted Ofelia, an employee, to solicit upon the licensed premises, the purchase or sale of a drink intended for her consumption, in violation of rule 143.² (Count 5) and
 - (8) On October 12, 2018 and October 19, 2018, Respondent-Licensee's agent or employee permitted Martha Solis Tapia, an employee, to solicit upon the licensed premises, the purchase or sale of a drink intended for her consumption, in violation of rule 143; (Counts 10 and 15) and
 - (9) On August 17, 2018, October 12, 2018 and October 19, 2018, Respondent-Licensee's agent or employee, Martha Solis Tapia, possessed, within the licensed premises, a controlled substance, to-wit: methamphetamine, for the purpose of sale, in violation of Health and Safety Code section 11378; (Counts 6, 11 and 16); and

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

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

- (10) On August 17, 2018, October 12, 2018 and October 19, 2018, Respondent-Licensee's agent or employee, Martha Solis Tapia, sold, furnished or offered to sell or furnish within the licensed premises, a controlled substance, to-wit: methamphetamine, in violation of Health and Safety Code section 11379; (Counts 7, 12 and 17) and
- (11) On October 19, 2018, Respondent-Licensee's agent or employee, Martha Solis Tapia, possessed, within the licensed premises, a controlled substance, to-wit: cocaine, in violation of Health and Safety Code section 11350; (Count 18); and
- (12) On October 19, 2018, Respondent-Licensee's agent or employee, Martha Solis Tapia, possessed, within the licensed premises, a controlled substance, to-wit: cocaine, for the purpose of sale, in violation of Health and Safety Code section 11351; (Count 19). (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 February 16, 2021.

FINDINGS OF FACT

1. The Department filed an Accusation on April 25, 2019. On or about June 15, 2020, the Department filed a First Amended Accusation.
2. The Department issued a type 40, on-sale beer license to the Respondent for the above-described location on June 12, 2014 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.

May 25, 2018
(Counts 1, 3-5)

4. On Friday, May 25, 2018, at approximately 11:45 p.m., Department Agent Castillo³ and Agent Hernandez entered the Licensed Premises in a plain clothes capacity. The agents were conducting an investigation at the Licensed Premises based on a complaint the Department received from the local police department that drink solicitation violations were occurring therein. The agents walked to the fixed bar and Agent Castillo ordered two, 12-ounce bottles of Modelo beer from the on-duty female bartender. Agent

³ At the time of the investigation Agent Castillo was working for the Department of Alcoholic Beverage Control as an agent. At the time of the hearing he was working for the Department of Justice as a special agent. Agent Castillo prepared an ABC-333 Investigation Report Number 18-02-064 of the Department's investigation into the Licensed Premises, which report was marked as Exhibit J and admitted as administrative hearsay.

Castillo paid \$5 per beer to the bartender who served the agents their alcoholic beverages. Thereafter the agents walked to a table in the center of the premises, approximately 15 feet from the bar. Agent Castillo observed approximately 30 patrons inside the premises.

5. The agents were approached by a female who introduced herself as Ofelia. Ofelia engaged in general conversation with the agents. Ofelia asked Agent Castillo if he would buy her a beer. There was no evidence Respondent's employees were nearby or heard Ofelia ask the agent for a beer. Agent Castillo agreed to buy her the beer and told Ofelia to go with him to the fixed bar to get her the beer. Ofelia appeared to the agent not to like his suggestion. Agent Castillo gave Ofelia \$10, which she took with her to the fixed bar and was provided a 12-ounce Bud Light beer can by the bartender. There was no evidence how much money Ofelia handed to the bartender. Ofelia returned to the Agents' table with the Bud Light beer and drank it. There was no evidence whether or not Ofelia gave the agent any change.

June 14, 2018

6. On Thursday, June 14, 2018, at approximately 7:45 p.m., Agents Castillo, Pinney and Hernandez entered the Licensed Premises in a plain clothes capacity and sat at a table in the center of the premises. Agent Castillo observed approximately six patrons in the premises. Agent Castillo walked to the fixed bar and ordered three 12-ounce bottles of Modelo beer from the female bartender. He paid \$4 per beer to the bartender who served him the three beers. Agent Castillo walked back to the table with the beers and sat with the other two agents.

7. Agent Castillo observed Ofelia sitting and speaking with patrons, obtaining money from them, getting beer from the bar and returning to the patrons' tables with the beer.

8. At one point the agents were approached by a female who was later identified as Martha Sols Tapia (also known as Maria De Lourdes Torres, Lourdes and Martita, but hereinafter referred to as Tapia), who asked the agents if they wanted to order another round of beers. Agent Castillo ordered three 12-ounce bottles of Modelo beer from Tapia. Tapia walked to the fixed bar, obtained three 12-ounce bottles of Modelo beer from one of the two bartenders, and brought the beers back to the agents. Agent Pinney gave \$12 to Tapia, who walked back to the fixed bar and handed the \$12 to the bartender. Agent Castillo observed Tapia performing waitressing duties including taking patron orders and serving them beers.

9. Agent Castillo observed in the premises a security guard, later identified as Raul Salcedo Rodriguez (hereinafter Rodriguez), wearing a black polo shirt with the word "Security" written on the front and back, and a duty belt with a firearm. Rodriguez positioned himself at the rear entrance where patrons entered, and he patted them down.

Later, the agents walked out the rear entrance door and Agent Castillo asked Rodriguez if he knew anyone from whom he might be able to purchase cocaine. Rodriguez told Agent Castillo to wait, while Rodriguez walked back into the premises. Agent Castillo positioned himself near the premises' rear, opened door and was able to see, with a clear view, Rodriguez motion to someone to come over to him. Agent Castillo then observed Tapia walk over to Rodriguez in response. Agent Castillo overheard Rodriguez tell Tapia that Agent Castillo wanted cocaine.⁴ Agent Castillo heard Tapia reply, "I don't know them," and she walked away. Rodriguez walked back outside and told the agents Tapia did not have any more cocaine.

**August 17, 2018
(Counts 2, 6 and 7)**

10. On Friday, August 17, 2018, at approximately 8:00 p.m., Agents Castillo and Pinney entered the Licensed Premises in a plain clothes capacity. They walked to the fixed bar and Agent Castillo ordered two 12-ounce bottles of Modelo beer from one of the female bartenders, to whom he paid \$5 for each beer. Agent Castillo observed Tapia assisting the bartenders in putting up decorations behind the fixed bar and throughout the premises. Agent Castillo asked one of the bartenders why they were putting up decorations and he was told it was for a birthday for one of their co-workers.

11. At some point, while the agents were seated at the fixed bar, Agent Pinney observed Tapia enter and remain in the restricted employee only side of the fixed bar near the agents, doing something behind the bar.⁵ There were other employees behind the fixed bar area. No employee had Tapia leave the restricted employee side of the fixed bar. (Exhibits A and K – color photos of what appears to be a waist-high door to enter restricted employee area with sign, "NOTICE EMPLOYEES ONLY.")

12. The agents walked to a table near the center of the premises. Agent Castillo observed Tapia wait on customers, take their drink orders, obtain and serve beers to patrons. Tapia approached the agents and asked if they wanted any more beers. Agent Castillo told her no but asked her for a gram of cocaine. Tapia asked the agent who it was who told him to ask her. Agent Castillo replied that she knew he was friends with the security guard Rodriguez. Tapia said she did not have cocaine but had a \$20 worth of crystal, which is the street vernacular for methamphetamine. Agent Castillo accepted her offer for methamphetamine and handed her \$20, which she accepted and placed in her pocket. Tapia retrieved from her pocket and provided to the agent a small black plastic

⁴ During the hearing Agent Castillo wrote on Exhibit F in red pen, "TR" and drew a circle around the letters to indicate the position where Tapia and security guard Rodriguez were standing while he overheard their conversation.

⁵ During the hearing Agent Pinney wrote on Exhibits A and G, in red pen, the letter "T" with a circle around it to indicate where he saw Tapia walk behind the fixed bar.

baggy, which contained the suspected methamphetamine he paid for. He put the baggy in his pocket. Later, the agents left the premises.

13. Agent Castillo transported the small black plastic baggy to the Monrovia District Office where he photographed it slightly opened on a scale which displayed 0.5 grams. (Exhibit 2.) Agent Castillo performed a NIK test on a sample of the contents of the black baggy, which resulted in a presumptive positive for methamphetamine. He then secured the black plastic baggy and the remainder of its contents in a secured evidence locker under Daily Report number (DR#) 18-02-064.

October 12, 2018
(Counts 8-12)

14. On Friday, October 12, 2018, at approximately 7:10 p.m., Agent Castillo returned to the Licensed Premises with three other agents, two of whom remained outside as cover, and one, Agent Pinney, who entered the Licensed Premises with Agent Castillo, both in a plain clothes capacity. The two agents walked to the fixed bar and placed an order with one of the bartenders for two, 12-ounce bottles of Modelo beer, for which Agent Castillo paid \$5 per beer.

15. Agent Castillo observed Tapia talking with other patrons and assisting them with the purchase of their beers. There was no evidence Tapia was drinking alcoholic beverages at tables with patrons. At some point Agent Castillo greeted Tapia and the two agents sat at a table in the center of the premises. Later, Tapia approached the agents and asked them if they needed more beer, which Agent Castillo declined. Tapia walked back to the fixed bar area.

16. At some point, Agent Castillo called Tapia over to the agents' table and asked Tapia for another \$20 worth of crystal meth. Tapia asked Agent Castillo if they were police, to which he asked her if she forgot about him that he was Raul's friend, referring to security guard Rodriguez. Tapia walked to the fixed bar, spoke to a patron and then returned to the agents' table. Tapia then furnished Agent Castillo with a small black plastic baggy containing the suspected methamphetamine, which the agent placed in his pocket and then handed Tapia \$20.

17. Tapia then asked Agent Castillo if he would buy her a beer, to which he agreed and decided to order a beer for himself too. He paid Tapia \$15, to pay for her \$10 beer and his \$5 beer. Tapia did not give him any change. Before leaving, Agent Castillo asked Tapia her name to which she replied, "Lourdes."

18. At some point the agents left the Licensed Premises and drove to the Monrovia District Office where Agent Castillo photographed the black plastic baggy on a scale reading 0.7 grams. (Exhibit 3A – color photo of black plastic baggy upon scale; Exhibit

3B – close-up color photo of small black plastic baggy, slightly opened.) He conducted a NIK test on a sample of the contents of the plastic baggy, which resulted in a presumptive positive for methamphetamine. He then secured the plastic baggy with its remaining contents in an evidence locker under DR# 18-02-064.

October 17, 2018

19. On October 17, 2018, Agent Castillo transported the two black plastic baggies with their contents and the DR# 18-02-064 to the Los Angeles County Sheriff's Department Crime Laboratory (LASD Crime Lab) in Downey for further testing. The baggies and their substances were given LASD Crime Lab receipt numbers L038712 and L038713. (Exhibits 10 and 11.)

**October 19, 2018
(Counts 1, 2, 13-19)**

20. On Friday, October 19, 2018, at approximately 8:00 p.m., Agents Castillo, Pinney and Hernandez entered the Licensed Premises in a plain clothes capacity, and walked straight to the fixed bar, while additional agents remained outside as cover. Agent Castillo observed Tapia sitting at the fixed bar speaking to a patron. Agent Castillo ordered from one of the three bartenders behind the fixed bar a bucket of six Modelo beers, for which he paid \$27. The agents were served their bucket of beers and walked to a table at the center of the premises where they sat down.

21. At some point, Agent Castillo went to the restroom and as he walked back, he approached Tapia who was at the fixed bar speaking to a patron. Agent Castillo spoke with Tapia briefly and then returned to the table with the other agents. Shortly thereafter, Tapia approached the agents at their table and joined them. Agent Castillo offered Tapia one of the Modelo beers from their bucket, which she declined. Tapia asked Agent Castillo to buy her a Bud Light beer, and he agreed. Agent Castillo asked her how much for her beer. Tapia replied, \$10, which the agent gave her. Tapia walked to the fixed bar where she obtained from bartender Wendy a Bud Light beer, handed the bartender something, then brought the beer to the agents' table and took a seat.

22. Agent Castillo asked Tapia if he could buy more methamphetamine from her. She asked how much he wanted, and he replied, \$20 worth. Tapia walked to a patron at the fixed bar, spoke with him, then walked back to Agent Castillo. Tapia placed on the agents' table a black plastic bindle, which Agent Castillo picked up and placed in his pant pocket. In payment for the suspected methamphetamine Agent Castillo paid Tapia \$20, which was pre-marked with the agent's initials, "GC." (Exhibit 8.) Tapia placed the \$20 in her pocket.

23. Later Tapia introduced the agents to her friend and asked if she could join them, to which the agents agreed. Tapia asked Agent Castillo if he would buy her friend a beer and he agreed. Agent Castillo ordered a Bud Light beer from Tapia, to whom he paid \$10 for the beer. Tapia walked to the fixed bar where she obtained a Bud Light beer from the bartender and brought it back to hand to her friend at the agents' table. Tapia's friend drank the beer.

(Cover Team)

24. At some point the outside cover team entered the Licensed Premises. All uninvolved persons were permitted to leave the premises, at which point Agents Castillo, Pinney and Hernandez exited the Licensed Premises.

25. Agent Clark, as part of the arrest team, entered the Licensed Premises. She approached Tapia, conducted a search of her person and arrested her. Agent Clark found in Tapia's front, left pant pocket three white plastic bindles of suspected narcotics and a single \$20 bill which had Agent Castillo's initials thereon. (Exhibit 5 – color photo of three white plastic bindles on a scale reading 1.0 grams, and Exhibit 8 – color photo of \$20 bill with initials at lower right corner of bill.) Agent Clark found in Tapia's front, right pant pocket four black plastic bindles of suspected narcotics. (Exhibit 6 – color photo of four black plastic bindles on a scale reading 1.9 grams.) Agent Clark handed all seven bindles to Agent Gonzalmen, who was in charge of cataloguing and inventorying the seized evidence.

26. Agent Zapata, a Department certified Spanish speaker, was present while Agent Clark searched Tapia. Agent Zapata had taken multiple courses in identifying drug sales, including small hand-to-hand and large-scale, major narcotics investigations. He attended an 80-hour narcotic course through the Orange County Sheriff's Department, which included training on how to identify different types of drugs, their various packaging and the standard for pricing, selling and transporting narcotics. Agent Zapata has investigated, at the time of the hearing, over 200 narcotic cases.

27. Agent Zapata asked Tapia for her identification (ID), after which Tapia walked through the unlocked waist-high employee door, retrieved her purse from behind the fixed bar, and returned to the agents. Agent Zapata searched Tapia's purse for her ID and found three white plastic bindles of suspected narcotics, packaged consistent with how drugs are packaged for individual sales, and a combined total of \$258 in various denominations. (Exhibit 7- color photo of three white plastic bindles upon a scale reading 0.8, and Exhibit 9 – U.S. currency consisting of a large quantity of \$1 and \$5 bills, one \$10 bill, and four \$20 bills.) Agent Zapata placed the evidence on a table, which Agent Gonzalmen catalogued and inventoried. In Agent Zapata's opinion, based on his training and experience, all bindles and packages found on Tapia and in her purse

were suspected narcotics to be sold in hand-to-hand transactions, given the manner in which they were packaged along with the amount of U.S. currency of varying denominations found in her purse.

28. Agent Gonzalmen, was part of the cover team that night and as the evidence custodian completed form ABC-320 Evidence Property Receipt Reports, cataloguing all the evidence seized at the Licensed Premises as described above, under DR# 18-02-064. (Exhibit J.) Agent Gonzalmen gave all the said seized evidence to Agent Castillo, who transported the same to the Monrovia District Office and secured it in an evidence locker under DR# 18-02-064. Agent Castillo also transported the black plastic bindle of suspected methamphetamine Tapia had sold him to the Monrovia District Office where he placed it in a secured evidence locker under DR# 18-02-064. (Exhibit 4 - subsequently, on October 22, 2018, he took a color photograph of the said black plastic bindle which was on a scale reading 0.4 grams.)

29. After finishing a debriefing, Agent Gonzalmen received a call from the booking agent who was booking Tapia. The booking agent advised that the suspect's name on the forms was incorrect.⁶ Agent Gonzalmen had experience as the evidence custodian for the Santa Ana District Office for approximately one year. In her experience as evidence custodian the Department uses the DR#, not a subject's name, to track all evidence seized during an investigation. In Agent Gonzalmen's professional opinion while the suspect's name was listed incorrectly on the ABC forms it would not affect the tracking of the said evidence, which used the DR# 18-02-064.

October 22, 2018

30. On October 22, 2018, Agent Castillo photographed, weighed and performed NIK tests on the said narcotics seized from Tapia's person and purse, and the black plastic bindle Agent Castillo purchased from Tapia at the Licensed Premises on October 19, 2018, as described above. (Exhibits 4, 5, 6, 7, 8 and 9.) Agent Castillo performed NIK tests of representative samples of the suspected narcotics, with the results as follows: the white plastic bindles were a presumptive positive for cocaine; the black plastic bindles were a presumptive positive for methamphetamine.

October 25, 2018

31. On October 25, 2018, Agent Castillo transported the said narcotics evidence of

⁶ Exhibits 10 and 11 list Maria De Lourdes Torres. Exhibits 12, 13 and 14 list Martha Solis Tapia. Exhibit J - The names on the ABC-333 and ABC-320(s) list Martha Solis Tapia. The ABC-333, at page 3 of 20, lists "TAPIA, Martha Solis (A.k.a. "Lourdes"). Exhibit J, Attachment #13, 2 of 2, states Atanacio Morales only knows Torres as Martha.

October 19, 2018, with the DR# 18-02-064 thereon, to the LASD Crime Lab for further testing. The bindles and their substances were given LASD Crime Lab receipt numbers L038714, L038715 and L038716. (Exhibits 12, 13 and 14.)

(Senior Criminalist Testimony)
November 15, 2018

32. Aaron Lewis appeared and testified at the hearing. Aaron Lewis is a senior criminalist for the LASD Crime Lab. Sr. Criminalist Lewis received a Bachelor of Science Degree in Chemistry from Cal Poly San Luis Obispo. He worked as a criminalist for the LASD Crime Lab since 2011 and was promoted to a senior criminalist in 2013. After beginning employment with the LASD Crime Lab he had three months training specific to the analysis of controlled substances, and clandestine labs or drug manufacturing analysis. His duties in 2018 included, but were not limited to, an assignment in the controlled substance department where he analyzed evidence samples for the presence of controlled substances or drugs. Methamphetamine is classified in California as a Schedule 2 controlled substance, stimulant.

33. On November 15, 2018, Sr. Criminalist Lewis conducted multiple tests of the two substances which Agent Castillo transported to the LASD Crime Lab using testing methods generally accepted within the scientific community as an acceptable manner of testing methamphetamines. The results of his thorough testing revealed the substances contained methamphetamine. Sr. Criminalist Lewis prepared Laboratory Reports after conducting said tests upon the substances. (Exhibit 10 – Lab Receipt L038712, File Number 18-02-064; and Exhibit 11 – Lab Receipt L038713, File Number 18-02-064.) The instrumentation used for the testing was functioning properly and undergoes annual calibration/maintenance.

November 16, 2018

34. Rachel Redmond appeared and testified at the hearing. Rachel Redmond is a senior criminalist for the LASD Crime Lab. She worked as a criminalist for LASD Crime Lab for one year and thereafter as a senior criminalist for 18 years. The parties stipulated to Sr. Criminalist Redmond's qualifications and training as a criminalist/senior criminalist to test narcotics/controlled substances. Her duties as a senior criminalist include analyzing solid narcotic substances as well as evidence which comes to the lab from clandestine lab scenes.

35. On November 16 and 19, 2018, Sr. Criminalist Redmond conducted multiple tests of the substances which Agent Castillo transported to the LASD Crime Lab on October 25, 2018, using testing methods generally accepted within the scientific community as an acceptable manner of testing methamphetamines and cocaine. The results of her

thorough testing revealed the substances contained methamphetamine and cocaine. Sr. Criminalist Redmond prepared Laboratory Reports after conducting said tests upon the substances. (Exhibit 12 – Lab Receipt L038714, File Number 18-02-064, methamphetamine; and Exhibit 13 – Lab Receipt L038715, File Number 18-02-064, methamphetamine and cocaine; Exhibit 14 - Lab Receipt L038716, File Number 18-02-064, cocaine.) The instrumentation used for the testing was functioning properly and undergoes calibration/maintenance once every six months.

36. There was evidence of a proper chain of custody of the said narcotics/controlled substances by the Department and the LASD Crime Lab.

(Respondent's Witnesses)

37. Darwin Cardoza appeared and testified at the video hearing on February 16, 2021, from the location of the Licensed Premises. He said his parents are the Respondent's corporate officers, Atanacio Morales and Maria Isabel Morales. Mr. Cardoza began working on the weekends at the Licensed Premises when it opened. Mr. Cardoza said that after Mr. Morales had knee surgery a few years ago⁷ and was not working at the Licensed Premises Mr. Cardoza began managing the Licensed Premises in the evenings, Thursday through Sunday. Mr. Cardoza was managing the Licensed Premises on his own, for the most part, in 2018 because either his mother cared for her husband or at one point neither Mr. nor Mrs. Morales was well enough to work.

38. Mr. Cardoza was working the evening of October 19, 2018, managing the premises from his chair at the cash register the whole night, except for occasionally serving a patron at the bar fixture. Mr. Cardoza said that it is typical for him to remain at the cash register area and in his chair each night he works, managing the business from that spot. During his testimony, he was shown exhibit A and he pointed himself out in the color photograph with his hand on the chair in which he sits and where he is normally positioned. Mr. Cardoza claimed the only employees working in the Licensed Premises in October of 2018 were Amalia Duarte, Cristina Jiron, and Wendy Navoa, all of whom were behind the fixed bar with him at the time the cover team entered the Licensed Premises on October 19, 2018. Mr. Cardoza claimed he never employed Tapia.

39. When the cover team entered, Mr. Cardoza said one of the officers walked into the employee restricted area through the employee only door. (Exhibit A - color photo of waist-high door to enter restricted employee area with sign, "NOTICE EMPLOYEES ONLY.") There was no evidence that someone had to unlock the said employee door for

⁷ The undersigned understood Mr. Cardoza to mean a few years ago from the hearing date of February 16, 2021.

the officer to enter. Later in his testimony, Mr. Cardoza claimed that door “stays locked the whole time.”

40. Mr. Cardoza said that Tapia had been a customer of the prior owners, prior to Mr. and Morales’ ownership of the Licensed Premises. Mr. Cardoza claimed Tapia was a “regular customer.” He said when Tapia entered the Licensed Premises as a customer, she would either go with friends or meet friends there, and order a beer, which she drank.

41. Atanacio Morales appeared and testified at the video hearing on February 16, 2021, from the location of the Licensed Premises. Mr. Morales is the corporate president of Respondent. His wife is Maria Isabel Morales, the corporate secretary. Mr. Morales said Darvin Cardoza is his wife’s son. Prior to operating the Licensed Premises, he had approximately 20 years’ experience operating other bars. Mr. Morales hired Amalia Duarte, Cristina Jiron, Wendy Navoa, and Darvin Cardoza. Mr. Morales said he did not hire Martha Tapia. Mr. Morales knew Tapia. There was no evidence elicited how he knew Tapia. In the last year prior to October 19, 2018, Mr. Morales rarely worked and could not operate the Licensed Premises because he was too ill to work.

42. On October 19, 2018, Mr. Morales received a call from Mr. Cardoza informing him the police had entered the Licensed Premises. Mr. Morales showed up at the premises and cooperated during the investigation.

43. Maria Isabel Morales appeared and testified at the video hearing on February 16, 2021, from the location of the Licensed Premises. Mrs. Morales is the wife of Atanacio Morales and is the corporate secretary of Respondent. Mrs. Morales and her husband have had approximately 20 years’ experience operating another bar, restaurant, and bar and grill. Mrs. Morales worked as a bartender at the Licensed Premises. Mrs. Morales was not present at the Licensed Premises on October 19, 2018, because she had surgery during the first few days of October and was in recovery.

44. During the year prior to October 19, 2018, Mrs. Morales said she would stay at home caring for her husband and would go weekly, sometimes three times a week, to the Licensed Premises when her son, Darvin Cardoza could relieve her at the house and stay with Mr. Morales. During that time Mrs. Morales said the Respondent’s employees were Amalia Duarte, Cristina Jiron, Wendy Navoa and there were other employees who worked as waitresses from time to time. Mrs. Morales did not name the waitresses. Mrs. Morales returned to work at the Licensed Premises in November of 2018.

45. On August 17, 2018, Mrs. Morales was working behind the fixed bar throwing a can in the trash can when Agent Castillo asked her why they were putting up decorations. Mrs. Morales claimed she thought for a moment that Agent Castillo and his partner were health officials or officials from some agency/department.

46. Mrs. Morales said to enter into the employee side of the fixed bar the waist-high door has a latch on the employee side that is utilized to open the door for entry. (Exhibit A.)

47. Mrs. Morales said she and her husband did not hire Tapia to work at the Licensed Premises. At times when Mrs. Morales went to work as a bartender in the Licensed Premises, she would go in the evening, and would sometimes see Tapia therein. Mrs. Morales said sometimes Tapia would come alone and other times she came accompanied to the Licensed Premises. She said Tapia would regularly sit at the fixed bar on the last chair next to the fire extinguisher, where she would place her purse upon the counter. (Exhibit F.) Mrs. Morales would, on occasion, tend to Tapia, who would ask for a drink and go in the parking lot to smoke. (Exhibit E.)

48. Mrs. Morales claimed she was never made aware Tapia was soliciting drinks from customers.

49. Amalia Azucena Duarte Cruz⁸ appeared and testified at the video hearing on February 16, 2021, from the location of the Licensed Premises. Ms. Duarte worked for the Respondent as a bartender for approximately three years. She worked Friday, Saturday and Sundays from 4:00 p.m. to 10:00 p.m. She usually worked with Darwin Cardoza, two other bartenders named Cristina Jiron and Wendy Navoa, and two waitresses, whose names she did not provide. Ms. Duarte last worked for Respondent on March 15, 2020, when the premises closed due to the COVID-19 Pandemic. She is hoping the Respondent will rehire her when the Licensed Premises opens again.

50. Ms. Duarte said she knew Martha Tapia as "Martita." On October 19, 2018, Ms. Duarte said she was working as a bartender behind the bar with Mr. Cardoza working as cashier, and bartenders Cristina and Wendy, both of whom started their shift at 8:30 p.m. Ms. Duarte was aware of where Tapia was in the Licensed Premises prior to the cover team entering. During her testimony Ms. Duarte described the specific location where Tapia was seated on October 19, 2018, pointing to a table adjacent a pole in the center of a color photograph marked as exhibit D. She said Tapia frequently came to the Licensed Premises and Ms. Duarte would tend to her. Ms. Duarte was aware of Tapia's movements and routine when Tapia was in the Licensed Premises, including that Tapia would sit at the fixed bar on the last chair next to the fire extinguisher, where she would place her purse upon the counter, greet customers at their tables, get a drink and sometimes dance. Ms. Duarte claimed Tapia always had her purse with her when she walked around the Licensed Premises.

⁸ The undersigned will refer to this witness as Ms. Duarte to be consistent with the manner in which she was referred during the hearing and the providing of testimony.

51. Ms. Duarte claimed Tapia never worked at or was an employee at the Licensed Premises. Ms. Duarte further claimed she never heard Tapia solicit drinks from customers or never saw Tapia sell drugs in the Licensed Premises. Ms. Duarte claimed she never saw Tapia go to places restricted only to employees in the premises.

52. Ms. Duarte said at the end of the cover team investigation on October 19, 2018, one of the police officers handed Tapia's purse to Ms. Duarte, who put it behind the fixed bar. Two days later, on Sunday October 21, 2018, a young woman entered the Licensed Premises claiming to be Tapia's daughter and asked for the purse. Ms. Duarte gave Tapia's purse to the young woman.

53. Cristina Raquel Jiron appeared and testified at the video hearing on February 16, 2021, from the location of the Licensed Premises. Ms. Jiron worked for the Respondent Friday and Saturday evenings as a bartender for two and one-half years prior to October 2018. She is hoping the Respondent will rehire her when the Licensed Premises opens again after its closure in March of 2020.

54. Ms. Jiron said she knew Tapia as "Martha." On October 19, 2018, Tapia was already in the Licensed Premises when Ms. Jiron started her shift at 8:30 p.m. Ms. Jiron said Wendy arrived for her shift at 8:30 p.m. as well and that Mr. Cardoza and Ms. Duarte were already working. Ms. Jiron said when the cover team entered, two officers walked through the employee only door of the fixed bar into the employee section of the bar area. (Exhibit A.) There was no evidence that anyone had to open or unlock the said door for the officers to walk into the restricted employee area behind the bar fixture. Ms. Jiron said the cover team, after entering, took all the customers outside of the Licensed Premises and "they just left the employees inside - they left us there and Martha."

55. Ms. Jiron claimed Tapia was not employed by the Respondent. Ms. Jiron was familiar with and aware of Tapia's routine and movements while Tapia was in the Licensed Premises. Ms. Jiron claimed Tapia was a regular customer who came in the Licensed Premises either alone or accompanied. When Tapia came alone, Tapia would sit at the fixed bar on the last chair next to the fire extinguisher, where she would place her purse upon the counter. Tapia would greet customers at their tables and "be there a while," get up and go to the bar fixture, buy a beer, and return to the table to drink and talk with those customers. Tapia liked to dance. Ms. Duarte claimed Tapia always had her purse with her when she walked around the Licensed Premises.

56. Ms. Jiron claimed she did not know Tapia sold drugs or solicited drinks for money in the Licensed Premises.

57. 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 1,⁹ 8, 9, 10, 13, 14, and 15.¹⁰ (Findings of Fact ¶¶ 2, 6, 8, 10-12, 14-15, 17, 20, 21 and 27.) With respect to these counts there was ample evidence of Tapia's

⁹ As to count 1, only specifically relating to the date of October 19, 2018.

¹⁰ Solicitations by Tapia on each investigative date were admissible as operative facts which constitute the violation.

employment. The agents credibly testified to observing Tapia conducting typical waitressing duties, including, but not limited to, waiting on customers, taking patron orders, serving them drinks, walking and remaining behind the fixed bar, which was restricted to employees only, as well as storing her purse behind the fixed bar. There was evidence of a scheme and commission paid when the agents purchased their 12-ounce beers for the price of \$4 or \$5 and were charged \$10 for Tapia's beers.

8. Cause for suspension or revocation of the Respondent's license does **not** exist for the violations of sections 25657(a) and section 25657(b) and rule 143 alleged in counts 3, 4 and 5, respectively. On May 25, 2018, although Ofelia solicited a drink from Agent Castillo, there is no evidence she was employed by Respondent at the Licensed Premises or that any employee of the Licensed Premises was aware of her solicitation. There were 30 patrons filled in the bar and no evidence Respondent's employees were near Ofelia and Agent Castillo's table at the center of the premises. Ofelia was never seen going behind the fixed bar or performing waitressing duties, including, but not limited to taking orders, serving drinks, clearing or cleaning tables, or otherwise waiting on customers. Since Ofelia purchased the beer at the bar counter out of the agent's presence, there is no evidence she was paid a commission for the purchase of the beer. There was no evidence whether or not Ofelia gave Agent Castillo any change from the \$10. (Findings of Fact ¶¶ 4 and 5.)

9. The Department attempted to bring in some of the hearsay statements made by Ofelia to Agent Castillo, including, but not limited to employment.¹¹ The Department argued those statements were admissible under the hearsay exception of Evidence Code section 1224. However, section 1224 has been upheld in cases involving contractual obligations to indemnify or guarantee against loss caused by the default of another. Section 1224, "contemplates situations in which 'the obligation or duty' of a third person is 'an essential operative fact in establishing the cause of action or defense involved'; e. g., where ... the party has assumed responsibility for obligations of the declarant (guarantor, surety ...)." (*Brown v. Surety Company of the Pacific* (1981) 122 Cal.App.3d 614 at p. 618 [176 Cal.Rptr. 143 at p. 146] citing Witkin, Cal. Evidence (2d ed. 1977 pocket supp.) s 522, pp. 233-234.) These matters involving guarantors, sureties, insurers, and shareholders, involve the law of agency between a third party and declarant, such as a principal-agent relationship, a relationship when one person has legal authority to act for another. Agency law relationships generally include guardian-ward, executor or administrator-decedent, principal-agent, guarantor-debtor and employer-employee. However, in these cases if no such relationship existed the hearsay statements were not admissible unless an exception applied. For example, the court in *Brown v. Surety Company of the Pacific*

¹¹ While the undersigned overruled the Respondent's hearsay objections to Ofelia's hearsay statements, they were admitted as administrative hearsay, and not admitted as an exception based on Evidence Code section 1224 as argued by the Department.

concluded even though there was no connection or relationship between the third party and the hearsay declarants, the only way the hearsay statements (of the construction workers and an architect) were admissible against the surety company was when those hearsay statements were coupled with the admission of their truthfulness by the debtor (Edwards) based on the adoptive admission exception; concluding those hearsay statements would be admissible against not only the debtor but the surety as well.¹²

10. In the matter at hand, there is no reliable evidence of any agency relationship between Ofelia and the Respondent. There is no evidence the Respondent assumed responsibility for the obligations of declarant Ofelia. To allow Ofelia's statements to be ascribed to the Respondent would impose a responsibility which the law does not contemplate. Therefore, Evidence Code section 1224 is not applicable as an exception to the hearsay rule in this matter. There was no adoptive admission by the Respondent of Ofelia's statements, nor any other exception which applied to make her hearsay statement(s) admissible. There was no other evidence, direct, or otherwise, (relating to employment) for the hearsay statements to supplement or explain, and as such shall not be sufficient in themselves to support a finding.¹³ Furthermore, there was no evidence Ofelia was unavailable to testify as a witness at the hearing, which would provide another exception for her hearsay statement(s) to be admissible.¹⁴

11. Health and Safety Code section 11378 provides that it is illegal for a person 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.

12. Health and Safety Code section 11379 provides that it is illegal for any person to transport, import into this state, sell, furnish, administer, or give away, to offer to transport, import into this state, sell, furnish, administer, or give away, or to attempt to import into this state or transport any controlled substance which is:

¹² *Id.* at p. 619.

¹³ Government Code section 11513(d).

¹⁴ By way of example only, Evidence Code section 1230.

- (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 prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state.

13. Health and Safety Code section 11350 makes it a felony to possess any controlled substance

- (1) specified in
 - (a) subdivision (b), or (c), 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.

14. 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.

15. Business and Professions Code section 24200.5(a) provides in part, "Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

- (a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises. Successive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission. As used in this section, "controlled substances" shall have the same meaning as is given that term in Article 1 (commencing with Section 11000) of Chapter 1 of Division 10 of the Health and Safety Code, and "dangerous drugs" shall have the same meaning as is given that term in Article 2 (commencing with Section 4015) of Chapter 9 of Division 2 of this code."

16. With respect to count 2, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) on the basis that, between on or about August 17, 2018, and October 19, 2018, on numerous occasions, the Respondent-Licensee knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the Licensed Premises, in violation of Business and Professions Code section 24200.5(a) As an employee, Tapia's actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 2, 10-13, 17, 20, 22, 28-36.)

17. With respect to counts 6, 7, 11, 12, 16, and 17, 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) on the basis that on August 17, 2018, October 12, 2018, and October 19, 2018, the Respondent's agent or employee, Martha Solis Tapia, possessed and sold, furnished or offered to sell or furnish, within the premises, a controlled substance, to-wit: methamphetamine, in violation of Health and Safety Code sections 11378 and 11379. As an employee, Tapia's actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 2, 10-13, 14-18, 20, 22, 29, 32, 33, and 36.)

18. With respect to counts 18 and 19, cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) on the basis that, on October 19, 2018, Respondent-Licensee's agent or employee, Martha Solis Tapia, possessed, and possessed for the purpose of sale, within the Licensed Premises, a controlled substance, to-wit: cocaine, in violation of Health and Safety Code sections 11350 and 11351. As an employee, Tapia's actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 2, 20, 24-31, 34-36.)

19. The Respondent argued there is no justification to impose liability on the Respondent absent constructive or actual notice, citing *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 3 Cal.Rptr.2d 779. The Respondent argued neither actual nor constructive knowledge existed in the matter at hand. This argument is rejected. The *Laube* court held that a licensee who has actual or constructive knowledge can be found to have permitted unacceptable conduct. Here, the Respondent had constructive knowledge of Tapia's unlawful activities in the Licensed Premises. Security guard Rodriguez immediately referred Agent Castillo to Tapia as a source for illicit drug sales when Agent Castillo asked from whom he could buy cocaine. Tapia, as Respondent's employee, engaged in a continuing course of multiple, openly conducted, illegal methamphetamine transactions within the Licensed Premises. It is well settled case law, that "The holder of a liquor license has the affirmative duty to make sure that the licensed premises are not used in violation of the law and the knowledge and acts of his employees are imputable to the

licensee.”¹⁵ There was no evidence the Respondent had taken any measures whatsoever, let alone strong measures, prior to the violations to prevent the type of illegal acts engaged in by one of its employees. Tapia’s illicit acts were foreseeable.

20. The types of misconduct historically imputed to a licensee are those that are foreseeable in the operation of a licensed premise. One such traditional ground is for the illegal sale of drugs. Similarly, when a clerk sells alcohol to a minor, even though the licensee is not present, the licensee is liable for that sale as if the licensee had made the sale themselves – the conduct is imputed to the licensee because it is foreseeable, and is therefore the type of conduct the licensee has an obligation to prevent. The same is true of the current matter, in that the sale of a controlled substance, by Respondent’s employee, Tapia, in the Licensed Premises, is the type of misconduct that is foreseeable in the operation of the Licensed Premises. The Respondent cannot claim Tapia acted without Respondent’s knowledge, especially when each of Respondent’s bartenders, including the corporate secretary, Mrs. Morales, who served as a bartender and her son, Mr. Cardoza, all testified to knowing Tapia’s movements in the Licensed Premises when she was there. If a licensee elects to operate its business through employees/agents it must be responsible to the licensing authority for their conduct in the exercise of its license and it is responsible for the acts of his *agents or employees* done in the course of his business in the operation of the license.”¹⁶ Tapia’s actions and knowledge are imputed to the Respondent-Licensee.

21. The Respondent argued there was a break in the chain of custody relating to the said narcotics because two different names were listed on the lab receipts, Maria De Lourdes Torres and Martha Solis Tapia.¹⁷ This argument is rejected as without merit. There was credible evidence as to the chain of custody of the said controlled substances, both by the Department and at the LASD Crime Lab. It was clear from the evidence that Tapia had given the agents the name Maria De Lourdes Torres, and when Agent Castillo asked her

¹⁵ *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal. App. 2d 504, 514, [22 Cal. Rptr. 405, 411]; *Munro v. Alcoholic Beverage Control Appeals Board* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527]; *Givens v. Department of Alcoholic Beverage Control*, *supra*, 176 Cal.App.2d 529, 534; *Fromberg v. Department of Alcoholic Beverage Control* (1959) 169 Cal.App.2d 230, 234 [337 P.2d 123]; *Mantzoros v. State Board of Equalization* (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657]; *Swegle v. State Board of Equalization*, *supra*, 125 Cal.App.2d 432, 438; *Mercurio v. Department of Alcoholic Beverage Control*, *supra*, 144 Cal.App.2d 626, 630; *Cooper v. State Board of Equalization* (1955) 137 Cal.App.2d 672, 678 [290 P.2d 914]; *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395, 401-402 [300 P.2d 366].

¹⁶ *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192, 71 Cal.Rptr. 357, emphasis added.

¹⁷ The Respondent, during its closing, made a late motion to strike the criminologist testimony and object to the admissibility of the lab reports. That motion is denied, and objection overruled.

name on October 12, 2018, she told him it was Lourdes. In fact, she was known by many names. Ms. Duarte knew Tapia as Martita. The ABC-333 reflects Tapia's a.k.a.'s. See exhibit J, at page 3 of 20, which lists "TAPIA, Martha Solis (A.k.a. "Lourdes"), and at Attachment #13, 2 of 2, states Atanacio Morales only knew Torres as Martha. Agent Gonzalmen credibly testified that in her experience as evidence custodian the Department uses the DR#, not a subject's name, to track all evidence seized during an investigation. In Agent Gonzalmen's professional opinion while the suspect's name was listed incorrectly on the ABC forms it would not affect the tracking of the said evidence, which used the DR# 18-02-064. That DR# is used throughout all of the ABC forms, lab receipts and lab reports.

22. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness's testimony at the hearing, the extent of the opportunity of the witness to perceive any matter about which the witness testifies, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

23. Respondent's contentions that, (1) Tapia was not its employee, but a regular customer only, (2) Respondent, its corporate officers and employees were not aware Tapia was selling drugs or soliciting in the Licensed Premises, (3) the waist-high door with the sign "NOTICE EMPLOYEES ONLY" to enter the employee restricted area behind the fixed bar remains "locked the whole time," (4) Tapia never went behind the fixed bar on the employee side or left her purse behind the bar fixture at any time, (5) Mr. Cardoza overheard what the officers were asking Tapia and Tapia's responses and that Tapia was carrying her purse with her when being escorted by agent Clark, and (6) that Mrs. Morales told Agent Castillo on August 17, 2018, they put up the decorations because they were having a party for a customer, are disbelieved for the following reasons.

24. Mr. and Mrs. Morales and Mrs. Morales' son Mr. Cardoza exhibited a bias in the presentation of their testimony as the corporate officers and child of a corporate officer of the Respondent Premises subject to revocation. Mr. Cardoza admitted that the Licensed Premises is his "parents'" primary source of income and that his family needs the income made from the bar. The former employee witnesses' testimony exhibited a motive to go along with the seemingly scripted testimony, in hopes to be rehired by the Respondent since their last day of employment was on or about March 15, 2020, with the closure of the Licensed Premises due to the COVID-19 Pandemic. On February 16, 2021, all of the

witnesses for the Respondent appeared for the video hearing from the Licensed Premises, in an environment controlled by the Respondent, with Mr. Cardoza at Ms. Duarte and Ms. Jiron's side.

25. The testimony of Mrs. Morales, Ms. Duarte and Ms. Jiron were nearly identical and appeared scripted relating to Tapia, specifically where she sat, that Tapia always had her purse with her, there were times she came alone and times she was accompanied into the Licensed Premises, that she would sit near the extinguisher at the fixed bar, that she placed her purse on the counter next to the fire extinguisher, she would drink, dance, and greet customers at tables. As the Department pointed out, it was more than curious their memories were crystal clear with uniformity on specific details with none having written anything down at or near the time of the events, yet not one of them recited the security guard Rodriguez as working in the Licensed Premises. All of the foregoing makes their testimony suspect and tends in reason to disprove the truthfulness of the testimony at the hearing.

26. Mr. Cardoza presented inconsistent and conflicting testimony, which began from the time he took the witness stand. He claimed that Atanacio Morales was his father, yet when Mr. Morales was asked whether Mr. Cardoza was his son, Mr. Morales testified that he is his wife's son. Later in Mr. Cardoza's testimony, he claimed that the employee only door remained locked "the whole time." Yet he also testified to an officer entering through that same door, walking behind the fixed bar to approach Mr. Cardoza at the cash register on October 19, 2018. There was no evidence that anyone unlocked the said door so the officer could gain access through the door. Mrs. Morales said to enter into the employee side of the fixed bar the waist-high door has a latch on the employee side that is used to open the door; she did not mention anything about the door being locked. Cristina Jiron also testified to two officers walking behind the fixed bar into the employee only restricted area, without mention of anyone having to unlock the door for them.

27. Mr. Cardoza's testimony was further riddled with inconsistencies. It is incredulous that Mr. Cardoza overheard the officers and Tapia speaking because Mr. Cardoza testified that the entire time he was at the west wall he was in conversation for one and one-half hours with a female officer asking him questions and he answering. In fact, on direct examination he was asked whether he was talking the entire one and one-half hours, to which he replied, "Yes." Mr. Cardoza said his father, Mr. Morales came to the Licensed Premises one hour after the cover team entered and was questioned for 20 minutes, after which Tapia had been escorted out of the premises. That was well within the one and one-half hours' time frame that Mr. Cardoza had been fully engaged in conversation with an officer. It is improbable that while he was engaged in conversation with the officer he could overhear anyone else's conversation, let alone pay attention to what was happening with the three bartenders and officers as well as Tapia and the officers. Furthermore, Mr. Cardoza acknowledged he did not create any sort of notes

from the night of October 19, 2018. From October 19, 2018 to the date of his testimony on February 16, 2021, two years, three months and 28 days had passed. This is a long time to remember, in such detail, what transpired and what was said without having taken any notes at or near the time of the incident.

28. While Mr. Cardoza claimed Tapia was a “regular customer,” upon direct examination Respondent’s counsel cleverly framed questions to him about Tapia, including asking when Tapia was in the Licensed Premises “as a customer” what she would do. It is not uncommon for employees, on their days off, to go to a restaurant or bar at which they work. The fact that Tapia sometimes goes to the Licensed Premises as a customer does not preclude the fact that she was Respondent’s employee performing waitressing duties on the investigative dates when she was observed by the agents.

29. Mr. Cardoza claimed the only employees working with him in October of 2018 were Amalia Duarte, Cristina Jiron, and Wendy Navoa. Yet Amalia Duarte testified that in the two years and 8 months prior to October of 2019 that she worked at the Licensed Premises she worked with Mr. Cardoza, Cristina, Wendy, and two servers or waitresses. Ms. Duarte was asked to provide the first names of the other employees she worked with, however, she did not provide the names of the waitresses with whom she worked, and only referred to them as two servers or waitresses. This was evasive, given the credible testimony of the agents was that Tapia performed waitressing duties. During Ms. Jiron’s testimony she slipped up and admitted Tapia was an employee, testifying that after the cover team “entered they took all the customers out [of the Licensed Premises] they just left the employees inside – they left us there and Martha [Tapia].”

30. Based on the preponderance of the evidence, it is more likely than not, Tapia, on the dates in question, was Respondent’s employee given the credible testimony of agents that they observed Tapia performing waitressing duties, including taking patron orders, serving alcoholic beverages to patrons and was permitted behind the fixed bar in the employee only restricted area on multiple occasions. Agent Pinney credibly maintained that on August 17, 2018, he observed Tapia walk through the waist-high door into the employee restricted only area behind the fixed bar, where other employees were located. In fact, on that date, not one of the bartenders or Mr. Cardoza instructed Tapia to leave the employee only restricted area when Agent Pinney observed Tapia enter and remain behind the fixed bar.

31. The Respondent argued that Agents Clark and Zapata’s testimony that Tapia’s purse was behind the fixed bar is not credible given the conflict in the agents’ testimony as opposed to Respondent’s witnesses’ uniform testimony that Tapia had her purse with her at all times. The Respondent argued Tapia carried a lot of money and drugs in her purse that is why she would keep it with her and “won’t leave that purse just anywhere.” These arguments are rejected. It should be noted that both agents testified credibly. The

Department agents exhibited no bias, interest, or other motive in the presentation of their testimony. No two people will use the exact same words to describe the same event—word choice, distance and time estimates, and so forth will naturally vary from person to person. That is why the identically recited testimony of the Respondents is suspect, especially given the time lapse since the events occurred. On the other hand, the minor differences in the testimony of the two agents do not call into question either's credibility. What difference there may have been was without material consequence, since both agents testified that Tapia's purse was behind the fixed bar. It matters not who went to get the purse from behind the bar. In fact, Agent Castillo's ABC-333 Investigation Report written at or around the time of the events also indicated that, "TAPIA retrieved her purse from behind the fixed bar." (Exhibit J, page 18 of 20, 7th paragraph after the first set of bullets.) It seems appropriate that Tapia would secure her purse behind the fixed bar, where only employees are permitted, behind a door with a sign restricting the entrance of any patrons therein. Agent Castillo credibly testified that when he paid Tapia for the methamphetamine on August 17, 2018 and October 19, 2018, she placed the \$20 he gave her in her pocket and on August 17, 2018, she had retrieved the methamphetamine from her pocket. There was no evidence she had her purse on her person while she was with Agent Castillo.

32. Except as set forth in this decision all other allegations, contentions or defenses made by the parties, whether in the pleadings or at the hearing, lack merit.

PENALTY

The Department requested that the Respondent's license be revoked based on the following: (1) Respondent was barely licensed four years at the time of the violations, and already had a drink solicitation scheme up-and-running, and (2) the heavy quantity of drug sales at the Licensed Premises, with recurring drug sales.

The Respondent did not recommend a penalty should the accusation be sustained in whole or in part.

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as rule 144. Section 24200.5(b) mandates revocation for a violation of its provisions. This mandate is satisfied by a stayed revocation¹⁸ as well as an outright revocation.¹⁹ The penalty recommended for a violation of section 25657(a) is

¹⁸ See, e.g., *Harris v. Alcoholic Beverage Control Appeals Board*, 244 Cal. App. 2d 468, 36 Cal. Rptr. 697 (1964) (revocation stayed coupled with suspension imposed for violations of section 24200.5).

¹⁹ See, e.g., *Greenblatt v. Martin*, 177 Cal. App. 2d 738, 2 Cal. Rptr. 508 (1960) (outright revocation imposed for violations of section 24200.5).

revocation, and for a violation of section 25657(b) the penalty ranges from a 30-day suspension up to revocation. The penalty for a violation of rule 143 is a 15-day suspension. Revocation is also the recommended penalty for a violation of section 24200.5 and any health and safety code section violations with sales transactions on the licensed premises. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

Aggravation is warranted for the continuing course of multiple drink solicitations and illegal drug violations openly conducted by Respondent's employee in the Licensed Premises in the presence of all staff, including the acting manager, Mr. Cardoza, who admitted managing the premises from a chair and/or position at the register the majority of the night. The only evidence of mitigation was Mr. Morales' cooperation in the investigation on October 19, 2018. In weighing and balancing the aggravation and mitigation, the penalty recommended herein complies with rule 144.

ORDER

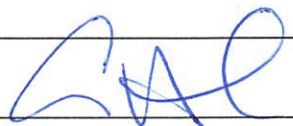
Counts 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 are sustained. With respect to these violations, the Respondent's on-sale beer license is hereby revoked.

Counts 3, 4, and 5 are dismissed.

Dated: March 30, 2021



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>05/21/21</u> _____