

ISSUED JUNE 24, 1996

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

ALTAGRACIA CARDENAS	)	AB-6509
dba Janitzio Cafe)	
1303-07 East 12th Street	)	File: 40-038830
Los Angeles, CA 90021	)	Reg: 94029987
Licensee/Appellant,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rosalyn M. Chapman
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	May 1, 1996
	)	Los Angeles, CA

Altagracia Cardenas, doing business as Janitzio Cafe (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which revoked appellant's on-sale beer license, for permitting female employees to loiter in the premises for the purpose of soliciting alcoholic beverages and other drinks from patrons for the employees' own consumption under a profit-sharing plan, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, and in violation of Business and Professions Code §§24200(a), 24200.5(b), 25657(a) and (b), and Title IV, California Code of Regulations

¹The decision of the department dated January 12, 1995 is set forth in the appendix.

§143.

Appearances on appeal included appellant Altagracia Cardenas, appearing through her counsel, Roger S. Shafer; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's type-40 on-sale beer license was issued on January 18, 1979. Thereafter, the department instituted an accusation on May 17, 1994, alleging drink solicitation charges. An administrative hearing was held on November 17, 1994, at which time oral and documentary evidence was received. At that hearing, it was determined that several female employees were permitted to solicit drinks from patrons.

Subsequent to the hearing, the department issued its decision, which revoked appellant's license. The decision alleged three prior violations: a solicitation charge in 1990; service to an intoxicated person in 1990; and a solicitation charge and service to an intoxicated person in 1991.

In her appeal, appellant raised the following issues: (1) the department's findings were not supported by substantial evidence; and (2) the penalty was excessive.

DISCUSSION

I

Appellant contended that the findings were not supported by substantial evidence. "Substantial evidence" is relevant evidence which reasonable minds would

accept as a reasonable support for a conclusion (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477, 95 L.Ed. 456, 71 S.Ct. 456, and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871, 269 Cal.Rptr. 647).

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the appeals board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874, 197 Cal.Rptr. 925).

Appellate review does not "...resolve conflict[s] in the evidence, or between inferences reasonably deducible from the evidence..." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678, 13 Cal.Rptr. 658).

Appellant argued that hearsay evidence was improperly allowed into evidence over timely objection. 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." Such evidence is inadmissible (Evidence Code §1200).

Government Code §11513(c) states in part: "...Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding...." Therefore, appellant rightfully contended that if hearsay evidence was a basis for finding a violation, then the finding of a violation was not supported by substantial evidence.

Chris Ramirez, a police officer with the Los Angeles Police Department, testified

at the administrative hearing that he was on patrol in an unmarked police car, and while driving past the premises at about 9:30 p.m., he observed two or three females in front of the premises. One of the females hailed the officer over to the curb. The female asked if the officer would come into the premises and buy her a beer. The officer responded: "Well, what would it cost me to buy you this beer?" The female responded, "...about \$7" [R.T. 35-37]. The officer stated that he was without funds and left; he then drove back to the police station and located his partner.

Officer Ramirez thereafter entered the premises, as did his partner, Officer Ulysses Gasca. They sat at separate locations in the premises [R.T. 11-12, 38]. Both were solicited by females inside the premises to purchase beers for the females. The officers purchased their own beers, with Ramirez's beer costing \$2.50, and Gasca's beer costing \$2.00. The beers purchased for the females cost \$7.00 each. When payment was made, the bartenders gave change and an orange ticket to each female purchaser [R.T. 11-20, 34-48].

At the administrative hearing, appellant, through her attorney, objected to various statements made by the officers. Officer Gasca stated that the female told him that the beer, a "natural beer," cost \$7.00 [R.T. 16]. This statement was not offered for the truth, but only that the remark was made. Direct testimony substantiated the \$7.00 cost. The objection by appellant's attorney was properly overruled by the administrative law judge (ALJ).

The next objection to hearsay evidence was concerning Officer Gasca's testimony when the female stated she worked there and received \$5.00 for each beer

solicited [R.T. 17]. This was hearsay testimony. However, it was properly admitted as administrative hearsay; that is, it could only be used to clarify or explain other proper evidence. It explained why orange tickets were given by the bartenders to the female //

persons who solicited the drinks, and why the drinks of the females cost over three times the price of the drinks ordered and served to the officers.

The last objection to hearsay was concerning Officer Ramirez's testimony, which stated that Bustamente, a female solicitor, told him that she worked there and received a \$5.00 commission on every beer purchased for her [R.T. 44]. This was hearsay testimony. However, it was properly admitted as administrative hearsay. It explained why orange tickets were given to Bustamente for her beer, and the high cost of the beer. Additionally, Officer Gasca observed Bustamente serving beers to other patrons [R.T. 24], which is direct evidence of apparent employment.

We determine that the crucial findings were supported by substantial evidence.

II

Appellant contended that the penalty was excessive. The appeals board will not disturb the department's penalty orders in the absence of an abuse of the department's discretion (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287, 341 P.2d 296). However, where an appellant raises the issue of an excessive penalty, the appeals board will examine that issue (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785, 97 Cal.Rptr. 183).

The department had the following factors to consider: (1) in 1991, appellant's license was suspended for 60 days with 20 days stayed for a violation of Penal Code §303(a)--permitting loitering for the purpose of soliciting customers to purchase alcoholic beverages for the solicitors; (2) in the present matter, the solicitation by the two females was open and blatant; (3) employment by serving beers to customers, and employment by proof of a commission scheme were shown; and (4) the females outside the premises were trying to induce patrons to purchase drinks for them. Thus there was a clear showing of a blatant scheme of solicitation.

Considering such factors, any dilemma as to the appropriateness of the penalty must be left to the discretion of the department. The department having exercised its discretion reasonably, the appeals board will not disturb the penalty.

CONCLUSION

The decision of the department is affirmed.²

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.