ISSUED MAY 15, 1996

# BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

# OF THE STATE OF CALIFORNIA

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| MIGUEL M. SANCHEZ<br>dba Kan Kan Bar<br>104 South Pacific Avenue<br>San Pedro, CA 90731<br>Appellant/Licensee,<br><br>v.<br><br>THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,<br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | AB-6538<br><br>File: 42-114746<br>Reg: 94029523<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>Jaime Rene Roman<br><br>Date and Place of the<br>Appeals Board Hearing:<br>April 3, 1996<br>Los Angeles, CA |

Miguel M. Sanchez, doing business as Kan Kan Bar (appellant), appealed from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's on-sale beer and wine license but stayed the imposition of the revocation for a three year probationary period provided a 20-day suspension was served, for permitting employees to loiter in the premises for the purpose of soliciting the purchase of alcoholic beverages for the employees' own consumption under a profit-sharing plan or scheme, in violation of Business and Professions Code §§24200.5, 25657(a), and 25657(b), and the California Code of Regulations, Title IV, §143 (rule 143).

[1]The decision of the department dated June 8, 1995 is set forth in the appendix.

Appearances on appeal included appellant Miguel M. Sanchez, through his counsel, Benjamin P. Wasserman; and the Department of Alcoholic Beverage Control, through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on July 8, 1982. Thereafter, the department instituted an accusation against the license on December 15, 1993.

An administrative hearing was held on May 11, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that appellant permitted employee solicitation of the purchase of alcoholic beverages, employed persons for the purpose of encouraging the purchase of alcoholic beverages, allowed persons to loiter for the purpose of encouraging the purchase of alcoholic beverages, and allowed employees to accept alcoholic beverages purchased by patrons, all within the area of the premises under the care and control of appellant.

Subsequent to the hearing, the department issued its decision which revoked appellant's on-sale beer and wine license, said revocation stayed for a period of three years.

In his appeal, appellant raised the following issues: (1) there was insufficient evidence to support the revocation and suspension of appellant's license; (2) appellant was entrapped, and (3) the penalty was disproportionate to the alleged violations.

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DISCUSSION

I

Appellant contended that there was insufficient evidence to support the revocation and suspension of his license, arguing that employment was not proven.

The scope of the appeals board's review is limited by the California Constitution, by statute, and by case law. In reviewing a department's decision, the appeals board may not exercise its independent judgment on the effect or the weight of the evidence, but is authorized to determine whether the department's decision is supported by the findings. Moreover, the department's decision may not be disturbed unless it lacks substantial support on its face. (See American Federation of Labor v. Unemployment Ins. Appeals Bd. (1994) 23 Cal.App.4th 51, 58; 29 Cal.Rptr.2d 210; Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal.3d 101, 111, 172 Cal.Rptr. 194.)

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). "Substantial evidence" is defined as relevant evidence which reasonable minds would accept as a rational 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; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871, 269 Cal.Rptr. 647.)

The record establishes that Investigators Vasquez, Arroyo, and Alvarez entered appellant's premises and seated themselves at the center of the bar (R.T. 6). Guadalupe Gonzalez and Lourdes Chavez were also seated at the bar, to the left of the investigators (R.T. 8-10, 12-13). Chavez solicited a beer from Vasquez (R.T. 13) and then Chavez ordered the beer from the bartender, Graciela Cruz, who provided Chavez with the alcoholic

beverage (R.T. 13-14). Chavez charged Vasquez $8.00 for the beer (R.T. 14) just moments after Investigator Arroyo was charged $2.50 per beer for those beverages he had bought for himself and his two co-investigators (R.T. 7). Chavez solicited a $6.00 "commission" from Investigator Vasquez in the bartender's immediate presence (R.T. 17-18). Chavez solicited a second beer from Investigator Vasquez, and the transaction was repeated generally in the same manner (R.T. 19), except during the second transaction, the change from the money tendered by Vasquez to the bartender, as payment for Chavez's beverage, was given directly to Chavez by the bartender (R.T. 24). Chavez stated that she was employed by appellant for "a short while"[2] (R.T. 19-20).

Investigator Arroyo's testimony established that Guadalupe Gonzalez left her seat at the bar, cleaned a few tables of empty bottles and used ash trays (R.T. 34), took the empty bottles behind the bar (RT 34), and then returned to her seat next to Investigator Arroyo, at which time she solicited a beer from that investigator (R.T. 34). In response to her solicitation, Investigator Arroyo tendered five one-dollar bills to the bartender for the beer that Gonzalez had solicited (R.T. 36). The bartender returned three of those one-dollar bills to Gonzalez, who then placed the bills in her purse
(R.T. 36-37). Investigator Arroyo's testimony also established that Gonzalez admitted that she had been employed by appellant at the premises for a period of approximately one week (RT 37-38).[3]

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[2]This declaration attributed to Chavez is hearsay as defined by §1200 of the Evidence Code. However, subdivision (c) of §11513 of the Government Code permits hearsay to supplement or explain other evidence tending to prove that she was employed by appellant and that she worked on the premises.

[3]This declaration is hearsay also, but subdivision (c) of §11513 of the Government Code permits such hearsay to supplement or explain the other evidence tending to prove that Gonzalez was employed by appellant and that she

Appellant testified that he had not employed either Chavez or Gonzalez (R.T. 62). That testimony notwithstanding, 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). The appeals board is bound to resolve conflicts of evidence in favor of the department's decision, and must accept all reasonable inferences which support the department's findings. (Gore v. Harris (1964) 29 Cal.App.2d 821, 40 Cal.Rptr. 666. See also Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 67 Cal.Rptr. 734, 737; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439, 102 Cal.Rptr. 857 [case where there was substantial evidence supporting the license-applicant's position as well as the department's position]; and Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 248 Cal.Rptr. 271).

Conflicts in the evidence most often raise questions of the credibility of the witnesses. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. See Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315, 314 P.2d 807, 812, and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183, 42 Cal.Rptr. 640, 644.

There is substantial evidence to reasonably support the findings that appellant allowed persons to loiter for the purpose of encouraging the purchase of alcoholic beverages, and that appellant allowed employees to accept alcoholic beverages purchased by patrons. The testimony of Investigators Vasquez and Arroyo constitutes the requisite

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worked on the premises.

substantial evidence, even if contradicted by appellant, to reasonably support the findings in dispute.

The rule is well settled in Alcoholic Beverage Control Act case law that the illegal acts of an employee are imputed to his or her licensee-employer. (Mack v. Department of Alcoholic Bev. Control (1960) 178 Cal.App.2d 149, 2 Cal.Rptr. 629, 633; Harris v. Alcoholic Bev. etc. Appeals Bd. (1962) 197 Cal.App.2d 172, 17 Cal.Rptr. 315, 320; Morell v. Dept. of Alcoholic Bev. Control (1962) 204 Cal.App.2d 504, 22 Cal.Rptr. 405, 411; Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395, 300 P.2d 366, 370-371.) It follows that knowledge of Ms. Chavez's and Ms. Gonzalez's misconduct is imputed to appellant, and he is therefore accountable for their misbehavior.

II

Appellant contended that the investigators' conduct toward Chavez and Gonzalez constituted entrapment.

The test for entrapment has been stated in the California Supreme Court case of People v. Barraza (1979) 23 Cal.3d 675, 153 Cal.Rptr. 459, as follows:

> "We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purpose of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d at 689-690, fn. omitted.)

The record establishes that Investigators Vasquez and Arroyo, to paraphrase Barraza, supra, merely offered the opportunity for misconduct to appellant's employees.

There is no evidence of impermissible "overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime" that would sustain appellant's contention regarding entrapment.

While the officers' conduct of inviting the females to sit with them does not approach an entrapment, their conduct is suspect for proper police conduct. By inviting the females to socialize, the officers approach that line of conduct that could be construed as entrapment, when, because of the nature of the crime, the females would make the approach in due time. The police should not create the scene, which, by long history, would be created by the persons whose interests were enhanced by this violation of the law.

III

Appellant contended that the penalty is disproportionate to the violations. 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 an issue of an excessive penalty, the appeals board will examine that issue. (Joseph's of California v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785, 97 Cal.Rptr. 183).

Any violation of a statute or rule of the department, when done with intent, as is shown by the record, is contrary to the public welfare and morals. (Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99 fn. 22, 84 Cal.Rptr. 113).

The department has the following factors to consider: (1) the solicitations were open and in the immediate presence of the bartender; (2) the alcoholic beverages served to the soliciting females were significantly more expensive than the alcoholic beverages served to the investigators; and (3) the illegal conduct of the employees, including the bartender, was

sufficient to impute their illegal conduct to the appellant. The penalty imposed was proportionate to the misconduct and there is no abuse of discretion by the department.

CONCLUSION

The decision of the department is affirmed.[4]

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

[4]This 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.