

ISSUED NOVEMBER 13, 1996

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

GARAM, INC.,	)	AB-6609
dba CLUB GARAM)	
600 N. Vermont Ave.	)	File: 57-224565
Los Angeles, CA 90004,	)	Reg: 95032637
Appellant/Licensee)	
	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 7, 1996
	)	Los Angeles, CA

Garam, Inc., doing business as Club Garam (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked appellant's club license for serving alcoholic beverages to non-members; for employing a host for the purpose of procuring or encouraging the purchase of alcoholic beverages; and for violating a condition of the license by allowing employees to accept drinks from customers, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§ 23431; 25657, subdivision (a); and 23800.

¹The decision of the Department dated November 16, 1995, is set forth in the appendix.

Appearances on appeal include appellant Garam, Inc., appearing through its counsel, Rick Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's club license was issued in January 1989, subject to several conditions. The license was amended to add additional conditions, as a result of a disciplinary action, in 1992. Thereafter, the Department instituted an accusation on April 13, 1995, alleging drink solicitation violations by the club's host and hostesses and violations of the statutory and license conditions that limited sales of alcoholic beverages to bona fide members of the club and their bona fide guests.

An administrative hearing was held on October 17, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that appellant had furnished alcoholic beverages to two undercover officers who were not then members of the club, in violation of Business and Professions Code §23431 and in violation of a condition of the license; that the club had employed a host for the purpose of encouraging the purchase of alcoholic beverages, in violation of Business and Professions Code §25657, subdivision (a); and that the club had permitted three of the club's hostesses to accept alcoholic beverages from customers, in violation of a condition of the license.²

²The Proposed Decision of the Administrative Law Judge determined that Counts 4, 5, and 6 of the Accusation, which alleged violations of the Department's Rule 143 (Cal.Code Regs., tit. 4, §143), were not established, since the violation required "purchase" of alcoholic beverages for the employees, and the undercover

Subsequent to the hearing, the Department issued its decision unconditionally revoking appellant's license. Appellant then filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) there was not substantial evidence to support the findings with regard to service to non-members or the host's encouraging the purchase of alcoholic beverages; and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that the findings with regard to service to non-members were not supported by substantial evidence.

Business and Professions Code §23431 limits holders of club licenses to sales to members and their guests.³ However, the statute does not define what constitutes a "bona fide member" or a "bona fide guest."⁴

The condition on the license apparently⁵ states: "The designated patrons, for whose use the license has been requested, shall be members of a private club known as Club Garam and said member's [sic] bona fide guests."

officers never paid for anything since the backup officers arrived too soon.

³The full text of this statute is set out in the appendix.

⁴Business and Professions Code §23037, provides a general definition of "guest." The full text of the statute is set out in the appendix.

⁵The record does not include a copy of the original license with conditions. The language quoted is from Count 7 of the Accusation issued by the Department.

Appellant contends that Officer Kim was a member: he filled out a membership application, received a membership card, and actually became a member of the club on the night in question.

The proposed decision of the Administrative Law Judge (ALJ), in Determination of Issues II, states that "By the end of the evening of February 10, one of the peace officers was made a member of [Club Garam]," but concludes that he was served before he became a member, so there was a violation of the statutory and license conditions. However, the ALJ did not specify what he considered to be the operative event that made Officer Kim a member.

A review of the transcript shows clearly that Officer Kim filled out the membership application and received his membership card before the alcoholic beverage was served [R.T. 68, 87-88]. The uncontradicted testimony was that there was no fee for membership, so in filling out an application, having the application accepted, and being given a membership card, Officer Kim completed all requirements for membership. This was before he was served an alcoholic beverage, so there is no substantial evidence of a statutory or license condition violation as to him.

Officer Kim also filled out a membership application for his companion, Officer Wong. With regard to Officer Wong, the ALJ's decision states: "The other peace officer was never made a member." However, appellant argues, Officer Wong was clearly a "bona fide guest" of Officer Kim, who became, that night, a "bona fide member" of Club Garam.

Although Officer Kim filled out a membership application for him, there is no evidence that the application was approved or that a membership card was issued to Officer Wong. The ALJ's proposed decision bases the violations alleged in Counts 1 and 7 on the fact that alcoholic beverages were served "before any granting of membership" or "before either of them became a member of the club." (Emphasis added.) (Determination of Issues II and VI.) The ALJ did not consider either of the officers "bona fide guests" because he did not consider either of them members. However, since Officer Wong was the companion of Officer Kim, who was a member, we conclude that Officer Wong was the guest of a member. Therefore, there was no violation of the statute or license condition as to Officer Wong.

II

Appellant contends that the finding that appellant employed a host for the purpose of procuring or encouraging the purchase of alcoholic beverages is not supported by substantial evidence.

Business and Professions Code §25657, subdivision (a), provides that it is unlawful "to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages" The ALJ's proposed decision, in Determination of Issues III, states that "When [the club host] brought a bottle of Crown Royal with several glasses to the two peace officers, when he knew that they were not members of the club, he was procuring or encouraging the purchase of alcoholic beverages by the officers."

Appellant contends that the host, Mr. Kim, was essentially “a maitre d’ who greeted incoming customers, explained house rules, seated them at their table, perhaps took an order, and assumingly provided a number of other duties.” (App. Brief 4.) Appellant argues that Mr. Kim, when he brought the bottle to the officers, did no more than any waiter or server in a licensed premises would do, and such actions do not constitute the “procuring or encouraging the purchase or sale of alcoholic beverages” prohibited by §25657. Appellant also states that it was not true that Mr. Kim, when he brought the bottle to the officers, “knew that they were not members.”

With regard to the finding that Mr. Kim, the host, was procuring or encouraging the purchase or sale of alcoholic beverages in violation of the statute, we can only say that if that is true, every bartender and waiter in every licensed premises has violated the statute innumerable times. The record fails to show that the explanation of the customary practices of the club with regard to tipping was anything more than information provided to a prospective member. There is no evidence of Mr. Kim doing anything other than what a waiter or maitre d’ would ordinarily and legally do. The mere explanation of the charges for drinks and the subsequent serving of them cannot possibly violate the statute.

We conclude that there was no substantial evidence to support this finding.

III

Appellant argues that, since Counts 1, 2, and 7 of the Accusation are not supported by substantial evidence, that leaves only Count 8 upon which to base the

penalty.⁶ Appellant seems to suggest, without really arguing, that the evidence is unclear as to whether the hostesses violated a condition of the license by accepting alcoholic beverages from the officers.⁷ Appellant states: "It is questionable in light of the evidence whether or not Count 8 would have been sufficient for revocation of the license. It is apparent that this matter should be remanded to the Department for further consideration of penalty in light of the circumstances." (App. Brief 5.)

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].)

⁶Counts 3, 4, 5, and 6 were dismissed in the Department's decision.

⁷The conditions as set out in the Department's Accusation were as follows: "No employee or agent shall be permitted to accept money or any other thing of value from a customer for the specific purpose of any person sitting or otherwise spending time with customers while in said premises. Provided, however, that nothing in this section shall prohibit the employer from engaging the services of employees or agents for the specific purpose of sitting or otherwise spending time with customers, so long as such employees are compensated by the employer solely on an hourly or other time basis without reference to the number of alcoholic or other beverages consumed by customers who are recipients of the aforescribed services."

"No employee or agent shall solicit or accept any alcoholic or non-alcoholic beverage from any customer while in the premises."

Having already concluded that the findings regarding Counts 1, 2, and 7 are not supported by substantial evidence (see I and II, supra), the matter must be remanded to the Department for reconsideration of the penalty, since it would clearly be an abuse of discretion to revoke based only on this violation of the license condition.

CONCLUSION

The decision of the Department is reversed as to Determination of Issues II, III, and that part of VI regarding violation of the members-only condition on the license, the decision is otherwise sustained, and the matter is remanded to the Department for reconsideration of the penalty.⁸

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

⁸This 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.