

ISSUED AUGUST 7, 1996

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

BEEHIVE BAR, INC.	)	AB-6613
dba The Beehive)	
5647 Whittier Boulevard	)	File: 48-067204
Los Angeles, CA 90022,	)	Reg: 94030117
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Humberto Flores
THE DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	July 1, 1996
	)	Irvine, CA

Beehive Bar, Inc., doing business as The Beehive (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which revoked appellant's on-sale general public premises license, for appellant's employee loitering within the premises for the purpose of soliciting the purchase of alcoholic beverages for that employee's own consumption under a commission or other profit-sharing plan, scheme, or conspiracy, 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 § §24200.5, subdivision (b), and 25657, subdivision

¹The decision of the department dated November 29, 1995, is set forth in the appendix.

(b); Penal Code §303a; and §143 of Title 4, California Code of Regulations (rule 143).

Appearances on appeal included appellant Beehive Bar, Inc., appearing through its counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 28, 1963. Prior to the filing of the present accusation, the department issued a decision on January 11, 1994, for essentially the same type of violations which are considered in the present matter, with the license being conditionally revoked during a probationary period of two years.

Thereafter, the department instituted the present matter's accusation dated June 14, 1994, for drink solicitations allegedly occurring on April 22, 1994, a date approximately three months following the entry of the January 11, 1994, decision of conditional revocation.

An administrative hearing was held on May 2, 1995, at which time oral and documentary evidence was received. At that hearing, evidence was presented that appellant had employed Iliana Roxana Diaz to loiter on the licensed premises for the purpose of soliciting alcoholic beverages for her own consumption.

Subsequent to the hearing, the administrative law judge (ALJ) issued his proposed decision which ordered appellant's license disciplined by a second conditional

revocation. The department thereafter rejected the proposed decision² and issued its own decision which unconditionally revoked appellant's license. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raised the following issues: (1) Government Code §§11512 and 11517 are unconstitutional; (2) the crucial findings were not supported by substantial evidence; and (3) the penalty was excessive.

DISCUSSION

I

Appellant contended that Government Code §§11512 and 11517 are unconstitutional and void under the due process clauses of the United States and California Constitutions.

Article III, §3.5 of the California Constitution specifically denies California State agencies the power to declare a statute unconstitutional.

We therefore decline to review this contention.

II

Appellant contended that the crucial findings were not supported by substantial evidence, arguing that Iliana Roxana Diaz was not an employee.

"Substantial evidence" is relevant evidence which reasonable minds would

²The department may reject a proposed decision in whole or in part pursuant to Government Code §11517, subdivision (c).

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].)

Anthony Pacheco, a department investigator, entered the premises, sat at the bar, and ordered and received a 12-ounce bottle of beer, paying the sum of \$3.00 [R.T. 4-7].

While at the bar, he observed a woman identified as Iliana Roxana Diaz approach a male patron who was sitting next to Pacheco. Thereafter, Diaz ordered a beer from the bartender [R. T. 10]. The bartender poured beer from a tap labeled "Budweiser" into a small glass which was placed in front of Diaz. The patron gave some currency to the bartender, who returned change to the male patron and to Diaz [R. T. 11]. Diaz immediately returned \$1.00 to the bartender [R. T. 11].

Later, Diaz approached Pacheco and over time, asked Pacheco for a total of three

beers [R. T. 12-13, 16-17]. Each transaction occurred in the same manner: Diaz ordered a beer, the bartender retrieved a small glass, filled it from a tap labeled "Budweiser," gave the glass of beer to Diaz, charged Pacheco \$6.00 for each glass, and made change back to Pacheco and Diaz, with Diaz handing \$1.00 back to the bartender [R. T. 12-14, 16-17].

During the above transactions, Diaz told Pacheco she was working [R. T. 14], and when asked, explained that she received \$4.00 per beer and, instead of receiving four \$1.00 bills, received a \$5.00 bill and gave \$1.00 back to the bartender [R. T. 15].³

At one point, Diaz excused herself, went behind the bar, retrieved her purse, applied makeup, and talked with the manager and bartender [R. T. 17].

We determine that there was substantial evidence of the solicitation, employment, and responsibility of appellant.

III

Appellant contended that the penalty was excessive, arguing that appellant had been licensed for 32 years with only one previous disciplinary action in the last 15 years.

The appeals board will not disturb the department's penalty orders in the

³The statements of Diaz were hearsay, but admissible under government Code §11513, subdivision (c), which allows hearsay evidence for the limited purpose of explaining other evidence.

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) approximately three months before the illegal solicitation in the present matter, appellant had a decision entered against it for the same type solicitation violations, wherein its license was revoked with execution of the revocation stayed for a probationary period of two years; (2) the present matter's solicitation violations occurred in an open and blatant manner wherein the solicitor received immediate compensation, in front of the solicited patron, showing an exchange of commission which can only be explained as a scheme or plan.

The dilemma as to the appropriateness of the penalty in the present matter shall be left to the discretion of the department. The department has exercised its discretion in a reasonable manner, and the appeals board will not disturb the penalty.

CONCLUSION

The decision of the department is affirmed.⁴

⁴This 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.

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