

ISSUED APRIL 27, 1998

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

JOSE ORTIZ	)	AB-6786
dba Valley Inn)	
5068 Valley Boulevard	)	File: 61-252830
Los Angeles, California 90032,	)	Reg. 96036208
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing
	)	January 7, 1998
	)	Los Angeles, CA
)	

Jose Ortiz, doing business as Valley Inn (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered his on-sale beer public premises license revoked for having employed two persons to solicit the purchase of alcoholic beverages by a customer, as part of a commission or percentage scheme, and for permitting the two employees to loiter for the purpose of soliciting the purchase of drinks, and for serving an alcoholic beverage to an obviously intoxicated patron, being contrary to the universal and generic public welfare and morals provisions of the

¹ The decision of the Department, dated November 27, 1996, is set forth in the appendix.

California Constitution, article XX, §22, arising from violations of Business and Professions Code §§24200, subdivision (a); 24200.5, subdivision (b); 25602, subdivision (a); 25657, subdivisions (a) and (b); and Penal Code §303a.

Appearances on appeal include appellant Jose Ortiz, appearing through his counsel, M.R. Ward; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's license was initially issued to appellant in 1989 as a member of a partnership, and in its present form on October 5, 1990. The Department instituted the 12-count accusation in this matter on May 21, 1996, alleging in counts 1, 2, 7, and 8 that appellant employed or permitted Blanco Garcia ("Garcia") and Paola Villa ("Villa") to solicit or encourage customers to purchase alcoholic beverages for them (the employees), in violation of Business and Professions Code §§24200.5, subdivision (b), and 25657, subdivision (a). Counts 3 and 9 alleged that appellant employed or permitted the same two women to loiter on the premises to solicit customers to purchase alcoholic beverages for them (the employees), in violation of Business and Professions Code §25657, subdivision (b). Counts 4, 5, 10, and 11 alleged that the two women solicited customers to purchase alcoholic beverages and that they consumed the beverages, in violation of Rule 143. Counts 6 and 12 alleged essentially the same facts as counts 3 and 9, and alleged that such conduct violated §303a of the

Penal Code. Count 13 alleged the sale of an alcoholic beverage to an obviously intoxicated person, in violation of Business and Professions Code §25602, subdivision (a).

An administrative hearing was held on October 31, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles Police Officer Francisco Vega concerning the solicitation allegations in the accusation, and by Officer Roger Argomaniz in connection with the charge pertaining to the sale of an alcoholic beverage to an obviously intoxicated person. Appellant did not testify or present any defense witnesses.

Subsequent to the hearing, the Department issued its decision which found the allegations of counts 1, 2, 3, 6, 7, 8, 9, 12, and 13 to have been established by the evidence, and dismissed, on procedural grounds, counts 4, 5, 10, and 11 (the counts which alleged violations of Rule 143).

Appellant thereafter filed his timely notice of appeal, and contends the findings of the decision are not supported by substantial evidence.

DISCUSSION

Appellant contends that the findings are 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 [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 conflicts 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.2d 658].)

Appellant does not dispute the fact that Garcia and Villa solicited the undercover officers to purchase alcoholic beverages for their consumption. Nor does he dispute the testimony of officer Vega regarding the manner in which the transaction was carried out. Appellant asserts that, other than hearsay, there is no evidence that either of the two women worked at appellant's premises. Neither woman was produced as a witness, and, other than jurisdictional documents, there was no documentary evidence introduced at the hearing.

Officer Vega and two fellow officers visited appellant's bar in the evening hours of December 2, 1995, and seated themselves at a table about ten feet directly across from the bar. They purchased beers for themselves at the bar, and were charged

\$3.00 for each beer [RT 9]. Next, according to Vega, Garcia and Villa asked if they could join the officers, and were told they could. Garcia then asked Vega if he would buy her a drink [RT 10-11]. He said he would. Garcia called to a woman (identified in the record only as Palomera) standing by the bar, and asked her to come over. When she did, Garcia asked Palomera to bring her a beer. Palomera went behind the bar, and returned with a can of Miller Lite beer and a ticket, giving both to Garcia.² Palomera then took the \$10 bill which Vega had given Garcia, again went behind the bar, this time to the cash register, made change, and returned \$3.00 to Vega [RT 12-13, 33].

Villa then asked to have a beer bought for her [RT 15]. Vega gave her a \$10 bill, which Villa took to the bar, purchased a beer, was given a ticket by the bartender [RT 15] similar to the ticket which had been given to Garcia, and returned with \$3.00 change.

Vega then testified that one of his partners asked why the beers that were purchased for the two women cost \$7.00, while the beers the officers purchased for themselves were only \$3.00 [RT 16-17]. Garcia explained that she and Villa worked at

² The ticket was described by Vega as similar to movie tickets, a two-by-one inch ticket with a serial number. Vega testified that although this ticket and others were seized, they had since been disposed of, along with all other physical evidence seized at the time. While in the circumstances of this case the absence of the tickets is not fatal to the Department's case, we can foresee situations where such evidence might be crucial. Here, the officers observed the tickets, and were given an explanation of their significance.

the bar, and the additional \$4.00 was for them. The tickets were to be turned in at the close of the evening, and they were to be given \$4.00 for each ticket [RT 17].

Appellant challenges the statements attributed to Garcia as hearsay, and argues that without such evidence the solicitation counts must fall. We reject this contention.

Although hearsay, the statements explain the significance of the tickets given to the two women, as being records of the sales for which they were to be compensated, and evidence of a commission scheme for the purpose of soliciting drinks.

Appellant asserts that the police officers had no contact with the bartender, and that there was no evidence the bartender had knowledge Garcia and Villa were sitting with the officers, much less soliciting the officers for drinks. However, appellant overlooks officer Vega's testimony [RT 15, 35] that when Villa purchased her drink with the money Vega had given her, it was the bartender who handled the transaction, and gave Villa the change and the ticket.

The evidence that the bartender was involved in the distribution of the tickets, and charged the inflated price for the beer purchased by Villa, supports the charges that appellant had employed or permitted Garcia and Villa to solicit drinks under a commission, percentage, salary or other profit-sharing scheme in violation of the Business and Professions Code provisions set forth in the accusation.

It is also reasonable to draw the inference that Palomera was acting on behalf of appellant when she handled the transaction involving the beer purchased for Garcia,

from the fact that she freely went behind the bar to obtain the beer, and again went behind the bar and operated the cash register. All this occurred while the bartender was also behind the bar and in a position to observe Palomera.

Appellant also challenges the ALJ's finding that on a separate occasion, appellant's bartender, Maria Avila, served an alcoholic beverage, beer, to Javier Velasco, a patron, at a time when Velasco was obviously intoxicated. Appellant contends there was no evidence the bartender was ever in close proximity to Velasco, nor any evidence she saw the symptoms of intoxication described by the police officer.

As the Department points out in its brief, however, the police officer testified that Velasco was seated at the bar only two or three feet from the bartender just prior to walking towards the men's room, staggering in the process. Velasco was served additional beers after his return from the men's room, attracting the bartender's attention with a raised finger when he ordered, and was served, the last beer before the officers decided to take action. A considerable period of time passed during which Velasco displayed what the officer described as symptoms of intoxication. The bartender has a duty to monitor patrons so that they are not permitted to purchase, or be served, an alcoholic beverage if intoxicated. In this case, the bartender apparently was inattentive.

CONCLUSION

The decision of the Department is affirmed.³

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

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

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