ISSUED SEPTEMBER 30, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JOSE L. PATINO dba La Copa De Oro 15310 Parthenia Street Sepulveda, California 91343 , Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6858 File: 40-211658 Reg: 96037588 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: July 8, 1998 Los Angeles, CA

Jose L. Patino, doing business as La Copa De Oro (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 45 days, with 15 days thereof stayed for a probationary period of one year, for having purchased cases of beer from a retailer not licensed for resale, and for having permitted a person to loiter on the premises for the purpose of soliciting drinks, being contrary to the universal and generic public welfare and morals

[1]The decision of the Department, dated April 3, 1997, is set forth in the appendix.

provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§23402 and 25657, subdivision (b).

Appearances on appeal include appellant Jose L. Patino, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on March 7, 1988. On September 27, 1996, the Department instituted an accusation against appellant charging, in separate counts, that appellant purchased beer from Smart and Final, a retailer which was not licensed for resale to other retailers, in violation of Business and Professions Code §23402, and permitted a female, Alma F. Altan,[2] to loiter on the premises for the purpose of soliciting drinks.

An administrative hearing was held on January 13, 1997, and February 25, 1997, at which time oral and documentary evidence was received. At that hearing, Department investigator Dan Shoham described the circumstances resulting in the seizure of receipts from appellant's business premises which showed the purchase of beer in case lots from Smart and Final, which, although a licensed retailer, was not licensed for resale to other retailers. In addition, Los Angeles police officer Thomas Penson testified concerning an incident of drink solicitation in appellant's premises by Altan. Appellant did not present any witnesses.

---

[2] This person is identified in the transcript alternately as Elma Felicia Alton and Alma Alton. All references are clearly to the same woman.

Subsequent to the hearing, the Department issued its decision which determined that appellant had committed both of the charged violations, and ordered the suspension which is now the subject of appeal.

Appellant has filed a timely notice of appeal, and raises two issues: (1) the receipts offered to prove the allegations of count 1 lacked foundation, since the Department failed to establish the requisite chain of custody; and (2) the findings with respect to count 2 are not supported by substantial evidence, since the only evidence offered was hearsay.

DISCUSSION

I

Appellant contends that the receipts purporting to show the beer purchases violative of Business and Professions Code §23402 lacked proper foundation, and should not have been admitted into evidence. Appellant asserts the Department failed to establish a chain of custody, and that the receipts do not match the alleged purchases. They are, therefore, hearsay, appellant contends, and do not constitute substantial evidence in support of the decision.

Investigator Shoham testified that he took possession of the receipts from appellant's manager after they were pointed out to him by Ira Anderson, a supervising auditor from the Board of Equalization who accompanied him on the investigation. After seeing that they indicated purchases of large quantities of beer, he selected receipts of recent date and asked the manager if the receipts were for supplies for use at the premises, and was told they were. Shoham took the receipts with him when he left the premises, and placed them in the district office

evidence locker. He did not obtain a receipt for the records. Photocopies of selected receipts were marked as Exhibit 1. Later in the hearing, the original copies of the selected receipts, in the form of cash register receipts, were marked as Exhibit 3, and identified by Shoham.

Appellant's chain of custody objection is actually a challenge to the authenticity of the receipts. Since the receipts are in the very same form they were when Shoham placed them in the evidence locker - his testimony indicates that is the case, and there is no evidence to the contrary - then a sufficient foundation has been established for their admissibility.

The receipts were seized at appellant's place of business. Appellant's manager admitted that the receipts in question represented the purchase of supplies for the business.

Even if someone other than Shoham had removed the receipts from the evidence locker and later returned them, the only real question is whether the receipts are in the same form as they were when Shoham first placed them there. That is, so long as there is no evidence of any alteration of their content, there is no reason to question their authenticity.

Appellant's chain of custody objection is very similar to one rejected by the court in People v. Barajas (1978) 81 Cal.App.3d 999, 1010-1011 [147 Cal.Rptr. 195]. In that case, the defendant had argued there was no way of ascertaining whether a tape recording, translated for the jury by an investigator from the district attorney's office, was the same tape recording made by a police officer, then

translated by another police officer and typed in English, and then placed in an evidence locker. In holding the objection without merit, the court said:

> "[The police officer's] identification of the tape cassette as the one he had used and [the investigator's] identification of the same cassette as the one from which he had prepared his transcript provided sufficient authentication. Any significant alteration of the tape could have been discovered by comparison of the ... translations, both of which were available to defendant. No claim of alteration was made until the appeal, making it mere speculation."

In the present case, the investigative report [Exhibit A] prepared approximately one and one-half months after the investigation listed the receipts by date. The receipts offered in evidence bore the same dates, and Shoham identified them as the receipts he had seized.

Appellant does not claim that the receipts were altered, nor does he claim they do not represent beer purchases. Instead, appellant merely challenges the variance between the number of cases of beer alleged in the accusation to have been purchased[3] and the number of cases of beer the receipts indicate were purchased.[4]

That the accusation did not list all of the purchases that might have been alleged is immaterial, and could be the result of a number of things. For example, when preparing the accusation, the Department may have intended to focus on

---

[3] Five cases each of "Miller Draft" and "Bud Lite" and twenty cases of "Corona".

[4] After a recess during which Department counsel and Shoham reviewed the receipts, Department counsel moved to amend the accusation to allege the purchase of more cases and brands of beer than the number of cases and brands listed in the accusation.

purchases on a specific date, or on specific receipts. At the hearing, Department counsel placed all the receipts in evidence. It is difficult to find any prejudice from the fact that the proof showed more purchases than the accusation alleged. Appellant was on notice that he was accused of having violated Business and Professions Code §23402 by purchasing from a retailer who lacked the proper license to sell to appellant. The difference in the number of cases purchased is of little, if any, significance.

II

Appellant contends that the only evidence offered in support of the solicitation charge is hearsay evidence, which is insufficient to support a finding.

Our task would have been easier had the decision of the Administrative Law Judge (ALJ) reflected the teachings of the decision of the California Supreme Court in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836], regarding the need for administrative agencies to explain how they arrive at their result:

> "Our ruling in this regard finds support in persuasive policy considerations ... the requirements that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law, and is 'remarkably uniform in both federal and state courts.' As stated by the United States Supreme Court, the accepted ideal ... is that the orderly function of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.
>
> "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis.

> "Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of actual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable." (Citations omitted).

The Administrative Law Judge (ALJ) did not set forth the evidence upon which he based his finding and determination that appellant knowingly permitted Elma Alton to loiter in the premises for the purpose of soliciting drinks, in violation of Business and Professions Code §25657, subdivision (b). Consequently, the Board must review the record to ascertain whether there is sufficient non-hearsay evidence upon which to base that aspect of the decision.

Officer Penson testified that Altan solicited him to buy her a drink, that she ordered and was served two beers from the bartender, that she pocketed some part of the change from a $20 bill while in front of the bartender, that he received $9.50 in change, and that he observed her clearing empty bottles from the tables and returning them to the bar. None of this testimony is hearsay.

Appellant does not contend that there was no solicitation. Appellant appears to focus his argument on the lack of any non-hearsay evidence of employment. While the testimony that Altan was performing tasks ordinarily performed by a witness might be some evidence of employment, the fact is that the ALJ did not find that appellant had employed Altan; instead, he found appellant had knowingly permitted Altan to loiter.

The fact that Altan pocketed part of the change from the $20 bill while located where the bartender could have seen her do it is some evidence of knowledge on the part of one of appellant's employees which is attributable to appellant.

Appellant's theory of defense, that Altan was, in essence, acting on her own, and simply "ripping off" part of Shoham's change, is speculative. Evidence that the bartender would have seen her pocketing money - the police officer testified that she pocketed the money while in front of the bartender - is more consistent with a retention of the proceeds from drink solicitation than with theft of a customer's change.

CONCLUSION

The decision of the Department is affirmed.[5]

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

---

[5]This 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.