

ISSUED OCTOBER 8, 1998

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

| | | |
|-------------------------|---|--------------------------|
| Virginia Valencia |) | AB-6965 |
| dba La Muneca |) | |
| 823 Guadalupe |) | File: 40-268163 |
| Guadalupe, CA 93434, |) | Reg: 97039426 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Rodolpho Echeverria |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | July 8, 1998 |
| |) | Los Angeles, CA |
| |) | |

Virginia Valencia, doing business as La Muneca (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked her license for allowing drink solicitation activity to occur on the premises, 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, subdivisions (a) and (b); 4 California Code of Regulations § 143 (Rule 143); and Penal Code § 303.

¹The decision of the Department, dated October 30, 1997, is set forth in the appendix.

Appearances on appeal include appellant Virginia Valencia, appearing through her counsel, Roger M. Hubbard, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on January 7, 1992. Thereafter, the Department instituted an accusation against appellant charging that she allowed drink solicitation activity to occur on the premises.

An administrative hearing was held on August 27, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Santa Barbara County Sheriff's detective Ruben Cintron and Guadalupe Police Department officer Helidoro Martinez, concerning their visits to the premises and the events that occurred there.

Cintron testified that he visited the premises in an undercover capacity on August 9, 1996, and while there a woman named Blanca Ofilia asked him to purchase beer for her, which he did, being charged \$5 for her beer but only \$2 or \$3 for his own beer or beer purchased for another male patron. Blanca Ofilia went behind the bar to get the beers and brought back change to Cintron. Appellant was behind the bar when Blanca Ofilia got the beers. Later, Cintron observed Blanca Ofilia crushing beer cans behind the counter.

On September 20, 1996, Cintron returned to the premises where a woman named Rosita asked him to buy her a beer. He gave money to Rosita and she went

to or behind the bar, got beers from the cooler, and returned change to Cintron. Appellant was behind the bar some of the times that Rosita went there to get beers. Cintron was charged \$5 for Rosita's beer and only \$3 for his own. Rosita told him that \$3 was for her and \$2 was for the register.

Officer Martinez also visited the premises in an undercover capacity on September 20, 1996, where a woman named Becky asked him to buy her a beer, which she told him would cost \$5. At the time, appellant was standing behind the bar, about four or five feet from Martinez, and Becky asked him to buy a beer for appellant, which he agreed to do. Becky took his money, went behind the bar, put the money in the cash register, took out some change, and got beer.

On September 27, 1996, Martinez returned to the premises, where Becky (aka Amelia) asked him to buy her a drink, which he agreed to do. Becky went to the cash register behind the bar and then returned with beer and change. Martinez also purchased beers for appellant that evening. Appellant was present when Becky asked Martinez to buy her a beer and appellant did nothing to stop Becky.

No witnesses testified on behalf of appellant and, when called as a witness by the Department, appellant, on the advice of her attorney, declined to answer any questions.

Subsequent to the hearing, the Department issued its decision which determined that appellant had employed or permitted Blanca Ofilia, Rosita, and Becky to solicit or encourage the officers to buy drinks for them in the premises

under a commission, percentage, salary, or other profit-sharing scheme in violation of Business and Professions Code § 24200.5, subdivision (b), as alleged in counts 1, 4, 6, and 11 of the accusation; that appellant employed Becky on the premises for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages in violation of Business and Professions Code §25657, subdivision (a), as alleged in counts 7 and 12 of the accusation; that appellant employed or knowingly permitted Blanca Ofilia and Becky to loiter in or about the premises for the purpose of begging or soliciting the officers to purchase alcoholic beverages for them, in violation of Business and Professions Code § 25657, subdivision (b), as alleged in counts 2 and 8 of the accusation; that appellant employed Blanca Ofilia and Becky for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages in violation of Penal Code § 303, as alleged in counts 3 and 10 of the accusation; that appellant permitted Rosita and Becky to solicit the purchase or sale of drinks intended for their consumption and/or permitted them to accept drinks which had been purchased or sold in the premises and intended for their consumption in violation of Rule 143, as alleged in counts 5 and 9 of the accusation; and that appellant herself solicited or encouraged Martinez to buy here a drink in the licensed premises under a commission, percentage, salary, or other profit-sharing scheme in violation of Business and Professions Code §24200.5, subdivision (b), as alleged in count 13 of the accusation. Counts 14 and 15 of the accusation, charging appellant herself with violations of Rule 143 and Penal Code

303, were found to be not established. Appellant's license was ordered revoked.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: 1) The Department's decision cannot be based on hearsay evidence, and 2) the Department did not establish all elements of the allegations in the accusation. These two contentions are related and will be discussed together.²

DISCUSSION

Appellant contends that the Department improperly based its decision on inadmissible hearsay evidence from the only witnesses, the police officers. If the inadmissible hearsay is eliminated from the record, appellant argues, there is no evidence establishing the elements of the violations charged.

Appellant is correct that hearsay cannot be the sole basis for an administrative agency's decision. (Gov. Code §11513, subd. (d).) If the evidence is not hearsay, however, it may be used as the basis for a decision. The Department contends that the testimony of the officers as to what the women said to them was not hearsay because the statements of the women were "verbal acts" or statements accompanying the women's conduct that explains the conduct. (See Witkin, California Evidence, Third Edition, §723 et seq.) The Department cites cases to the effect that, in crimes such as solicitation for prostitution, the

² The Department's brief includes a "Motion to Strike Statement of 'Facts'" which we do not discuss herein, since the facts referred to are not a part of the record and will not be considered by this Board.

statements made constitute the violation itself. If the thing to be proven here were the acts of solicitation, these cases would be relevant. However, appellant is arguing that the other elements of the violations are what have not been proven: employment of the women who solicited drinks, permitting the acts of solicitation, and the existence of a method of compensating the women through commissions or some profit-sharing scheme.

Employment is proven sufficiently by the conduct of the women that is consistent with what an employee would be permitted or required to do: going behind the bar to get beer, using the cash register, and, in the case of Blanca Ofilia, crushing cans behind the bar.

With regard to the compensation scheme, the officers observed the difference in price between their beers and those purchased for the women. The officers' testimony as to the women's explanation of the difference, even if hearsay, is "used for the purpose of supplementing or explaining other evidence," and so was properly admitted and relied on by the ALJ.

The fact that appellant was present on many of the occasions of solicitation or at the bar when the women got beer and used the cash register negates any argument that appellant did not know or did not permit the solicitation.

The ALJ determined that appellant herself "did solicit or encourage Officer Martinez to buy her a drink in the licensed premises under a commission, percentage, salary, or other profit-sharing scheme in violation of Section 24200.5

of the Business and Professions Code” (Det. of Issues XIII.) This determination was said to be based on Finding VI, which states:

“Martinez also purchased a total of four beers for [appellant]. [Appellant] personally asked Martinez if he would buy her the second beer. After agreeing to do so, Martinez gave Becky some money and she retrieved the beer for [appellant] and some change. Martinez left the premises at about midnight and before leaving, he made arrangements to meet [appellant] on September 27, 1996.”

Determination XIII must be reversed. There is nothing in Finding VI regarding appellant working under “a commission, percentage, salary, or other profit-sharing scheme.”

Even with reversal of determination XIII, which eliminates all the counts that involved appellant herself, there remain 12 solicitation counts proven. These counts are sufficient to sustain the penalty.

CONCLUSION

The decision of the Department is affirmed.³

RAY T. BLAIR, JR., CHAIRMAN
BEN DAVIDIAN, 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, before this final decision becomes effective, may 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.