

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

AVELINA BAUTISTA, EDELMO	)	AB-7180
BAUTISTA and RAMON BAUTISTA	)	
dba Los Dos Amigos	)	File: 42-247900
2222 East Anaheim Street	)	Reg: 97041897
Long Beach, CA 90804,	)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Rodolfo Echeverria
	)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	July 1, 1999
Respondent.	)	Los Angeles, CA
_____	)	

Avelina Bautista, Edelmo Bautista, and Ramon Bautista, doing business as Los Dos Amigos (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked their on-sale beer and wine public premises license for having employed two females under a commission, percentage, salary or other profit-sharing scheme, and for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, and permitting said females to loiter in the premises for the purpose of soliciting the purchase of alcoholic beverages, 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; 25657, subdivisions (a) and (b); and Penal Code §303.

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<sup>1</sup>The decision of the Department, dated July 9, 1998, is set forth in the appendix.

Appearances on appeal include appellants Avelina Bautista, Edelmo Bautista, and Ramon Bautista, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan and John W. Lewis.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on June 27, 1990. Thereafter, the Department instituted an accusation against appellant charging violations of provisions of the Business and Professions and Penal Codes involving the solicitation of alcoholic beverages

An administrative hearing was held on March 30, 1998. Following the conclusion of that hearing the Administrative Law Judge (ALJ) issued a proposed decision, which the Department adopted, finding the charges of the accusation to have been proven, and ordering appellants' license revoked.

Appellants thereafter filed a timely notice of appeal, and now make the following contentions: (1) no evidence was introduced which conclusively proved that respondents employed or knowingly permitted anyone to solicit a drink; (2) no evidence was offered to show that either of the two females was an employee; (3) no evidence was offered to show that Marina Lopez (appellants' bartender) employed or permitted either of the two females to solicit alcoholic beverages; and (4) the Department failed to prove the essential elements of employment or permission. Since these contentions all are, ultimately, fact-based, dispute the existence of any employment or permission, and require a review of the evidence, they will be discussed together.

#### DISCUSSION

Appellants challenge the Department's order of revocation by arguing that there is no evidence which proves appellants or their agent, Marina Lopez, employed or permitted anyone to loiter for the purpose of soliciting the purchase of alcoholic beverages. In other words, appellants deny there was what is known in the trade as B-girl activity.<sup>2</sup>

Appellants' attack is directed at the testimony of Department investigator Guillermo Arias, which they claim is insufficient to support the charges of employment and permission to loiter for the purpose of solicitation.

We have reviewed Arias's testimony in some detail. He testified that after he and a fellow investigator were seated at a table and had ordered two beers, for which he paid \$3.50 each, they were approached by two females, later identified as Lorena Lopez ("Lorena") and Anna Gonzalez ("Anna"), who had been sitting at a nearby table. Neither had been consuming alcoholic beverages or food when Arias observed them. Lorena, after telling Arias she had been employed at the premises for one year, asked if the officers would buy her and her companion a beer, which the officers did. The beers were served to them by Marina Lopez ("Marina"), appellants' bartender. The officers were charged \$20 for the two beers ordered by the women, and only \$7 for the two beers they also ordered for themselves. As she served the beers, Marina handed each of the women a roll of money which she had been holding in her hand. When the women had finished their beers, Anna signaled to Marina, who came over and stood behind Arias, about three feet from Lorena. At that point, Lorena asked Arias if he

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<sup>2</sup> *Appellants argue the Department failed to prove "conclusively" the elements of employment or permission to solicit. This overstates the Department's burden of proof, which is by a mere preponderance of evidence. (See Amin N. Haddad (1994) AB-6373, and cases cited therein.)*

would buy her another beer, and Anna asked the other investigator the same. Again the investigators were charged \$20 for the two beers for the women, and again Marina handed each woman a roll of money. When Arias asked Lorena why the beer was so expensive, she told him it was because she got six dollars for every \$10 beer. Arias further testified that his partner asked Anna the same question and got the same answer.

Although parts of Arias's testimony were clearly hearsay, there were no objections. Such testimony, if otherwise sufficient, can then support a finding. However, even if it were otherwise, the participation of appellant's bartender in the scheme, evidenced by her cash payments to the women for the beers they solicited, is enough to establish the essential elements of unlawful solicitation. Further, the payment of a commission, the evidence of which has not been questioned, is in itself enough to support an inference of employment.

Appellants are responsible for the acts of their employees. (See Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 (301 P.2d 474, 478) ("The licensee, if he elects to operate his business through employees, must be responsible to the licensing authority for their conduct in the exercise of his license.") Since there is no question but that Marina was employed as a bartender/waitress, and was clearly implicated in the commission scheme, it is irrelevant that none of the licensees was present at the time of the incident.<sup>3</sup>

## II

We close this decision with comments which do not bear on the merits of this

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<sup>3</sup> Appellants' brief mistakenly identifies Marina as appellants' manager, and refers to testimony purportedly given by her. Marina did not testify. Appellants' manager, Cristelo Prieto, the manager, was present on the night in question, but also did not testify. Only Edelmo Bautista testified. He gave a hearsay report of what he had been told by Prieto about what had occurred, and denied ever employing anyone for the purposes of solicitation.

case, but which we feel must be made and communicated to the attorneys and representatives who appear before this Appeals Board. In this and several other cases which were heard by this Board at its July meeting, appellants' opening briefs were filed more than a month after the date they were due. This resulted in the inability of the Department to file timely its reply briefs, as well as any closing brief those appellants may have hoped to file. Such delinquent filing not only manifests disrespect for the briefing schedules set by this Board, it puts an added burden on the Board and its staff, who must review the records and transcripts without the aid of the parties' counsel or representatives.

#### ORDER

The decision of the Department is affirmed.<sup>4</sup>

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

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<sup>4</sup> *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 order as provided by §23090.7 of said code.*

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