

ISSUED MARCH 22, 2000

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

ANGEL LUIS AQUINO, SONIA	)	AB-7369
MARGARITA AQUINO, BAUDELIO)	
ZAMBRANO, and JOSEFINA	)	File: 42-336697
ZAMBRANO	)	Reg: 98044247
dba Alexander's Nightclub)	
606-608 West Sepulveda Boulevard	)	Administrative Law Judge
Carson, CA 90745,	)	at the Dept. Hearing:
Appellants/Licensees,	)	Ronald M. Gruen
)	
v.	)	Date and Place of the
	)	Appeals Board Hearing:
DEPARTMENT OF ALCOHOLIC	)	January 20, 2000
BEVERAGE CONTROL,	)	Los Angeles, CA
Respondent.)	
)	

Angel Luis Aquino, Sonia Margarita Aquino, Baudelio Zambrano, and Josefina Zambrano, doing business as Alexander's Nightclub (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which conditionally revoked their on-sale beer and wine public premises license with revocation stayed for a probationary period of three years on condition that a 20-day suspension be served, for permitting the solicitation of an alcoholic beverage and the payment of a commission to the woman soliciting, being contrary to the universal and generic

¹The decision of the Department, dated March 11, 1999, is set forth in the appendix.

public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions code §24200, subdivisions (a) and (b), arising from a violation of Business and Professions Code § §24200.5, subdivision (b), and 25657, subdivisions (a) and (b); and Penal Code §303.

Appearances on appeal include appellants Angel Luis Aquino, Sonia Margarita Aquino, Baudelio Zambrano, and Josefina Zambrano, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on January 21, 1998. Thereafter, the Department instituted an accusation against appellants charging the referenced violations. An administrative hearing was held on January 14, 1999, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that counts 1-3, and 6 were true.² Appellants thereafter filed a timely

²Count 1, charging a violation of Business and Professions Code §24200.5, subdivision (b), which states in pertinent part: "... the department shall revoke a license ... [¶] If the licensee has ... permitted any persons to solicit ... others ... to buy them drinks ... under any commission, percentage ... or other profit-sharing plan, scheme, or conspiracy."

Counts 2 and 3, charged a violation of §25657, subdivision (a) and (b), which states in pertinent part: "It is unlawful [sub. (a)] For any person ... [to solicit an alcoholic beverage] or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring ... the purchase ...;" and [sub. (b)] "... to knowingly permit anyone to loiter ... for the purpose of ... soliciting any patron ... to purchase any alcoholic beverages for the one ... soliciting."

Count 6 charged a violation of Penal Code §303, which states in pertinent part: "It shall be unlawful for any person ... to pay any person a percentage or commission on the sale of such [alcoholic beverages] for procuring such ... sale."

notice of appeal.

In their appeal, appellants raise the issue that the soliciting woman's statements were hearsay, thus the findings of payment and permission are made without substantial evidence.

DISCUSSION

The record shows that Department investigator Rene Guzman (investigator) entered the premises with two other peace officers. The investigator went to the fixed bar counter and ordered and was served a beer by the bartender for a cost of \$4. Later, the investigator and his companions sat at a table away from the bar counter. A woman named Marisol Guzman (Marisol), was introduced to the investigator, sat with him, and solicited a beer [RT 28-31, 48].

The investigator and Marisol went to the fixed bar, and Marisol ordered a beer from the bartender, which was delivered to Marisol. The investigator asked the bartender for the price of the beer and was told \$10, which was paid by the investigator. The bartender in her testimony denied saying the cost of the beer was \$10 [RT 70]. The bartender placed some change, in folded bills, on the bar counter in front of Marisol.³ The investigator was standing beside Marisol when the change was so placed. Marisol took the change [RT 31-34, 61-64, 71, 74, 86]. The bartender testified that it was her practice to place any change on the bar counter [RT 71, 74].

Subsequently, after backup officers arrived, the investigator asked Marisol

³On direct testimony the investigator stated that the bartender "... went over to where Marisol Guzman and [the investigator] were and handed Marisol Guzman the folded currency." On cross-examination, the investigator changed the testimony to that shown above.

concerning the change. She told the investigator that the \$6 was for her [RT 37, 44]. Thereafter there were hearsay objections to that testimony concerning the \$6 [RT 37-43]. The objections as to hearsay were overruled.

Appellants contend the statements of Marisol were hearsay. In this appellant is correct.

“(a) ‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (¶) (b) Except as provided by law, hearsay evidence is inadmissible” (Evidence Code §1200.)

However, in administrative practice, hearsay evidence may be admitted if it supplements or explains other competent evidence, but may not in itself support a finding in the decision. (Government Code §11513, subdivision (d).)

Appellants raise what they term as the “core issues” of the matter: (1) “Did substantial evidence show that the Licensees, through their bartender, Susana Cortezano, permitted Marisol Guzman to solicit alcoholic beverages ...” (2) “or paid Marisol Guzman a percentage, commission or salary to solicit or encourage Investigator Rene Guzman to buy her a drink in the premises ...” and (3) “Was the testimony by Investigator Guzman that Marisol Guzman said she received \$6.00 for each beer inadmissible hearsay under Government Code Section 11513?”

While the evidence is clear that Marisol solicited the beer from the investigator, such was done out of the presence of any known employee of appellants. The testimony of the investigator alone could not connect the solicitation with appellants. The beer was ordered by Marisol from the bartender

with the investigator standing next to Marisol, making such an apparent legitimate purchase.

However, with the testimony of the investigator that when he and his associates purchased their beers, being 12-ounce Miller Lite beers, for the price of \$4 each [RT 29], the charge of \$10 for Marisol's 12-ounce Miller Lite beer strongly suggests a scheme between Marisol and the bartender. Adding the fact that the bartender placed the change, in folded currency, in front of Marisol instead of the investigator who paid for the beer, tends to support the finding of a scheme and commission for the sale.

A licensee is vicariously responsible for the unlawful on-premises acts of his employees, herein, the bartender's part in the scheme. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

Addressing the question of appellants whether the statement of Marisol as to receiving \$6 is hearsay, the statement is hearsay, but it tends to explain why the bartender placed the dollars in front of Marisol instead of the investigator who paid for the beer. The Administrative Law Judge chose to believe the testimony of the investigator rather than the bartender.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (a case where the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
 RAY T. BLAIR, JR., MEMBER
 E. LYNN BROWN, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

⁴This 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.