

ISSUED APRIL 17, 2001

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

PHUONG THI LIEN TRINH	)	AB-7517
dba 8's Pizza & Soups Restaurant	)	
4126 Monterey Road	)	File: 41-322526
San Jose, CA 95111,	)	Reg: 99045936
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Lee Tyler
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 15, 2001
	)	San Francisco, CA

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Phuong Thi Lien Trinh, doing business as 8's Pizza & Soup Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked her on-sale beer and wine public eating place license for having permitted numerous acts of drink solicitation, 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),

Appearances on appeal include appellant Phuong Thi Lien Trinh, appearing

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<sup>1</sup>The decision of the Department, dated September 16, 1999, is set forth in the appendix.

through her counsel, Morris Kemper, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on January 29, 1997. Thereafter, the Department instituted a 51-count accusation against appellant charging that, on three separate dates in June 1998, appellant employed persons under a commission, percentage, salary, or other profit-sharing scheme or conspiracy to solicit or encourage the purchase of drinks, in violation of Business and Professions Code §24200.5, subdivision (b) (counts 1, 6, 11, 16, 21, 26, 31, 36, 41, and 46); that she employed persons for the purpose of procuring or encouraging the purchase of drinks, in violation of Business and Professions Code §25657, subdivision (a) (counts 2, 7, 12, 17, 22, 27, 32, 37, 42, and 47); that she employed or knowingly permitted persons to loiter in the premises for the purpose of begging or soliciting patrons for drinks, in violation of Business and Professions Code §25657, subdivision (b) (counts 3, 8, 13, 18, 23, 28, 33, 38, 43, and 48 ); that she permitted employees to solicit the purchase by patrons of drinks for consumption by those employees, in violation of Rule 143 of Chapter 1, Title 4, California Code of Regulations (counts 4, 9, 14, 19, 24, 29, 34, 39, 44, and 49); that employees accepted drinks purchased by patrons and intended for consumption by those employees, in violation of Rule 143 of Chapter 1, Title 4, California Code of Regulations (counts 5, 10, 15, 20, 25, 30, 35, 40, 45, and 50); and that she permitted the premises to be used as a place where an act of prostitution was solicited, in violation of Penal Code §647, subdivision (b) (count 51).

An administrative hearing was conducted on May 25 and July 27, 1999. At that hearing, San Jose police officers Pedro Urrutia and Joseph Stewart testified that they and a fellow officer were solicited for drinks by a total of seven different women during visits by the officers to the premises on June 4, 11, and 18, 1998. Officer Urrutia also testified that one of the women solicited him for an act of prostitution. In addition Urrutia identified certain documents seized at the premises as records of payment to the women in the bar for drinks they solicited.

Appellant testified on her behalf, and disclaimed any knowledge of any of the women involved. Appellant stated that she had temporarily rented the premises to a woman named Nga Le while appellant traveled to Viet Nam, and had advised Le of regulations governing the sale by her of food and beer. She also testified that Le did not retain any of the people working at the restaurant at the time appellant went to Viet Nam.

Following the conclusion of the hearing, the Administrative Law Judge entered his proposed decision, which the Department adopted, in which he found appellant legally responsible for having permitted the solicitation conduct, and ordered her license revoked.<sup>2</sup>

Appellant has filed a timely notice of appeal, and now raises the following issues: (1) the conduct took place while appellant was in Viet Nam on business,

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<sup>2</sup> The counts charging violations of Business and Professions Code §§24200.5, subdivision (b), and 25657, subdivisions (a) and (b), were sustained. The counts charging violations of Rule 143 were determined not to have been established, since none of the women who solicited drinks were employees of appellant. Additionally, count 51 was determined not to have been established, because there was no proof appellant knew or should have known an act of prostitution would be solicited.

and she lacks knowledge of what occurred in her absence; (2) no evidence was presented that appellant employed women to solicit drinks; (3) appellant was not represented by counsel at the hearing, and did not understand that her license could be revoked; (4) the finding that the women in question were paid commissions for drinks is not supported by the evidence; and (5) the acts did not take place as described by the undercover officers.

Appellant has not filed a brief. Our determination that these are issues presented by appellant is based upon our review of the notice of appeal filed, in letter form, on appellant's behalf. The letter acknowledges appellant's responsibility, as license holder, for what occurred, but offers no analysis of the issues, beyond merely asserting them, and appears to be an appeal to the Board to set aside the order of revocation and replace it with some lesser sanction.

As the discussion which follows will indicate, we are of the view that none of appellant's contentions has any merit.

## DISCUSSION

### I

Appellant contends that she is not responsible for any of the conduct which took place on the premises, since she had leased the premises to a third-party while she traveled to Viet Nam for business reasons.

Appellant, who represented herself at the hearing, not only offered her absence as a reason for non-responsibility, she used her purported ignorance of what took place as a reason for declining to cross-examine any of the Department's witnesses.

Consequently, the extensive evidence offered by the two police officers of

multiple incidents of solicitation and payment of commissions is essentially undisputed.

Since appellant, as licensee, is responsible for conduct occurring on the licensed premises, the fact that she was in Viet Nam at the time of the solicitation conduct does not exonerate her from responsibility.

## II

Appellant disclaims responsibility for the conduct of the women who solicited drinks on the ground they were not her employees.

The fact that the women were not employees of appellant is not a defense. As stated in the Department's decision, appellant, as licensee, remained responsible for conduct occurring on the premises.

Appellant's attempt to transfer responsibility for the operation of the premises to a third party, by way of a written lease, cannot be allowed to work a change in the general rule that a licensee is responsible for conduct occurring on the premises. To permit such an escape hatch would open the door to wide-spread violations of the ABC Act, and frustrate the Department's ability to protect the public welfare and morals.

## III

Appellant's appeal letter asserts that, because she was not represented by counsel, she did not understand the serious nature of the proceedings and the fact that revocation of her license was probable.

The notice of hearing advised appellant that she was entitled to be represented by counsel, but at her own expense.

At the initial hearing of this matter, appellant appeared without counsel, but

was accompanied by a friend who was to act as a translator for appellant.

However, when the friend expressed doubt that she could do so adequately, the ALJ, over the Department's opposition, elected to continue the hearing so that an approved interpreter could be obtained.

When the hearing resumed, appellant still had not retained counsel, stating that she intended to represent herself. From the outset of the hearing, appellant's position was that she was in Viet Nam when the conduct occurred, so knew nothing about it [RT 5-6]:

"Because, you know, a lot of work there. I cannot handle the work, so I can rent the store out to somebody else. ... Because – and then during that time, I was back in Viet Nam. I was not aware of anything that was going on there."

At no time did appellant offer any explanation as to her decision to proceed without counsel.

Since appellant was on notice of her right to retain counsel, it can only be assumed that her decision to appear at the hearing without counsel was a knowing waiver of that right.

#### IV

Appellant contends there is no evidence of payment of commissions.

Officer Urrutia testified [RT 32-33], based upon his training and experience, that Exhibit 4, a document containing the names of some of the seven women together with markings which form boxes, numbers representing certain tables, and the notations "Paid," represented evidence of the payment of commissions for drinks which had been solicited.

No contrary evidence was presented.

V

Finally, appellant stated in her letter that she intended to present evidence that the acts did not occur as described by the police officers.

Appellant seems not to understand that the Appeals Board hearing is not for the purpose of presenting evidence to the Board which might have been presented at the administrative hearing.

Except for newly discovered evidence, the Appeals Board's review is confined to the record of the administrative hearing. The hearing is not "de novo," that is, the Board reviews questions of law, and may not retry factual issues.

#### ORDER

The decision of the Department is affirmed.<sup>3</sup>

TED HUNT, CHAIRMAN  
E. LYNN BROWN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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

Any party may, before this final decision becomes effective, apply to the appropriate district 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.