

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

MARIA E. and VICTOR ROSAS dba The Nugget
15448 Amar Road, La Puente, CA 91744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7532

File: 40-304050 Reg: 99046826

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: October 5, 2000
Los Angeles, CA

ISSUED NOVEMBER 20, 2000

Maria E. and Victor Rosas, doing business as The Nugget (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for drink solicitation violations, 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); Penal Code §303; and 4 California Code of Regulations, §143 (Rule 143).

Appearances on appeal include appellants Maria E. and Victor Rosas, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated November 10, 1999, is set forth in the appendix.

Appellants' on-sale beer license was issued on April 28, 1995. Thereafter, the Department instituted a six-count accusation against appellants charging that on April 30, 1999, they permitted various bar-girl (drink solicitation) violations, as noted above.

An administrative hearing was held on September 30, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by two Department investigators, Joe Chavez and Anthony Pacheco; two Los Angeles County Sheriff's deputies, Carlos Parga and Alex Canchola; appellant's bartender, Elisa Lopez; and appellant Victor Rosas.

On April 30, 1999, Parga and his partner, deputy Madrid, were conducting an undercover investigation at the premises looking for B-girl or narcotics activity [RT 55]. While they were sitting at the bar fixture, a woman, later identified as Wendy Martinez, approached them and asked Parga if he would buy her a drink. When he agreed, she told him that the beer would be expensive, but he said that was okay and she ordered a beer for herself and for Parga. The bartender (later identified as Elisa Lopez) brought two beers and took money from the cash that Parga had lying on the counter in front of him. She then gave a \$5 bill directly to Martinez. [RT 59-61.] After her initial drink was purchased in that manner, Martinez, without asking Parga, would simply order more beer, which Parga would pay for. Each time Martinez ordered a beer, Lopez would give her another \$5 bill, which Martinez would place in a small purse she had. This continued for about an hour, in which time Parga paid for five beers for Martinez. [RT 62-64.] At one point in their conversation, Martinez told Parga that she made her living "by working there getting – buying beers at expensive prices" [RT 65]. After about an

hour, officers, who had been alerted by the undercover deputies, entered the premises and detained everyone there [RT 68].

Department investigators were assisting the Los Angeles County Sheriff's Drug Task Force in their investigation at the premises that night [RT 6]. After Parga and Madrid were already in the premises, Department investigator Chavez entered, saw the two deputies playing pool, and seated himself at the south end of the bar [RT 8-9]. Shortly thereafter, he saw the deputies seat themselves at the north end of the bar, about 25 feet away [RT 10, 30]. At some point after that he saw Martinez enter, place her purse on top of a cooler behind the bar, and then walk toward the front to talk to a man. After conversing with the man, she approached Chavez and talked to him for a while, then walked to where the two deputies were seated and began talking to them, eventually sitting down in between them. Chavez saw the three of them, the two deputies and Martinez, drinking and talking there for the next hour or so, until the back-up officers came in. [RT 11-18.] At some point during that time, Parga met Chavez in the restroom and told him of the solicitation by Martinez [RT 45].

When the backup officers came in, Department investigator Pacheco went to Chavez, who indicated Martinez as the suspected B-girl. Chavez left the premises, still undercover, when patrons were allowed to leave. Martinez started walking toward the rear exit when the officers came in, but she was detained before she could leave [RT 18-20] and Pacheco placed her under arrest [RT 117]. She told him her name, but said she had no identification, so Pacheco had her get her purse from the top of the cooler behind the bar and one of the female deputies present searched the purse in Pacheco's presence. Inside it was a smaller purse containing six \$5 bills. [RT 118-121.]

Deputy Canchola, who was the lead investigator for the investigation at the premises, entered with the backup officers. He spoke to Parga to confirm who should be detained while he patted him down as if he were a possible suspect so that Parga's identity would not be revealed. Parga and Madrid, still undercover, were allowed to leave with the other patrons who were released. Canchola spoke to Parga again about 15 minutes later outside the premises. [RT 221-226.] At the Sheriff's Station, about an hour and a half after officers had first entered the premises, Canchola interviewed Parga and Madrid to get details of the violations they had observed so that Canchola could write a report of the investigation [RT 226]. Immediately prior to Parga and Madrid leaving the station at the end of their shift, around 2 a.m., Canchola saw the incident supervisor, Sergeant Leach, contact them to confirm that they were sober before driving home. This type of contact was routine when officers had been drinking in the line of duty. [RT 228.]

Subsequent to the hearing, the Department issued its decision which determined that all six counts of the accusation had been proved.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) it was an abuse of discretion for the Administrative Law Judge (ALJ) to rely on the testimony of an officer who was admittedly under the influence of alcohol during the investigation, and (2) it was an abuse of discretion for the ALJ to deny appellants' motion for continuance.

DISCUSSION

I

Appellants contend that the only proof of the violations was the testimony of deputy Parga, which was wholly unreliable because he was under the influence of alcohol during the investigation.

Parga admitted he was “under the influence” of alcohol during the investigation, but the meaning of “under the influence” was never defined by anyone. Parga was drinking Corona beer during the one to two hours that he was in the premises, and he testified that he was served six or seven bottles of beer during that time, five or six of them apparently when he was drinking with Martinez [RT 83, 109]. When Parga was asked if he thought he would have passed a field sobriety test at the time of the investigation, he answered “I don’t know” [RT 106]. (He gave the same response when asked if he thought he would have passed a field sobriety test that night if he had consumed no beer [RT 107].) Parga stated that since he had been drinking, he was sure he exhibited some objective symptoms of intoxication that night, but when asked if he was unsteady on his feet or felt that his judgment was impaired, he answered “No” [RT 105]. Several other times over the course of his testimony, Parga reiterated his belief that the beer he consumed had not impaired his memory of the events or his ability to testify regarding them [see RT 84, 103, 111].

Department investigator Chavez testified that he observed Parga at various times while in the premises, and although he saw Parga drinking, he did not see him display any signs of intoxication [RT 156-157]. When Chavez momentarily observed Parga later, apparently at the sheriff’s station, he did not see Parga display anything indicating any degree of intoxication [RT 158-159].

Deputy Canchola observed and spoke to Parga in the premises when the backup officers entered the premises, about 15 minutes later outside the premises, an hour to an hour and a half later at the station, and immediately before Parga left the station to go home. At none of these times did Canchola see any indication that Parga was intoxicated or in any way impaired by his consumption of alcohol. [RT 225-228, 233, 237, 240.]

Appellant's bartender, Elisa Lopez, testified that she could tell Parga was drunk because she observed that he walked unsteadily, sang out loud, stepped on his partner while dancing, and had red eyes [RT 178-181]. She also testified that Parga spoke loudly, was difficult to understand, had trouble sitting down correctly on the bar stool, and tried to get her to stay and drink when she was leaving to go home [185-187]. Lopez stated that after serving Parga and his companions about five rounds of beer, she determined that they were intoxicated. She served them more when they insisted, but she told the bartender on duty after her not to serve them. [RT 182, 196.]

In Finding 14, the ALJ addressed appellant's contention that Parga's consumption of beer made him an unreliable witness:

"The [appellants] argue that the testimony of Deputy Parga, the key witness in the matter, had been compromised by the fact that Parga had consumed at least seven bottles of beer during the two hours plus undercover operation and was obviously intoxicated.

"Deputy Parga did admit that he was under the influence, however, his testimony and testimony of his supervising deputy and Investigator Chavez, demonstrated that his ability to observe and recollect during the operation was not significantly impaired by his drinking. However, to avoid even the appearance of impropriety, peace officers should use greater restraint in the consumption of alcoholic beverages during such operations."

The ALJ was aware that credibility was a crucial issue in this matter, first with regard to whether or not Parga's testimony was reliable in light of his beer consumption, and secondly with regard to establishing the circumstances of the violation. He addressed this problem early on in the decision, in Finding 4:

"At the hearing in the matter, the evidence was hotly contested with sharply conflicting testimony from the ABC investigators and deputy sheriffs from the Los Angeles Sheriffs' Office on the one hand, and co-[appellant], Victor Rosas, and his employees on the other. After a careful review of the evidence, taking into account among other things, the internal consistency of the testimony of the witnesses and their credibility and bias, and evidence of ability to observe and recollect, the following facts are found to have been established."

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]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

The ALJ found the investigators and deputies more credible than appellant and his bartender, both as to Parga's reliability and the circumstances of the violation. While a different conclusion is certainly possible, this Board does not believe the ALJ's credibility determination was unreasonable. First, Parga testified that he did not consume all of every beer ordered for him [RT 104], so to say he drank seven beers may well overstate the amount he actually consumed. Secondly, as the ALJ pointed out at the hearing [RT 101-102], the effect of a given number of beers can vary from individual to individual and from time to time, depending on a number of circumstances.

However, our conclusion is based primarily on the fact that the only actual act of solicitation occurred *before* Parga began drinking with Martinez. At that point it appears that he had consumed only one beer. Regardless of any degree of impairment

thereafter, there is nothing to suggest that he was in any way impaired when the solicitation occurred or that he was untruthful about it. Therefore, we reject appellant's contention that Parga was too drunk to testify reliably about the act of solicitation.

Nevertheless, we do find that two of the counts in the accusation must be reversed. Counts 5 and 6 allege violations of Rule 143, which requires that the licensee permit an *employee* to solicit or accept a drink. The ALJ did not explain why he concluded that Rule 143 was violated, but a review of the hearing transcript and the decision reveal only two possible pieces of evidence that might tend to show that Martinez (the solicitor) was appellants' employee. One is Parga's testimony that the person who approached him was an employee. He based his conclusion that she was an employee on her statement to him "that she earned her money by working there" [RT 59]. The other is the testimony of Chavez [RT 12] and Pacheco [RT 119, 141] that Martinez put her purse on top of a cooler behind the fixed bar.

Martinez could earn her money by working in the premises without being an employee. The kind of statement purportedly made by Martinez is often admitted in solicitation cases as administrative hearsay to explain other evidence such as waiting on customers and cleaning tables; in such circumstances, the statement may indeed indicate an employment relationship between a solicitor and a licensee. Here however, Martinez did not take customers' orders, pour or deliver drinks to customers, clean off tables, stock shelves or coolers, or ring up sales. The only thing she did was to put her purse on top of a cooler behind the counter. This indicates no more than Martinez' familiarity with the bartender and the bartender's acquiescence in Martinez' placement of her purse on the cooler. There was no evidence that employees put their purses or

personal belongings on top of the cooler; the only evidence presented in this regard was that of Victor Rosas, who said that employees put their purses under the counter [RT 206, 213-214].

The purse on the cooler does not indicate that Martinez was employed at the premises. It only shows, as Department counsel said in closing argument, “she was going to be there for a while” [RT 243]. Similarly, the statement about earning her money there, even if admissible to explain the placement of the purse, does not show employment.

II

Appellants contend the ALJ abused his discretion in denying their counsel’s motion to continue the case to allow expert testimony regarding the effects on Parga of consuming seven beers during the investigation.

Appellants contend that their counsel made the motion twice, once during the evidentiary portion of the hearing and again during closing argument. They argue that the ALJ himself said that appellants needed expert testimony to support their argument

regarding the effect of alcohol on Parga [RT 102],² but then denied their motion for continuance to do just that.

A review of the hearing transcript shows that the motion was made just once, at the very end of closing argument by appellant's counsel. During the evidentiary portion of the hearing, counsel merely said he was *going to* make a motion at some unspecified time. The ALJ did not make any ruling at that time because there was no motion made, and he made it clear that he was not making a ruling. [RT 102-103.]³ Appellants'

² This arose when the Department questioned Parga regarding his opinion of the effect of the beers on his testimony or recollection. Appellant's counsel objected because the question called for the witness to speculate and no expert was there to explain "the effects of the consumption of seven beers":

"THE COURT: Well, you know, I can – I can take official notice that different people act differently based on consumption of alcoholic beverages. And I would assume I have heard enough evidence – expert testimony. I would assume that if an expert were called upon to testify, he would say based upon a number of variables. They don't have a hard-fast rule as to whether seven beers in an hour would affect all people the same way. ¶ So I mean, if you get down to something like that, you are certainly going on have to ask him [sic] expert testimony to support argument; otherwise, it's speculation."

³ "MR. CHAVIRA: And I think that there is a real issue in this case now when an individual testifies, "I have" – "I had seven beers," that there is a real issue about the reliability of that person's testimony. In this case the department's asking for revocation.

"THE COURT: Well, wait. The point is if it is a real issue, it's relevant. And if it's relevant, the objection is overruled because he is certainly allowed to delve into that issue. ¶ It's a fair issue. You are right. And, certainly any questions relating to that issue is [sic] relevant. So I can't sustain your objection, Counsel.

"MR. CHAVIRA: Then, your Honor, I would let you know I am going to move to continue to bring in an expert on that issue because that expertise is now relevant in this case.

"THE COURT: Okay. I don't know. Let – I am not – I don't have to cross that bridge at this time. ¶ The objection is overruled, Counsel."

counsel did not ask for a ruling or press the matter in any way, indicating that he himself did not believe he had made a motion.

At the end of his closing argument, counsel for appellants moved for a continuance and the ALJ denied the motion, as follows [RT 256-257]:

“[MR. CHAVIRA:] If there is an issue, Judge – because I don’t want to leave this out of the record – I want to make a motion to continue the case to have the ability to produce expert evidence on the issue of the effects of that type of consumption of beer over the period of the investigation and the likely level of impairment inherent in that type of drinking. It’s a critical issue in the [appellants’] case. And if the Court is satisfied that it has the information, that’s fine. But I feel compelled to make that motion.

“THE COURT: Without reaching the merits of the motion, you failed to make the motion in a timely matter [manner?]; therefore, it’s denied.

“MR. CHAVIRA: The motion, I think, your Honor, was made previously, and I think that –

“THE COURT: No. I think we hadn’t crossed that bridge yet, Counsel. You were suggesting you might have to. I believe you said I don’t have to consider the motion at this time. So I am not going to hear it because it wasn’t a time right for you to make a motion, if I recall, during the testimony of, I think, Deputy Parga, and so we left it at that. ¶ I am – at the conclusion of your case when I asked you if you had any further evidence there was no motion to hold the record open. You said you rested. So as far as I am concerned, the evidentiary part of the hearing is concluded. I did indicate that. So the motion is denied.”

Pursuant to Government Code §11524, an ALJ may grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause, and sought to prevent, the condition or event establishing the good cause. A party has no absolute right to a continuance; they are granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal

unless it is shown to be an abuse of discretion. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

It does not appear to this Board that the ALJ abused his discretion here. Counsel for appellants apparently knew that the sobriety of Parga would be an issue, since his witness testified that Parga was drunk. He could have had an expert ready to testify if needed at the scheduled hearing. Making the situation more egregious, counsel waited to move for a continuance until the case was about to be submitted. The abuse here was on the part of appellants' counsel.

ORDER

The decision of the Department is reversed with respect to counts 5 and 6 only, and affirmed in all other respects.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.