

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

AB-7605

File: 42-337220 Reg: 99047362

ARNULFO MARTINEZ and ROSALVA MARTINEZ dba Club Mi Ranchito
8863 Woodman Avenue, Arleta, CA 91331,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 5, 2001
Los Angeles, CA

ISSUED JUNE 20, 2001

Arnulfo Martinez and Rosalva Martinez, doing business as Club Mi Ranchito (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for permitting solicitation and loitering within the premises, and a sale to a patron exhibiting obvious signs of intoxication, 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) (solicitation under a commission, etc.); 25657, subdivisions (a) and (b) (loitering to solicit); and 25602, subdivision (a) (obvious intoxication).

Appearances on appeal include appellants Arnulfo Martinez and Rosalva Martinez, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren

¹The decision of the Department, dated February 17, 2000, is set forth in the appendix.

Solomon, and Joseph Budesky, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on January 26, 1998. Thereafter, the Department instituted an accusation against appellants charging the permitting of solicitation of patrons to purchase alcoholic beverages and drinks for employees and for the employees' own consumption, and loitering by employees for the purpose of soliciting of drinks and alcoholic beverages.

The accusation sets forth the history that appellants suffered the same violations as in the present matter by way of accusation filed on November 23, 1998 which by way of sanction, the license was revoked but execution stayed for a probationary period of three years. The alleged violations in the present matter occurred within the stayed period of the prior accusation's penalty.

The present accusation alleges ten counts: two counts concerning solicitation by a bartender (counts 1 and 2); two counts each for three females soliciting drinks (counts 3, 4, 6, 7, 8, and 9); and one count concerning the facts of the above cited solicitations as a violation of conditions on the license prohibiting solicitations (count 10). As the condition violations are essentially a restatement of the other counts, this redundancy was noted by the Department and the issue was suspended with no penalty affixed. Count 5 concerns service of an alcoholic beverage to a patron exhibiting obvious signs of intoxication.

An administrative hearing was held on January 14, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department

issued its decision which suspended the license for 30 days for the sale and service to a patron exhibiting obvious signs of intoxication, and revoked the license for the soliciting allegations. Each penalty was to run concurrently.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the bartender was performing her duties as a bartender and therefore was not employed to solicit drinks; (2) there are no findings as to loitering; (3) there is no evidence as to any salary or profit sharing scheme; and (4) the witnesses for the Department testified in an incredible and unbelievable manner. Issues 2 and 3 will be considered together as they concern the same type of violation and are interrelated.

DISCUSSION

I

Appellants contend the bartender was performing her duties as a bartender and therefore was not employed to solicit drinks. The accusation as to counts 1 and 2 cite the statutes violated.²

Karina Medina was working behind the bar counter filling orders for drinks, and supplied officer Cesar Corona a beer upon his request, with the officer paying \$2.50 [RT 10-11, 13]. Medina then asked the officer to buy her a beer, the same brand and

²Business and Professions Code §24200.5, subdivision (b) states: "...the department shall revoke a license ... (¶) (b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy." Business and Professions Code §25657, subdivision (a) states: "It is unlawful: (¶)(a) For any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages. or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises."

kind the officer had previously purchased, only her beer had a cost of \$7.50. This solicitation occurred two times [RT 11-13]. The bartender was working as such, and it can be reasonably concluded she was paid some type of remuneration, a salary, for her services as bartender.

The bartender's further culpability in this alleged solicitation scheme is shown when the bartender signaled or waved another woman over to sit with the testifying officer, with that woman making two solicitations [RT 17, 44]. The bartender placed a \$5 bill under the soliciting woman's beer each time of the two solicitations [RT 20, 23, 39].

In another solicitation, by another woman, the bartender placed three \$1 bills in front of the soliciting woman, for each of three solicitations. The soliciting woman nodded to the bartender, then the bartender picked up the dollars and placed them in a container near the cash register [RT 36-37, 41, 45-47].

Officer Jose Verdin testified that this particular type of practice of displaying the money before the soliciting woman, then taking the dollars away, was to avoid prosecution of a soliciting woman because the woman would not have the pay-back in her possession if arrested.

The record amply attests to a blatant scheme of solicitation.

II

Appellants contend there are no findings as to loitering, and no evidence as to any salary or profit sharing scheme. The accusation as to counts 3, 4, 6, 7, 8, and 9

cites the statutes violated.³

Addressing the issue of failure to set forth findings of loitering, the decision of the Department sets forth findings as to each of the counts, unfortunately in the language of the Department's accusation. Such findings are essentially ultimate facts and in the matter, barely essential. The saving grace in the decision is the Supplemental Findings which gives evidentiary detail, which all together, clearly allows a reader to understand and comprehend the matter.

Addressing the issue of a profit sharing scheme, officer Jose Verdin testified that Estela Madrigal after being waved over to him, solicited the officer who in turn paid \$8 to the bartender for Madrigal's drink. The bartender then placed \$5 under Madrigal's beer. A second solicitation later occurred and under the same circumstances as before [RT 17-23, 44].

III

Appellants contend the witnesses for the Department testified in an incredible and unbelievable manner.

Officer Jose Verdin testified that he observed the intoxicated patron due to the patron's loud screaming, while seated between two woman, who are accused of soliciting the patron. The patron had bloodshot and watery eyes, and when the patron

³The provisions of Business an Professions Code §24200.5, subdivision (b), are set forth in footnote 2. Business and Professions Code §25657, subdivision (b), states: "It is unlawful: (¶)(b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting."

went to the dance floor, could not maintain his balance.

Appellants question the testimony that the patron had a “flushed up, pale face”

[RT 25]. The decision states:

“... A puzzling part of the officer’s otherwise credible testimony, was that Meras’s face was both flushed and pale. (¶) Although the testimony appears facially inconsistent, it is possible that Meras’s skin was blotchy or perhaps he had some condition that caused his face to alternately change in shade.”

While the later portion of the decision is speculative as pointed out by appellants, neither the Department’s counsel or appellants’ counsel had the tenacity to inquire on direct or cross examination what the police officer meant by his description, but apparently chose to let this possible inconsistency stand, and later raised the question on appeal.

While not the best case made for obvious intoxication, the patron had red and watery eyes, could not keep his balance on the bar stool or when attempting to dance.

The case is weak, but sufficient.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
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.