

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

WESTERN AVENUE BISTRO, INC. dba Q
425 S. Western Avenue, Los Angeles, CA 90020,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7608

File: 47-291156 Reg: 99047623

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 12, 2000
Los Angeles, CA

ISSUED: MARCH 5, 2001

Western Avenue Bistro, Inc., doing business as Q (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 30 days, with 15 days thereof stayed for a probationary period of two years, for conduct involving drink solicitation, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25657, subdivision (a), and Penal Code §303.

Appearances on appeal include appellant Western Avenue Bistro, Inc., appearing through its counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated March 2, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on February 8, 1994. Thereafter, the Department instituted an accusation against appellant charging, in nine counts, various conduct on the part of appellant and its employees involving alleged drink solicitation. The accusation charged that appellant employed or paid a percentage or commission on the sale of alcoholic beverages to Hwa Kyung Pak ("Pak") for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, in violation of Business and Professions Code §25657,² subdivision (a) (**count 1**); that appellant employed Pak or permitted her to loiter for the purpose of soliciting the purchase of alcoholic beverages, in violation of §25657, subdivision (b) (**count 2**); that appellant employed Pak for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, in violation of Penal Code §303 (**count 3**); that appellant permitted Pak to solicit investigator Salao to purchase a drink intended for her consumption (**count 4**), and that Pak accepted such drink (**count 5**), in violation of Department Rule 143 (Title 4, Cal. Code Regs., §143); that appellant employed Yoon Hee Kang ("Kang") or permitted her to loiter for the purpose of soliciting the purchase of alcoholic beverages, in violation of §25657, subdivision (b) (**count 6**); that appellant employed Kang for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, in violation of Penal Code §303 (**count 7**); that appellant employed Young Sook Jin ("Jin") or permitted her to loiter for the purpose of soliciting the purchase of alcoholic beverages, in violation of §25657, subdivision (b) (**count 8**);

² Unless otherwise stated, all statutory references are to the Business and Professions Code.

and that appellant employed Jin for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, in violation of Penal Code §303 (**count 9**).

An administrative hearing was held on January 27, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigators Will Salao, Scott Seo, and Frank Robles. Appellant did not present witnesses on its behalf.

Following the hearing, the Department issued its decision which sustained only counts 1 (violation of §25657, subdivision (b)) and 3 (violation of Penal Code §303).

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the finding and determination that Penal Code §303 was violated is not supported by substantial evidence; and (2) the penalty is excessive.

DISCUSSION

I

The record reveals that there were two purchases of bottles of Crown Royal, a spirit liquor. The Administrative Law Judge (ALJ) based his finding and determination that counts 1 and 3 had been established on the events relating to the second of the two bottles. It is appellant's position that a critical element of a Penal Code §303 violation is lacking in the record.

Penal Code §303 provides:

"It shall be unlawful for any person engaged in the sale of alcoholic beverages other than in the original package, to employ upon the premises where the alcoholic beverages are sold any person for the purpose of procuring or encouraging the sale of such beverages, or to pay any person a percentage or commission on the sale of such beverages for procuring or encouraging such purchase or sale."

Appellant contends that the record does not support a finding or determination that, with respect to the second bottle of Crown Royal, it was engaged in the sale of an alcoholic beverage in other than the original package.

The ALJ based his determination that Penal Code §303 was violated on Finding of Fact V, which reads as follows:

“When the bottle of Crown Royal was empty, Seo stated that it was time to leave. Pak then asked Seo to ‘stay for another bottle’. Seo agreed. Shortly thereafter, the woman in red approached the table and Pak informed her that she, Pak, had persuaded the men to stay for another bottle. Pak then raised a candle, as if to signal the server, who brought another bottle of Crown Royal to the table.”

Appellant contends that there is nothing in this finding to the effect that the bottle of Crown Royal was in other than the original package. It asserts that “it was not a decanter ... not a pitcher ... not a glass ...not a partial bottle, it was a bottle of Crown Royal.”

Appellant calls to the Board’s attention the testimony upon which Finding of Fact V is based (at RT 34):

“Q. After you [Seo] agreed to stay, what’s the next thing that happened?

A. At that time, unidentified female dressed in red approached our table, and Ms. Pak stated to her that ‘I got these guys to stay for another bottle.’

Q. The unidentified female in red, is that the same one you were referring to initially, or is this another woman dressed in red?

A. That’s the same female.

Q. Okay. And after Ms. Pak made that comment to the woman in red, what’s the next thing that happened?

A. Ms. Pak raised a candle that was in the middle of the table, and she raised it up, and the next thing we knew, we had another bottle of Crown Royal.”

The Department agrees with appellant that, had appellant sold the Crown Royal in the original corked or sealed bottle, Penal Code §303 would not apply.³ However, the Department contends, the record shows that the officers bought an open bottle of Crown Royal, which was consumed before any payment was made. The Department further argues that the record shows clearly the officers were sold a bottle of Crown Royal which was not corked or sealed, because the female employees poured drinks into glasses for the officers, because it was served with glasses and snacks, and because the female employees joined the officers at their table.

As far as we can determine from the record, the bottle was brought to the table with its seal intact. There is no testimony that the bottle had been opened before being brought to the table. However, Department investigator Seo testified (RT 30) that Jin, one of the females, opened the second bottle when it had been brought to the table.⁴ There is no evidence in the record that the bottle was ever in the hands of the investigator

It is fair to infer from the evidence that the officers expected to share, or at least pretend to share, the contents of the second bottle with the females who had

³ Penal Code §303 does not define what it means by the term “original package.” However, the term is defined in Business and Professions Code §23028 as meaning “any container or receptacle used for holding alcoholic beverages which is corked or sealed with a stopper, cap, or in any other manner.”

⁴ Investigator Salao, when asked if the first bottle had been opened at the table, could not recall [RT 10].

joined them and who had urged them to buy it. Thus, when the bottle was brought to the table, and opened by Jin, her act was part of the “service” being provided by the bar. This, we believe, is sufficient to support the determination that the sale was not of an alcoholic beverage in its original package.

Appellant’s position would be more tenable if the evidence showed that the investigators, in preparation for their departure from the premises, had taken possession of the bottle with its seal intact. Were that so, Penal Code §303 would be inapplicable, even if the investigators then decided to remain in the premises, open the bottle and share its contents. That is not what happened.

II

Appellant challenges the penalty as excessive. It points to the fact that only two of the nine counts of the accusation were sustained, and to its challenge to the charge under Penal Code §303.

Because we have seen fit to sustain the charge under Penal Code §303, there is little basis to interfere with the penalty.

The Administrative Law Judge knew that only two counts of the accusation were being sustained when he decided what to recommend what he did in the way of penalty. It is not as if counts which had been sustained were being reversed by the Board. Under those circumstances, the Board frequently concludes that the penalty must be reconsidered.

We cannot say that a penalty that equates to a net suspension of 15 days, assuming appellant mends its ways, is excessive. Nor is a two-year probationary period inappropriate, inasmuch as it appears the conduct which was the subject of

the accusation was an integral part of appellant's business style.

ORDER

The decision of the Department is affirmed.⁵

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

⁵ 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.