

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

AB-7913

File: 48-260343 Reg: 01051031

BUL YA SONG, INC. dba Nuit D' Orient [El Portal Bar]
8284 Garden Grove Blvd., Garden Grove, CA 92844,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED JANUARY 28, 2003

Bul Ya Song, Inc., doing business as Nuit D' Orient [El Portal Bar] (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license for permitting the solicitations of alcoholic beverages [drinks], a violation of Business and Professions Code §24200.5, subdivision (b). The license was also suspended for a total of 15 days for various violations of law which appellant has not contested.

Appearances on appeal include appellant Bul Ya Song, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on May 29, 1991.

¹The decision of the Department, dated November 15, 2001, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging that a person under the age of 21 years was allowed on three separate dates to remain within the premises, that distilled spirits were allowed to be stored in an unlicensed area, alcoholic beverages within the premises were contaminated, and the permitting of solicitation of alcoholic beverages. Appellant does not contest the decision of the Department except in the matter of the solicitations.

An administrative hearing was held on September 20, 2001, at which time oral and documentary evidence was received.

The solicitation charges occurred on three dates, December 7, 2000, and March 3 and March 8, 2001. The solicitation matters under review are somewhat unique.

Appellant's owner, Larry Fees, instituted a scheme which he felt was lawful, yet would allow non-employee women to entertain male patrons by sitting with those patrons, with the patrons essentially providing the money for the nightly payment of the non-employee women, as "tips" [RT 114-115, 118-119, 123-125]. Fees believed that this procedure would avoid the literal wording of the law, that of Business and Professions Code section 24200.5, subdivision (b), which states in pertinent part as follows:

"... the department shall revoke a license upon any of the following grounds: ...
(b) If the [appellant] 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."

This new scheme apparently was instituted following a prior Department accusation for solicitations occurring on August 26, 1999, being in violation of the same statute as is charged in the present matter.

Fees' scheme and the testimony of the investigators are summarized by the Administrative Law Judge (ALJ) in his Determination of Issues IV:

“[Appellant’s] President and only disclosed principal, Larry J. Fees, focused attention on the scheme he had developed for encouraging sales of small beers at inflated prices to the ladies who work at his club. His employee-waitresses are instructed to bring the small beers to the table along with whatever beverage the male customer has ordered. This is to be done without anyone ordering the small beers. The small beers are brought to the table in a capped or sealed condition so they might be returned if the customer does not agree to buy it for the woman.

“According to Fees and his manager, Thi Nguyen, it is the employee-waitress who is to ‘solicit’ or ‘encourage’ the customer to buy the small beer for the consumption of the non-employee female. In this way, Fees contends, since the drink being solicited is not for the consumption of the solicitor, the scheme does not violate the law. Therefore, [Appellant’s] argument concludes, there has been no violation of Section 24200.5(b).

“Without considering whether the system devised by Fees would be lawful if it truly worked as he intended, that is not the scheme the evidence established. Instead, the evidence showed that while the employee-waitress did encourage sale of the small beers for consumption of the female companions, it was the female companions who solicited their purchases. The female companions asked the males to buy the beers for them.

“Fees contends that he is not responsible for and cannot control what these female companions do or say since they are not his employees. But he cannot escape responsibility so easily. Everyone agrees that these non-employee female companions are paid, and handsomely it must be added, for each beer that is purchased for them. The payment is made by [Appellant], either by Fees or by one of his employees. Therefore, [Appellant], through its agents, Larry Fees and [Appellant’s] employees, permits the female companions to solicit/encourage others, the male customers, to buy them drinks under a commission, percentage or profit-sharing plan, scheme or conspiracy. This is exactly what Section 24200.5(b) prohibits. The permission is clearly established due to the payment of \$13 for each beer sold.”

The record shows that the scheme, according to the testimony of Thi Thu Nga Nguyen, manager of the premises, was for non-employee women who come to the premises, to receive tips of \$13 for each beer they were provided by the male patrons [RT 114-116].

The inducement for the non-employee women to come to the premises and entertain patrons, was the \$13 “tip” they each received for each beer solicited (almost

double what the premises' share was of the \$20 charged for each solicited beer). Fees stated in closing argument:

“Your honor, the prior case which is still unsettled was a situation of where there was a direct solicitation by the ladies that were in the – in the bar entertaining the customers. After that particular incident it was corrected where the ladies are no longer the ones that solicit the beer, only the waitress the – or waitresses [in the present matter] ... The lady [non-employee women] is there to entertain the customer ... [and to a question by the ALJ concerning not paying the non-employee women, Fees answered]: Then they are not there and the customers go away also “

Subsequent to the hearing, the Department issued its decision which determined that the solicitations had been proven.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department did not have jurisdiction to proceed against appellant without representation by legal counsel, and (2) there are no findings as to whether the procedure practiced by appellant was lawful.

DISCUSSION

I

Appellant contends the Department did not have jurisdiction to proceed against appellant without representation by legal counsel.

Appellant in its brief states that the notice of hearing stated: “You are entitled to represent yourself without legal counsel.” Appellant also states that “Partially as a result of the misstatement of the law contained in the Notice of Hearing on Accusation, Fees represented the Corporation Licensee at the Hearing on September 20, 2001. The Department in contrast was represent by an ABC prosecuting attorney.”

Appellant does not set forth the “misstatement” alleged, but presumably it is the statement found in the Notice of Hearing that appellant did not have to have counsel. However, the Notice of Hearing is not as defective as appellant appears to argue, but

states as follows:

“You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel...”

Appellant’s brief also states: “The Department did not have jurisdiction to proceed in this manner.” Then the brief states that “As a general rule, in California, including at Administrative Hearings before administrative agencies acting in a quasi-judicial fashion, Corporations must be represented by legal counsel.” This is a misstatement of California law and practice.

The cases cited by appellant all concern the “law courts” or courts of record. Appellant has not cited any points and authorities which consider this same issue, and we know of none, other than the case cited below.

The rules which govern the Department’s conduct of proceedings, are found in the Administrative Procedures Act, and not the Code of Civil Procedure under which the law courts which were the focus of appellant’s points and authorities are regulated.

A recent court decision in *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Board* (2002) 99 Cal.App.4th 1094 [121 Cal.Rptr.2d 782], rejected appellant’s argument that in such administrative hearings, a corporation cannot be represented by a lay person.

II

Appellant contends there are no findings as to whether the scheme intended by appellant was lawful.

Appellant argues that “... the ALJ was incorrect in refusing to make a finding as to whether or not the scheme that Mr. Fees intended was lawful ... Thus, the ALJ’s refusal to make a finding as to the lawfulness of such a procedure is unreasonable and

denies Appellant an opportunity to raise that as a defense.”

Appellant errs in that the ALJ is not obligated to give an advisory opinion to appellant.

This matter presents an obvious scheme to avoid coming within the statute. Appellant’s scheme failed because the women sitting with the patrons solicited the beers, and, received payment for their solicitations -- \$13 for each 7-ounce beer solicited and paid for. Whether or not it was called a commission or a tip, it is the same.

We see no purpose determining whether Appellant’s scheme, as envisioned by Frees, was proper. Appellant is not entitled to an advisory opinion from the ALJ or this Board.

ORDER

The decision of the Department is affirmed.²

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

²This 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.