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

AB-8071
File: 40-320718 Reg: 02053132

LUZ M. CRUZ de PEREZ dba Noa Noa Bar
6038 Atlantic Boulevard, Maywood, CA 90270,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Frank Britt

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 8, 2003

Luz M. Cruz de Perez, doing business as Noa Noa Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for her bartender having permitted female patrons to loiter in the premises for the purpose of soliciting drinks and to solicit drinks pursuant to a commission, percentage, or profit-sharing plan or conspiracy, violations of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivision (b). The order of revocation was conditionally stayed, subject to a three-year probationary period and service of a 20-day suspension.

Appearances on appeal include appellant Luz M. Cruz de Perez, appearing through her counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated December 12, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on September 3, 1996. Thereafter, the Department instituted an accusation against appellant charging that appellant permitted female patrons to solicit drinks in violation of the above-cited sections of the Business and Professions Code.

An administrative hearing was held on September 19, 2002, at which time oral and documentary evidence was received. At that hearing, two Department investigators testified that, on three separate days in February and March 2002, they were solicited for drinks by females in the bar.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established, and issued the order from which this timely appeal has been taken.

DISCUSSION

Appellant contends that the testimony of the investigators that they were solicited for drinks was inadmissible hearsay.

She appears to argue that *People v. Henry* (1948) 86 Cal.App.2d 785 [195 P.2d 478, 481] and *Greenblatt v. Munro* (1958) 161 Cal.App.2d 596 [326 P.2d 929, 932-933], each of which held that statements similar to those in this case were not subject to the hearsay rule, were wrongly decided. In *People v. Henry*, statements made during telephone calls to pharmacies falsely representing the caller's status as an M.D., in an attempt to acquire narcotics, were considered "original evidence," and not hearsay:

> There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether those things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence.

Greenblatt v. Munro, supra, held that statements which constituted solicitations were not hearsay:

> We are not concerned with the truth of what the girls said, but with the fact that they made the statements. ...
>
> In the instant case, the statements of the bartender and female employees were not introduced for the truth of the contents but only to show what was said, for what is said is part of the violation itself. It made no difference whether the female employees wanted the beverages or not as long as they did ask the witness to purchase the beverages. As the violation is the solicitation, such can only be accomplished by words.

Appellant's argument is somewhat difficult to understand. She argues that "there is no truth in the statement to discern the character of the statement," but then asserts that it is inadmissible hearsay because "it cannot be offered for any truth other than the act of solicitation."

Appellant's focus on "truth" is misdirected. Once appellant concedes that the spoken acts of solicitation occurred, she concedes the violation. "What is said is part of the violation itself." (*Greenblatt v. Munro*, supra.) All that matters is that the words spoken were a request that a drink be bought for the female patron. Indeed, even if the patron had no intention of drinking it, the violation was complete once the words were spoken.

We see virtually no limit to the mischief which would flow if appellant's argument were accepted. Conceivably, it would eliminate much of the case law relating to drink solicitation, and make more difficult enforcement of provisions of the Business and Professions Code (sections 24200. 5, subdivision (b) and 25657, subdivisions (a) and (b)), the Penal Code (section 310), and Department Rule 143, all directed at drink solicitation. Appellant has not told us what more would be required in the way of evidence if a drink solicitation violation was to be proven. We think it clear that her

argument must be rejected.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2] 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.