

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

AB-8104

File: 41-355447 Reg: 02053400

VICTORINO SOLTERO dba La Cocina
9201 San Fernando Road, Sun Valley, CA 91352,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 19, 2004
Los Angeles, CA

ISSUED MAY 12, 2004

Victorino Soltero, doing business as La Cocina (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 30 days for having knowingly permitted a female patron to loiter in the premises for the purpose of soliciting the purchase of alcoholic beverages, a violation of Business and Professions Code section 25657, subdivision (b).

Appearances on appeal include appellant Victorino Soltero, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on August 16, 1999. Thereafter, the Department instituted a 17-count accusation

¹The decision of the Department, dated February 20, 2003, is set forth in the appendix.

charging, in 15 counts, the solicitation of the purchase of alcoholic beverages on three separate dates in April and October 2001, and in two counts, the purchase of alcoholic beverages from a seller not properly licensed to sell to appellant.

An administrative hearing was held on December 4, 2002. Following the hearing, all counts except counts 9, 12, and 15 were dismissed for failure of proof. Counts 9, 12, and 15 related to events occurring on October 19, 2001. Each charged a violation of Business and Professions Code section 25675, subdivision (b), which provides, in pertinent part, that it is unlawful:

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.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) The findings and decision with respect to counts 9, 12, and 15 are not supported by substantial evidence; (2) the decision with respect to counts 9, 12, and 15 must be reversed because there was no finding of loitering; and (3) the penalty is excessive.

DISCUSSION

I

The acts of solicitation which were sustained by the ALJ all occurred the evening of October 19, 2001. Each of the counts which were sustained involved the same pattern of conduct. Two Department investigators, Anthony Posada and Armando Gonzalez, were seated at the bar counter. Guadalupe Ramos was seated between them. Ramos solicited the purchase of a total of three beers, one from Gonzalez (count 9) and two from Posada (counts 12 and 15). The investigators paid for the beers

with \$10 and \$20 bills. Appellant's bartenders (Griselda Mejia (count 9), Aida Chrisantina Mendez (count 12), and Leivis Yaquelin Romero Mejia (count 15)) each in turn placed \$5 of the investigators' change under the beers which were served to Ramos. Ramos removed and retained the \$5 bills.

Appellant contends, with respect to count 9, that investigator Gonzalez did not recall the transaction sufficiently for his testimony to constitute substantial evidence. Appellant also contends, with respect to counts 12 and 15, that investigator Posada's testimony was confusing, and tainted by the administrative law judge's determination that his testimony about other counts of the accusation had been impeached. Appellant points to the absence in the written report prepared by investigator Posada of any reference to the bartender having placed a \$5 bill under Ramos's beer. Finally, appellant contends there is no evidence Ramos was loitering.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67

Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

None of the bartenders testified on appellant's behalf.

The testimony on the critical facts is not confusing, and the ALJ clearly understood, and believed, what the investigators said had occurred. The fact that the ALJ chose not to accept that part of Posada's testimony concerning counts 1 through 3 did not preclude him from accepting other parts of Posada's testimony relating to other times and events. The ALJ appears to have rejected Posada's testimony as to events which took place a year and nine months earlier, not because he believed Posada was intentionally testifying falsely, but, since Posada's contemporaneous written report contradicted his testimony, serious doubts were raised about the credibility of that testimony. That part of Posada's testimony which the ALJ accepted was uncontradicted.

A trier of fact has considerable leeway in evaluating the testimony and deciding that which he will accept and that he chooses to reject. He may accept part of the testimony of a witness and reject another part even though the latter may contradict the former. (See *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67 [107 Cal.Rptr. 45].)

The ALJ concluded that the evidence fell short of establishing that Ramos was soliciting drinks under a commission, percentage, salary or other profit sharing scheme with the permission or under the direction of the licensee. It is clear, however, from the pattern followed by each of the three bartenders, of placing \$5 of the investigators' change under Ramos's beer, that they knew and condoned Ramos's solicitation efforts, and the ALJ so found (Finding of Fact 6):

It is clear from the evidence that Ramos was a bar-girl and the licensee through its bartender knowingly permitted Ramos to loiter in the premises for the purpose of soliciting patrons to purchase alcoholic beverages for Ramos.

The same basic modus operandi was engaged in by all of the Respondent's bartenders

Ramos had no other apparent purpose at the location and the solicitations were her way of earning money and promoting the sale of beer to patrons to do so.

With respect to count 9, appellant points to a discrepancy in Gonzalez's testimony regarding whether or not the written report of the incident, prepared by Posada, referred to the placement of the \$5 bill under the bottle, and claims that Gonzalez's testimony cannot constitute substantial evidence. As stated earlier herein, it is the ALJ who resolves conflicts in the evidence and issues of credibility. He obviously did not consider that discrepancy to undercut Gonzalez's detailed description of the solicitation; since Gonzalez did not write that report, he cannot be held responsible for the omission of any reference to the placement of the \$5 bill.

Appellant raises similar arguments with respect to counts 12 and 15, pointing to discrepancies between Posada's testimony and the contents of his written report of the incident, prepared approximately one and one-half years earlier. Appellant contends that the ALJ's rejection of a portion of Posada's testimony concerning an earlier instance of alleged solicitation, which led to the dismissal of counts 1, 2, and 3, also warranted the rejection of the remainder of his testimony. This argument falls for the reasons stated above.

The Appeals Board is not entitled to second guess the ALJ on issues of credibility. An ALJ is entitled to find some of a witness's testimony credible and persuasive, and reject other portions as inconsistent with other testimony or documentary evidence. (See *Stevens v. Parke, Davis & Co., supra.*)

II

Appellant contends that the hearing transcript and the decision are devoid of any

evidence that Ramos loitered in the premises for the purpose of solicitation.

Section 25657, subdivision (b), declares it to be unlawful for any person “*to employ or knowingly permit anyone to loiter in or about*” the premises for the purpose of begging or soliciting of drinks for such person.

The ALJ concluded that it was clear from the evidence that “Ramos was a bar-girl” and “had no other apparent purpose at the location and the solicitations were her way of earning money and promoting the sale of beer to patrons to do so.” These findings are amply supported by the evidence.

Other than the testimony of the investigators that Ramos took drink orders from them before joining them at their table and soliciting drinks, there is no evidence that she performed any services for appellant. It is sometimes difficult to distinguish between one who is employed to solicit drinks and one who loiters in the premises to do so; much depends upon the inferences which may be drawn. In this case, we cannot say that the ALJ’s finding that Ramos loitered in the premises for the purpose of soliciting drinks is without support in the record. There is evidence that she spent the large part of the evening doing nothing other than sitting with the investigators and soliciting them to purchase drinks for her; certainly enough evidence to support the ALJ’s finding of loitering.

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.