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

AB-8134
File: 42-165302 Reg: 02053135

LUIS E. MEJIA dba Club Latina
2799 West Pico Blvd., Los Angeles, CA 90006,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED MAY 17, 2004

Luis E. Mejia, doing business as Club Latina (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for having employed or permitted persons to solicit the purchase for them of alcoholic beverages, pursuant to a commission, percentage, salary or profit sharing plan, and suspended the license for having sold alcoholic beverages in an unlicensed portion of the premises, violations of Business and Professions Code sections 24200.5, subdivision (b), and 23355, and Penal Code section 303.

Appearances on appeal include appellant Luis E. Mejia, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated April 10, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on December 4, 1984. Thereafter, on June 14, 2002, the Department instituted an accusation against appellant charging that appellant employed and permitted persons to solicit the purchase of alcoholic beverages pursuant to a commission, percentage, salary or other profit-sharing scheme (counts 1, 3, 4, 6, 8, 10, 12, 14, 16, and 18), permitted persons to loiter in the premises for the purpose of soliciting the purchase of alcoholic beverages (counts 2, 5, 9, 13, and 17), and sold alcoholic beverages in an unlicensed portion of the premises (counts 7, 11, 15, and 19).

An administrative hearing was held on January 29, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by two Los Angeles police officers and three Department investigators in support of the charges of the accusation. Appellant presented four witnesses on his behalf, all of whom denied that any acts of solicitation had occurred.

Subsequent to the hearing, the Department issued its decision which sustained the charges of drink solicitation pursuant to a commission plan or scheme; sustained the charges that alcoholic beverages were sold in a room of the premises not licensed for the sale of alcoholic beverages; and dismissed the charges that the women had loitered in the premises for the purpose of soliciting drinks.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the decision is not supported by the findings and the findings are not supported by substantial evidence; (2) the Department is estopped from proceeding against appellant; (3) the penalty violates the constitutional guarantee against cruel and unusual punishment; and (4) the administrative law judge (ALJ)

abused his discretion when he denied appellant's request for a continuance.

DISCUSSION

I

Appellant's attack on the findings and decision is premised on his contention that there is no substantial evidence that appellant employed or permitted any person to solicit drinks.

Appellant does not dispute the testimony of the two police officers and three Department investigators that, in the course of visits to the premises on four different dates in 2001 and 2002, they were asked by women in the premises to buy them drinks. Invariably, beers for the police and investigators cost $3 (domestic) or $3.50 (imported) while beers for the women were $10. Appellant contends that the women were patrons, not employees, and the solicitation conduct was occurring without his knowledge. Appellant explains the higher price for the women's beer as the result of the women simply keeping the additional $7.

Appellant has devoted a substantial portion of his brief to a dissection of the record intended to persuade the Board that he should not be held responsible for the conduct of the women who solicited drinks from the police officers and Department investigators, because he could not have known of it. His arguments are unavailing.

A realistic assessment of the record, viewed as a whole, is that the solicitation was rampant in the establishment, and the money the women kept from the change due the police officer or Department investigator was a commission for their efforts in generating the sale of beer. The pattern was consistent throughout each of the four visits to the premises - beer for the police officer or investigator was one price, beer for the woman who solicited it another, a much higher price, reflecting her commission.

The evidence, which appellant has not disputed, showed that, on one occasion, the $7 commission was paid directly by the bartender. [RT 102-103.] Appellant's suggestion that the investigator should have asked the bartender to give him the $7 change, or ask the woman to return it to him, does not persuade us that this was not an instance of solicitation pursuant to a scheme or plan. Clearly, the woman and the bartender were acting in concert. In addition, it is not a mere coincidence that the amount the bartender handed to the woman - $7 - was the same as the other police officers and investigators were surcharged for the beer they purchased for the women.

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (See, e.g., *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629].)

Appellant's claim that he was ignorant of the solicitation activity fails for another reason. As observed by the ALJ:

> Respondent is also culpable because he permitted the solicitations to take place in his premises.
>
> 'A licensee has a general affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from occurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action. Laube v. Stroh (1992) 2 Cal.App. 4th 364, 379.
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> It is well known that a reasonably possible unlawful activity at a bar is the soliciting of purchases of alcoholic beverages. Considering the fact that four

> women on five occasions successfully solicited the purchase of alcoholic beverages at Respondent's premises, and that Respondent's license was on probation (stayed revocation) for this type of unlawful activity while these solicitation activities occurred, Respondent clearly was not "diligent" in anticipating the unlawful activity. His failure to prevent the solicitations "permitted" the solicitations to take place.

The ALJ was not obligated to believe the denials of solicitation voiced by appellant and other witnesses . 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. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].)

II

Appellant contends that the Department is estopped from pursuing its claims that appellant permitted the sale of alcoholic beverages in an area of the premises that had not been licensed. He contends that the Department should have pursued such claims, if at all, at the same time it was pursuing other administrative charges in 1999. In addition, appellant contends that the Department improperly accumulated counts in violation of the principles established in *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1]. Finally, appellant contends that the Department is estopped from proceeding on its claim because, had it advised appellant in 1999 that the new addition needed to be licensed, he could easily have done so.

Appellant has not claimed that the Department committed any affirmative act with respect to the unlicensed room that might have misled appellant into a belief that it did not need to be licensed. All he has asserted is that the Department did not proceed with diligence in asserting the violation.

Thus, it cannot be said that one of the essential elements of estoppel is present -

that the party to be estopped engaged in conduct intended to induce, and inducing, detrimental reliance by the party asserting the estoppel. (See *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 [91 Cal.Rptr. 23].)

Nor do the facts of this case invoke the principles established in *Walsh v. Kirby, supra.* In *Walsh v. Kirby*, the Department accumulated a number of violations of then-existing fair trade laws, individually punishable only by fines, but in the aggregate, having the capacity to bankrupt the licensee. The court saw this as a means of revoking a license even though the statute in question did not authorize revocation.

In this case, even though there were four violations and, undoubtedly, countless others that would have been committed during the period of time the room was utilized, a single 15-day suspension was ordered. Hence, it cannot be said that violations were accumulated to achieve a penalty otherwise unavailable.

III

Appellant contends that the penalty constitutes cruel and unusual punishment because it is out of proportion to the offense.

The Department concluded that appellant had permitted numerous instances of solicitation pursuant to a commission plan or scheme, in which each instance of solicitation was rewarded with a payment of $7.

Business and Professions Code section 24200.5, subdivision (b), not only authorizes, but mandates revocation for a violation of its provisions. The conduct in this case clearly violated those provisions.

The concept of cruel and unusual punishment is confined to criminal proceedings. None of the cases cited by appellant supports the application of such a

concept to civil, administrative proceedings, and we are unaware of any case which does.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) We see none here.

IV

Appellant contends that he was denied due process by the refusal of the ALJ to delay the commencement of the hearing until the arrival of a Spanish-language interpreter.

At the outset of the hearing, appellant's counsel requested a continuance to allow him time to obtain an interpreter. He alleged that appellant is not English-speaking, and, without the aid of an interpreter, would have no way of understanding the proceeding. The ALJ denied the request, noting that appellant had already been granted one continuance, and that the hearing had been set to commence at 11:00 a.m. for appellant's convenience.

Department counsel was unwilling to agree to continue the matter until 1:00 p.m. He added that he had first heard that morning that appellant wished to have an interpreter present at the hearing, and pointed out that the case had actually been continued three times.

Appellant's counsel made a further unsuccessful attempt to gain a continuance, asserting that appellant's witnesses also did not speak English. The ALJ suggested that appellant's counsel, who spoke Spanish, advise appellant of what the Department's witnesses said in their testimony, only to be told "I'm not going to do that,

Your Honor." [RT10.] The hearing then commenced without an interpreter.

The interpreter arrived at 12:25 p.m. [RT 65] and this interchange took place:

The Court: The interpreter is here.

Mr. Rios: Does the Court want to swear him in?

The Court: No. Well, you just want him to interpret for your client?

Mr. Rios: Yes. Please.

The Court: You can sit down right next to Mr. Mejia.

The interpreter was sworn later in the proceeding, when appellant presented his first witness. [RT 205.] There is no further reference in the transcript to the interpreter, but, presumably, the testimony of appellant and his remaining witnesses was also presented through the interpreter.

Pursuant to Government Code section 11524, the ALJ has the right to grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause and sought to prevent the condition or event establishing the good cause. An appellant has no absolute right to a continuance; they are granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. *(Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

The testimony of one of the police officers was completed before the interpreter arrived at the hearing, and the testimony of a second officer had begun. It cannot be determined from the record whether appellant's counsel provided his client any translation of the testimony which preceded the interpreter's arrival.

Had appellant or counsel been without fault, the issue of whether the ALJ's refusal to continue the hearing until the arrival of an interpreter was a denial of due process might have force. Here, however, where the hearing had been scheduled three times, the notice of hearing each time advising appellant that it was up to him to arrange for the services of an interpreter, the focus is on whether appellant is entitled to take advantage of his and his attorney's lack of diligence.

Appellant has not refuted the claim of Department counsel that the subject of an interpreter was first raised on the morning of the hearing. Further, it appears from the record that there was no assurance from appellant's counsel as to when the interpreter might be expected.

> Right now it's 11:00 a.m. We are asking the Court to allow us to come back at 1:00. 1:30, and by that time the – I believe the interpreter can be here. We talked to two different interpreting services and they both have certified interpreters.
>
> And we're pretty confident that one will be here by 1:00, 1:30.

[RT 8.]

Given the delays already encountered, can it be said that the ALJ was without discretion to go forward with the hearing, especially where means were available to alleviate the impact on appellant from the absence of an interpreter. Appellant's attorney was in a position to provide appellant with the import of the testimony presented by the Department. If he did not do so, it was by his own choice.

The hearing had already been delayed one and one-half hours to accommodate appellant's counsel. On balance, then, it seems to us that appellant is in no position to complain.

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.