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

AB-8380
File: 40-295399 Reg: 04056760

ARMANDO MONDRAGON and GELACIO MONDRAGON dba King's Inn
3515 West Fifth Street, Santa Ana, CA 92703,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 3, 2005
Los Angeles, CA

ISSUED: DECEMBER 30, 2005

Armando Mondragon and Gelacio Mondragon, doing business as King's Inn (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for their employees having engaged in drink solicitation activity in violation of Business and Professions Code sections 24200.5, subdivision (b),[2] and 25657, subdivisions (a) and (b),[3] and Department Rule 143.[4]

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[1]The decision of the Department, dated December 30, 2004, is set forth in the appendix.

[2] Section 24200.5, subdivision (b) provides:

Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

(b) If the licensee 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.

[3] Section 25657, subdivisions (a) and (b) provide:

(continued...)

Appearances on appeal include appellants Armando Mondragon and Gelacio Mondragon, appearing through their counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on January 6, 1995. Thereafter, the Department instituted a 29-count accusation against appellants charging that their employees had solicited patrons to buy them drinks. An administrative hearing was held on October 13 and November 9, 2004, at which time oral and documentary evidence was received. The testimony at the hearing established that four female

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[3](...continued)
"It is unlawful:

(a) For any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.

(b) 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.

Every person who violates the provisions of this section is guilty of a misdemeanor.

[4] Department Rule 143 (Title 4, Cal. Code Regs., §143) provides, in pertinent part:

No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee.

employees had solicited undercover Department investigators for drinks during visits to the premises on February 21, 2003, and February 28, 2003. All four women followed the same pattern: when the investigator agreed to buy one of the women a drink, the woman in question would go to the bar, return with a small white cup containing a liquid that looked and smelled like beer. The woman charged the investigator $6 or $7 for the drink, while she charged him only $3.50 or $3.75 for the 12-ounce bottle of beer he had ordered. The woman would consume part of the beer, and then move on to serve, and drink with, other customers.

Subsequent to the hearing, the Department issued a decision sustaining counts 14, 15, 16, 23, 24, and 29 (violations of section 24200.5, subdivision (b)); counts 11, 12, 21, 22, and 28 (violations of section 25657, subdivision (a)); and counts 1, 2, 7, 8, 17, 18, 25, and 26 (violations of Rule 143). Counts 3, 6, 9, 19, and 27 (charging violations of section 25657, subdivision (b)), and counts 4, 5, 10, and 20 (charging violations of Rule 143) were not sustained.

Appellants have filed a timely appeal in which they raise the following issues: (1) the findings that Business and Professions Code sections 24200.5 and 25657, subdivision (a), were violated are not supported by substantial evidence; and (2) the penalty is excessive.

DISCUSSION

I

The administrative law judge (ALJ) found violations of sections 24200.5, subdivision (b), and 25657, subdivision (a), along with violations of Department Rule 143, all having to do with drink solicitation. Appellant appears to concede there were violations of Rule 143, but contends that the statutory violations are not supported by

substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

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, 51 [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, 826-827 [40 Cal.Rptr. 666].)

The ALJ treated the scheme as one in which the servers' commission was the surcharge for the beer served in small Styrofoam paper cups. The fact that the scheme

operated in a way that did not require that the payment of the commission by some direct action on the part of the licensee does not, in our view, escape the statute. The licensee benefits through the sale of beer in Styrofoam cups, and the commission is paid indirectly.

The language of section 24200.5, subdivision (b) is very broad - revocation is mandated "[i]f the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks ... under any commission, percentage, salary, *or other profit-sharing plan, scheme, or conspiracy*." (Emphasis supplied.) A number of the counts which were sustained charged violations of this section.

II

Where an appellant raises the issue of an excessive penalty, the Appeals Board will examine the issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].) However, 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].)

Appellants argue that the finding that a policy was in place to prevent drink solicitation warrants some lesser penalty than revocation, and that it was unreasonable for the Department to rely on a prior violation remote in time.

When there is evidence of a scheme as pervasive as the one demonstrated in this case, and the existence of a so-called policy aimed to prevent it, one can only wonder who was responsible for enforcing that policy. The ALJ found that one of the co-licensees was present at the time the conduct was occurring, and yet there was no

evidence that he took any action to stop it.

We are unwilling to assume he could have been unaware that higher than normal prices were being charged for smaller than normal amounts of beer.

Consequently, we cannot say the Department abused its discretion by ordering revocation even while it acknowledged the existence of the so-called policy to prevent what took place.

Nor do we think it inappropriate for the Department to refer to the prior violation even though five years earlier. The prior violation was also for drink solicitation, and was cited by the Department to show knowledge that the risk of drink solicitation was present. In any event, the violations of section 24200.5, subdivision (b), supported an order of revocation even without any reliance on a prior violation not all that remote in time.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.