

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

AB-8406

File: 47-323690 Reg: 03055454

SULING WANG, INC., dba The Chef's Hat
2553 Rosemead Boulevard, South El Monte, CA 91733,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED DECEMBER 30, 2005

Suling Wang, Inc., doing business as The Chef's Hat (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked appellant's license, with revocation stayed on the conditions of a three-year probationary period and a 25-day suspension, the suspension to continue indefinitely until appellant petitions the Department to include on its license the three conditions specified in the decision, for drink solicitation activities, violations of Business and Professions Code² sections 24200, subdivisions (a) and (b); 25657, subdivision (a); and Department rule 143. (4 Cal. Code Regs., §143.)

¹The decision of the Department, dated February 3, 2005, is set forth in the appendix.

²Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

Appearances on appeal include appellant Suling Wang, Inc., appearing through its counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on March 17, 1997. On July 24, 2003, the Department filed an 11-count accusation against appellant charging violations of rule 143 (counts 1 through 9); section 25657, subdivision (a) (count 10); and section 25657, subdivision (b) (count 11). The counts alleged drink solicitation activities on two occasions in 2002: December 20 (counts 1 through 4) and December 27 (counts 5 through 11), involving at least five different women.

At the administrative hearing held on October 26, 2004, documentary evidence was received and testimony concerning the violations charged was presented by former Department investigator Frank Fu.

On December 20, 2002, Fu and investigator Enrique Alcala, operating undercover, entered the premises and sat in a booth. A waitress approached, and they ordered Bud Light beer. The waitress brought them a six-pack of Bud Light beer in bottles and also put four or five glasses on their table.

They were then asked by a woman, Hong Zhu, if they would like some female companionship, to which Fu assented. Alcala asked Zhu how much the companionship would cost, and she replied that it would cost \$20 per girl, per hour, "just like everywhere else," or words to that effect. She poured some beer from one of the bottles into one of the glasses, toasted the investigators, and drank some of the beer.

Zhu left the table, but returned later with two women, Jenny and Jasmine.³ The three poured beer into glasses for themselves and drank some of it. Zhu and Jasmine left for a while, but came back with another woman, Nina. Nina poured some of the beer into a glass, proposed a toast, and drank some of the beer. During the evening, Zhu told the investigators that she was the "mamasan" at the premises, and that she had worked there for some years.

When Fu later asked for the bill, Zhu gave him four bills totaling \$120. On each of three of the bills was a woman's name and a dollar amount. The fourth bill apparently contained charges for beer and other unknown items. When the investigators paid the bill with cash, Zhu gave each of the three women \$20.

The two investigators returned to the premises on December 27, 2005, and Zhu asked if they would like the same women as last time. Fu said they would, and they sat in a booth. Again, Fu ordered some Bud Light beer, and the waitress again brought a six-pack of bottles and several glasses. Zhu came to their table with Nina and another woman known as Cindy. Nina and Cindy each poured beer into glasses for themselves, proposed a toast, and drank some of the beer. Zhu then left the table with Nina, and another woman, Rebecca, came over, poured herself some beer, proposed a toast, and drank some of the beer.

Later, Nina told Fu she would like more beer and asked if he could order some more. He ordered more Bud Light beer, and the waitress brought another six-pack of beer to the table. Nina poured some for herself and drank it.

³Except for Hong Zhu, we use the names the women were known by at the premises instead of their real names.

The bills that evening came to \$240, showing a dollar amount next to the name of each of the women who had joined the investigators at their table. The investigators paid the bill, gave a tip to each woman, and Zhu gave each woman \$20.

Subsequent to the hearing, the Department issued its decision which dismissed counts 7 and 11 as not supported by the evidence, upheld the other counts, and limited the conditions that appellant would have to have added to the license to the first three out of the 11 proposed by the Department. Appellant filed an appeal contending the findings do not support the decision and the penalty is excessive.

DISCUSSION

I

Appellant contends that, in finding that the women "accepted" drinks from the investigators, the Department is "play[ing] word games to create a meaning that does not fit what took place" (App. Br. at p. 3), in order to justify the rule 143⁴ violations alleged in the accusation. Appellant's argument, based on closing argument at the administrative hearing, appears to be that the investigators did not offer any beer to the women who came to the table. The beer was there on the table and the women did not ask for it, they just poured some for themselves with no objection from the investigators. According to appellant, there was no offer, so there could be no acceptance.

The decision addresses this argument in Determination of Issues III:

Respondent argued that the counts which alleged that Respondent's employees accepted drinks purchased for them should be dismissed

⁴Appellant agrees that the relevant portion of rule 143 states:

No on-sale retail licensee shall . . . 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.

because there is no evidence that any of the women "accepted" drinks from the investigators. If the word "accept" is interpreted very narrowly, Respondent is correct. Traditionally, there is no acceptance without an offer, and, in the present case, the investigators never formally offered any drinks to the women.

However, the women's consumption of the investigators' beers must be viewed in context with the totality of the circumstances.

The premises' "mamasan" offered to provide female companions to the two investigators, and the investigators accepted. When the investigators ordered Bud Light beer, Respondent's waitress brought to them a six-pack of Bud Light beer and several glasses. The investigators did not ask the waitress why she had brought so much beer and more than two glasses, nor did they ask her to take back the extra beer or the extra glasses. Considering that the investigators knew some of Respondent's female employees would be joining them, their acceptance of the extra glasses and the extra beer was clearly intended to be an offer of the extra beer to those female employees. When Respondent's female employees poured the extra beer into the extra glasses and drank the beer, they in effect accepted the investigators' offer.

Appellant is contending, essentially, that the Department's decision is not supported by substantial evidence. The Appeals Board's review of the decision in such a case is limited to determining whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board "may not confine [its] consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the [Department]. . . . [The Board] must accept any reasonable interpretation of the evidence which supports the [Department's] decision." (*Beck Development Co., Inc. v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160, 1203 [52 Cal.Rptr.2d 518].)

This is not simply a factual question, however; it also involves consideration of what rule 143 means by "accept": Does this term mean that there is no violation unless there is an express offer that is expressly accepted? We do not think so.

The circumstances in this case created at least an implied offer to the women employed by appellant, and we believe the ALJ correctly analyzed the situation. If there had been no implied offer, the women presumably would be stealing the beer they poured into their glasses. Business and Professions Code section 23001 declares that "the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the state and of all its people," and mandates that "[a]ll provisions of this division shall be liberally construed for the accomplishment of these purposes." It would be an unduly restrictive reading of the word "accept" to conclude that the female employees in appellant's premises did not accept drinks that were sold and purchased there and intended for their consumption.

II

Appellant contends the penalty is excessive, making three specific arguments: 1) the Board should find that seven of the eight rule 143 violations should be dismissed, reducing the severity of the incidents; 2) the penalty exceeds the standard penalty shown in the Department's penalty guidelines without justification; and 3) one of the conditions appellant is required to have on its license in order to avoid an indefinite suspension is vague, ambiguous, and does not necessarily prevent the prohibited solicitation activity, but may prohibit other lawful and legitimate activities.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California v. Alcoholic Beverage Control Appeals Bd.* (1971))

19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Since we concluded in part I, *ante*, that the rule 143 counts should not be dismissed, appellant's first argument must be rejected.

The Department's Penalty Guidelines (the guidelines), promulgated as rule 144 (4 Cal. Code Regs., § 144), include a schedule of penalties the Department usually imposes for a first offense of the various statutes listed there. The usual first-time penalty for a rule 143 violation is listed as a 15-day suspension.

Appellant argues that the facts of this case do not justify deviation from the guidelines. Although it may be true, as appellant asserts, that rule 143 violations are often the result of many more incidents than occurred here, this was not simply a waitress doing a little "moonlighting" while on the job. Here at least five different women were involved, on two occasions, in a well-organized B-girl scheme that clearly benefitted appellant financially. In addition, the decision finds a violation, in count 10, of section 25657, subdivision (a), the listed penalty for which is revocation. We cannot say, based on these facts, that the penalty imposed is unreasonable.

The condition appellant objects to, found in Determination of Issues IV, states: "The licensee shall not maintain or construct any type of enclosed room intended for

use by patrons or customers for any purpose." Appellant argues that it is not clear what "enclosed" means in this condition and that the condition would prevent construction of rooms with legitimate purposes, such as restrooms, banquet rooms, or reception areas.

We agree that the condition is written broadly and it could be interpreted to prohibit some legitimate construction. However, we do not believe it is so vague or unreasonable as to amount to an abuse of the Department's discretion. Nor does it violate the requirement that imposition of the condition be reasonably related to the problem sought to be eliminated. (Bus. & Prof. Code, § 23800, subd. (b); *Mayacama Food and Beverage, LLC v. Morse* (2003) AB-7934.) The ALJ found a clear nexus between the condition and the problem to be eliminated, and we do not find his conclusion unreasonable.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.