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

AB-8553
File: 40-196025 Reg: 05060786

JOSÉ ANGEL GARZA, dba La Cantinita
4405 Hecker Pass Road, Gilroy, CA 95020,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: April 5, 2007
San Francisco, CA

ISSUED JUNE 11, 2007

José Angel Garza, doing business as La Cantinita (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for permitting numerous instances of drink solicitation in violation of Business and Professions Code section 24200.5.

Appearances on appeal include appellant José Angel Garza, appearing in propia persona, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated April 13, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on December 16, 1986. On September 26, 2005, the Department instituted a 30-count accusation against appellant charging that he employed or permitted five women to engage in drink solicitation in violation of Business and Professions Code section 24200.5, subdivision (b) (counts 1-26, 28, and 29), permitted lewd conduct by one of the women in violation of Department rule 143.2, subdivision (3) (count 27), and knowingly permitted a person under the age of 21 to consume beer in the premises in violation of section 25658, subdivision (b).

At the administrative hearing held on February 17, 2006, appellant, who was represented by an attorney at the time, stipulated to the conduct alleged in each of the counts, except counts 7 and 30, and that no further evidence needed to be offered. The Department motion to dismiss counts 7 and 30 was granted. Both parties stipulated to appellant's licensing history which showed no disciplinary action since the license was issued on December 16, 1986. Appellant testified, among other things, about his limited time for overseeing the premises because of his job in another town; the manager and employees at the bar; his lack of knowledge and disapproval of the drink solicitation activity in the bar; and the actions he had taken since receiving the accusation. The parties also agreed that, if called as witnesses, the waitresses involved would testify that they had hidden the solicitation activity from appellant and that they did not do it anymore.

Subsequent to the hearing, the Department issued its decision which dismissed counts 7 and 30, determined that the remaining counts were established, and ordered appellant's license revoked. Appellant filed an appeal contending that revocation was too harsh a penalty under the circumstances.

DISCUSSION

The first violations charged took place in May 2004 and the next ones were almost a year later, in April 2005. Appellant was notified of the violations late in June 2005. Appellant contends that revocation is too harsh a penalty since he could have taken action to prevent most of the violations charged if he had been notified by the Department at the time the first violations occurred. In addition, he points out his long licensed history without any disciplinary actions, his lack of knowledge of the solicitation activity, and measures he has taken to prevent future violations.

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].)

The administrative law judge (ALJ) made careful and extensive findings of fact (FF), recognizing appellant's long discipline-free license history, his good working relationship with local law enforcement, and his installation and use of a surveillance video camera at the request of law enforcement. (FF IV.) The ALJ noted appellant's assertion that he was unaware of the illegal activity and that he would not have tolerated it had he been aware. (FF V.)

Appellant lives in Hollister and works rotating 12-hour shifts as a correctional officer. He spends only a few hours a week at the premises, often in the morning before the premises is open for business. His manager stops by the premises each day to supply change for the cash register, close up the premises, and change the tapes in the surveillance video cameras. (FF VII.) Appellant testified that the manager reviews the tapes weekly and notifies him if she thinks there is something he should see. After receiving the accusation, appellant had his employees attend the Department's one-day training. (FF VIII.)

Department investigator Favela, testifying as a rebuttal witness, said that the employees made no attempt to conceal the solicitation activity he observed during the investigation. He also stated that appellant was not notified of the violations sooner because of the on-going investigation. (FF X.)

In *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779], the court said:

> 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 recurring, once the licensee knows of it, is to "permit" by a failure to take preventive action.

Appellant was clearly aware that drink solicitation was a "reasonably possible unlawful activity," since he described the practice of women working for "fichas"[2] at other establishments in the area, and said he knew that some of the women who worked for him would also worked for fichas at other bars.

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[2]"Ficha" is a Spanish word meaning "token." Appellant said that, in other bars, women would be paid a certain amount for each beer that customers bought for them. The women would use the caps from the beer bottles as fichas to keep track of how many drinks they would be paid for.

The ALJ reached the following conclusions in his Determination of Issues:

III. . . . Aside from respondent, there was only one other manager-the bar manager-who worked during the day hours and "dropped in" during the evening hours. The evidence shows that respondent was, and currently is, an absentee licensee. His regular employment hours make it virtually impossible for him to provide adequate personal coverage of the activities of his employees. Even now, he relies solely upon his bar manager to show him questionable conduct reflected by the videotapes.

V. This is not a case involving an innocent licensee who has taken all reasonable steps to avoid anticipated illegal activity. The conduct that was occurring was not concealed. A reasonably prudent licensee should have observed what was happening by looking at the videotapes. A reasonably prudent licensee who, because of his regular employment hours found it impossible to be personally present in the premises to assure that illegal conduct was not occurring, should have employed management personnel to be present during the hours throughout the operation of the premises.

VI. Liability against respondent is determined by the following: 1. His responsibility as set forth in *Laube*, *supra*; [¶] 2. Employees of respondent made the solicitations. [¶] 3. The money for the solicitations was passed to the cashiers who were employed by respondent. [¶] 4. These transactions occurred on each of the dates set forth in the accusation. [¶] 5. The overt nature of the conduct. [¶] 6. Cameras were located in the premises presumably recording activity therein; however, there was no evidence indicating that respondent reviewed the tapes. [¶] 7. Respondent testified that he knew of the unlawful practice of solicitation of drinks in other bars in the area and that his own employees worked in said bars for "*fichas*." [¶] 8. There is no evidence that respondent, notwithstanding this knowledge, instructed his employees of the potential for unlawful conduct in his premises.

VII. Considering respondent's stipulation, the stipulation of the employees' testimony in lieu of their appearance and the testimony of Investigator Favela, it is concluded that respondent failed in his duty by not being diligent in anticipating the unlawful conduct of his employees. His failure to take preventative action resulted in the violations.

X. The Department seeks revocation of the license under Business and Professions Code section 24200.5. Respondent characterizes himself as a sympathetic licensee with a clean prior record since having been licensed in December 1986. He urges that, had he been advised of the illegal conduct when the investigation was ongoing, he would have resolved matters quickly. He believes he has taken adequate steps to assure non-recurrence of the illegal conduct by repositioning his cameras and sending his employees to the Department's training class. He has suffered no problems since the accusation was filed. He has retained the same employees involved in the conduct found hereinabove.

> XI. The nature of the illegal conduct found hereinabove is serious. The legislature has proclaimed that the Department shall revoke a license for such conduct. The evidence, though it does demonstrate an effort on respondent's part to control conduct on the premises, falls far short of what should be expected. There clearly is a lack of management control. Given respondent's regular employment hours, he simply cannot expend the necessary personal time in the premises to assure compliance. He has retained the same employees who engaged in the illegal conduct. He has not employed additional managers to be present when he is unable to be there. His current bar manager does spend additional time in the premises by "dropping in more often on weekends." This is still a premises operated by an absentee licensee with little control over the conduct of his employees.

Revocation is a harsh penalty, and it is not often that it is imposed where there is, as here, a long history with no prior discipline. However, appellant seemed almost unaware at the hearing of the seriousness of the violations; he failed to take any real measures to prevent these violations before the investigation, in spite of clear indications that such conduct was not just possible, but probable; and he believed that the insignificant measures he took after the investigation would prevent the same employees from engaging in the same conduct. Under the circumstances here, we can see why the Department believed that revocation was appropriate in order to protect the public's welfare and morals. We cannot say that this penalty was an abuse of its discretion.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]This 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.