

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

AB-8713

File: 41-289634 Reg: 06064234

MANUELA GARCIA FLORES and MARIO FLORES,
dba La Fonda Restaurant & Bar
1044 West Gladstone Street, Azusa, CA 91702-4207,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: August 7, 2008
Los Angeles, CA

ISSUED NOVEMBER 14, 2008

Manuela Garcia Flores and Mario Flores, doing business as La Fonda Restaurant & Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license, with revocation stayed for a probationary period of three years, and suspended their license for 35 days, for various drink solicitation activities by several women, in violation of Business and Professions Code² sections 24200.5, subdivision (b), and 25657, subdivision (b) .

Appearances on appeal include appellants Manuela Garcia Flores and Mario Flores, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated July 19, 2007, is set forth in the appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public eating place license was issued on December 6, 1993. On November 2, 2006, the Department filed a 20-count accusation against appellants charging drink solicitation activities prohibited by sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b). The accusation was amended on March 5, 2007, to contain only 18 counts.

At the administrative hearing held on March 27, 2007, documentary evidence was received and testimony concerning the violations charged was presented by Department investigator Jorge Campana. Co-appellant Mario Flores testified that his wife had cancer, he was awaiting a kidney transplant, and they had not been able to be at the premises as before.

The testimony established that, on four dates in June and July of 2006, Campana entered the premises, ordered a Bud Light beer, and paid \$3 for it. On each occasion, a woman would come up to him, engage him in conversation, and ask him to buy her a beer. When Campana agreed, the woman would place an order with the bartender, who would bring her a can of beer. Campana would ask the cost of the beer and the bartender would tell him either \$10 or \$8. Campana would pay the bartender, who would give Campana the difference between the amount given in payment and the amount charged for the woman's beer, put some money in the register, and give some to the woman who solicited. It was determined that the bartender put \$3 in the register for each beer and gave the woman the remainder of the amount charged, either \$5 or \$7. Campana was solicited as described above by "Yadira" and "Michelle" on June 2, 2006; by Lourdes Murillo on June 9; by both Lourdes Murillo and Julia Castillo on July 1; and by Lourdes Murillo on July 7.

Evidence presented at the hearing showed that appellants had previously stipulated to violations of sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b), alleged in a 45-count accusation. The previous violations occurred during June and July 2002, and the stipulation and waiver of hearing was entered in March 2003. On April 24, 2003, the Department issued its decision ordering appellants' license revoked, with revocation stayed for a probationary period of three years (until April 24, 2006), and suspending the license for 20 days.

Subsequent to the hearing in the present case, the Department issued its decision in which Counts 2, 5, 8, 11, 14, and 17 (all involving section 25657, subdivision (a)) were dismissed, the remainder of the counts were determined to have been proved, and the license was conditionally revoked and suspended for 35 days.

Appellants filed an appeal contending that substantial evidence did not establish that they permitted drink solicitation activities under a commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy or that they permitted the women to loiter in the premises for the purpose of soliciting drinks.

DISCUSSION

Appellants contend the findings that they permitted violations of sections 24200.5, subdivision (b), and 25657, subdivision (b), are not supported by substantial evidence. Section 24200.5, subdivision (b), provides that the Department shall revoke a license "[i]f 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." Section 25657, subdivision (b), provides it is a misdemeanor in an on-sale licensed 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."

"Substantial evidence" is relevant evidence which reasonable minds would accept as 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]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, 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, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *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].)

Appellants argue that, since the premises always received \$3.00 for each beer, there could not be any profit-sharing scheme. They assert it "is not the responsibility of the premises" that the women "may have been tipped in some way or other." (App. Br.

at p. 5.) Appellants also speculate that the bartenders may have believed there was some romantic involvement between the women and the undercover officers, or that the change belonged to the women.

Appellants simply ignore the clear evidence of a "commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy." There was a substantial differential in the price of beer for the investigator – \$3.00 – and the price of beer for the women soliciting – \$8.00 or \$10.00. The women clearly received a commission for each drink they solicited. All the bartenders charged more for the solicited drinks than for the investigator's drinks and all handed part of the amount paid by the investigator to the women soliciting the drinks.

These facts provide substantial evidence to support finding violations of both statutes cited above. Not only do they show the plan or scheme of paying a commission for each drink solicited, they also show that the bartenders were not merely innocent or ignorant bystanders. The complicity of the bartenders is obvious; without their complicity, the women would not have received commissions on the beers they solicited. There can be no question that the bartenders "knowingly permitted" these women "to loiter in . . . [the] premises for the purpose of . . . soliciting" drinks. It is hard to imagine a more obvious illegal "bar girl" operation.

It is well settled in Alcoholic Beverage Control Act case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Equally well settled is a licensee's vicarious responsibility for the unlawful on-premises acts of his or

her employees. (*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].) The permitting of this activity by the bartenders is attributed to appellants.

It is understandable that appellants' serious health problems prevented them from personally overseeing the operation of the premises during this time. However, that does not mean that they are not to be held responsible for illegal activity. Under the circumstances, the stayed revocation with a 35-day suspension appears to be a relatively lenient penalty.

ORDER

The decision of the Department is affirmed.³

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

³This 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.

