

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

AB-9203

File: 41-476040 Reg: 11074232

XAVIER GALLARDO PORTALLANZA, dba El Sol de la Noche
1302 Francisquito Avenue, Suite B, West Covina, CA 91790,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 16, 2012
Los Angeles, CA

ISSUED OCTOBER 3, 2012

Xavier Gallardo Portallanza, doing business as El Sol de la Noche (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license, with revocation stayed for three years, and suspended his license for 20 days for allowing drink solicitation activities in the licensed premises in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivision (b).

Appearances on appeal include appellant Xavier Gallardo Portallanza, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated October 10, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on January 5, 2010. On January 25, 2011, the Department filed a 22-count accusation against appellant charging that various drink solicitation activities occurred over the course of three visits to the licensed premises during a Department investigation.

At the administrative hearing held on March 29, 2011, documentary evidence was received and testimony concerning the violations charged was presented by Department investigator Anthony Posada; by the appellant, licensee Xavier Gallardo Portallanza; and by Maribel Magana, one of appellant's employees.

Subsequent to the hearing, the Department, through a designee of the Director, adopted the proposed decision submitted by the ALJ which dismissed all counts of the accusation. The prosecuting arm of the Department then petitioned for reconsideration. Reconsideration was granted, the previously adopted decision was rescinded, and the matter was decided pursuant to Government Code section 11517, subdivision (c). The Department's decision adopted all the ALJ's Findings of Fact; sustained counts 11, 13, 15, 16, 18, and 22, which charged violations of Business and Professions Code² sections 24200.5, subdivision (b), and 25657, subdivision (b), on July 23 and August 20, 2010; the remaining counts were found not established and were dismissed.

Appellant filed a timely appeal raising the following issues: (1) There was not substantial evidence to support a finding that section 24200.5, subdivision (b), was violated, as charged in count 11, and (2) there was not substantial evidence that any of

²Unless otherwise designated, all subsequent statutory references are to the California Business and Professions Code.

the persons named in counts 13, 15, 18, and 22³ "loitered" within the meaning of section 25657, subdivision (b).

DISCUSSION

I

Appellant contends there is not substantial evidence to support finding a violation of section 24200.5, subdivision (b) (24200.5(b)), with regard to count 11 of the accusation. Count 11 charges that appellant permitted a woman named Patti to solicit patrons to buy drinks for her in violation of section 24200.5(b). Section 24200.5(b) provides that:

[T]he 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.

In finding that the violation charged in count 11 was established, the Department said it relied on paragraphs 10, 11, 12, and 19 of the Findings of Fact (FF):

FF 10. On July 23, 2010, Investigators Posada and Zavala returned to the premises posing as customers. Patti greeted them and they sat in a booth. A female identified as Maura Esther Alvarez De Dios (Maura) approached and took their order of a Bud Light beer for each investigator. Posada described Maura as a bartender. [Appellant] testified that Maura was a waitress. Patti asked Posada to buy her a beer. Posada agreed. Posada handed Maura a \$20.00 bill. Maura served

³Appellant has not included count 16 in this appeal. Count 16 charged that appellant permitted a woman known as "Ibarra" to solicit drinks under a commission or profit-sharing plan on August 20, 2010, in violation of section 24200.5, subdivision (b). This is the same charge made in count 11 with regard to a woman known as "Patti." Since count 16 is not appealed, we consider that appellant has conceded the violation charged in that count.

three 12 ounce bottles of Bud Light beer. Maura did not give any change. Patti began to consume the beer.

FF 11. Patti asked Posada to buy her a drink. Posada agreed. Patti obtained a red plastic cup that contained a red colored liquid. The evidence is unclear as to how this was served, whether it was served at the table by Maura or whether Patti went to the fixed bar to get it. Patti told Posada that the red liquid was Clamato. Clamato is not an alcoholic beverage. After consuming this, Patti ordered another Clamato from Maura. Patti did not ask anyone to buy her this drink prior to ordering it. Patti asked Posada and Zavala if they wanted anything. Zavala said that he wanted a Bud Light beer. Patti was served another red cup containing a red liquid (Clamato) and Zavala was served a 12 ounce bottle of Bud Light beer. Posada handed Maura a \$20.00 bill. Maura gave Posada \$5.00 in change. Posada then observed Maura give Patti a folded napkin that had a \$5.00 bill within it. At no time was the price of the Clamato established. Apparently Investigator Posada never inquired as to the cost of the Clamato. The Department did not inquire from waitress Magana or [appellant], both of whom testified, what the cost of a Clamato drink was or better yet whether it was in fact served at the premises.

FF 12. Patti asked Posada to buy her a beer. Posada agreed. Patti ordered a Bud Light beer from Maura. At this time Posada and Patti got up and left the table to dance. As he was getting up Posada placed two \$5.00 bills on the table. Upon seeing this Patti took one of the \$5.00 bills. Maura approached Patti and Posada while they were dancing. Maura told Patti that she was short \$5.00. Patti informed Maura that she (Patti) already took her \$5.00.

FF 19. Respondent testified that Magana and Maura were both waitresses. [Appellant] testified that he does not know Ibarra (Exhibit C) or Patricia Ramirez (Exhibit D) and they are not employees.

In Conclusion of Law (CL) paragraphs 4(b) and 4(c) the Department explained the factors that established the count 11 violation:

CL 4(b) The evidence established that on July 23, 2010 (Count 11), an employee of the premises, waitress Maura, was present when Patti solicited the investigators. Moreover, Maura received payment from one of the investigators and returned some change to the investigator while surreptitiously handing part of the change to Patti. . . .

CL 4(c) While no evidence established that any of the excess money charged for drinks made its way to the licensee, this is not a requirement. The statute simply prohibits a licensee from permitting any person to solicit the purchase of alcoholic beverages under "any commission,

percentage, salary, or other profit-sharing plan, scheme or conspiracy." Since the women soliciting the drinks received some portion of the price charged for those drinks, there is sufficient evidence that this is some sort of commission, percentage or profit-sharing plan or scheme. Moreover, because the evidence established that employees of the licensee were aware of the activities involved, such knowledge is imputed to the licensee. (*Wright v. Munro* (1956) 144 Cal.App.2d 843.)

When an appellant contends 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. (Bus. & Prof. Code, § 23084; *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].) "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].)

Appellant argues there was not sufficient evidence to establish the violation charged because there was no evidence that Maura overheard Patti soliciting Posada for her beer nor was there testimony that Patti received any money from Maura in

conjunction with her solicitation of the beer. While appellant may be correct in these assertions, that does not preclude finding a violation of section 24200.5(b).

It could be argued that Maura heard or should have heard Patti's solicitation of Posada. As the Department points out in CL 4(b), the evidence showed that Maura was at the table where Posada and Patti were sitting, taking their order, when Patti solicited Posada. Posada ordered two Bud Lights, one for himself and one for Zavala, and Patti solicited him at that point. Posada testified:

- A. After I placed my drink order and Investigator Zavala's drink order, Patti looks at us and asks me if I would buy her a beer.

It would not be unreasonable to infer that Maura was aware of Patti's solicitation, particularly in light of what followed.

Although Patti received no money at the time the first beer was ordered, she did receive money from Maura a little later. When Patti got her second Clamato from Maura, Maura handed her a \$5.00 bill in a folded napkin. Then when Patti and Posada left the table to dance after ordering a solicited beer for Patti, Patti took one of the two \$5.00 bills that Posada left on the table to pay for the beer. Maura brought the beer but found only \$5.00 on the table. When she told Patti that there was not enough money, Patti said that she had already taken her \$5.00.

Even though Patti did not receive the \$5.00 in the napkin at the time she solicited the first beer, it is very reasonable to assume that the money was in the nature of a commission for her solicitation, particularly in light of the way the money was delivered. No other possible explanation comes to mind and appellant has not offered one. When Patti took the money from the table, and Maura did not dispute Patti's "right" to it, that was clearly money that Patti acquired as a result of her solicitation.

The failure to present positive proof of Maura hearing the actual solicitations is not fatal to the Department's determination in this case. The later payment to Patti showed that Maura was not only aware of, but participating in, a "plan, scheme or conspiracy" to pay commissions or otherwise share the money that was received as a result of Patti soliciting patrons to buy drinks for her.

The activities of Patti and Maura in the licensed premises are exactly those that show a violation of section 24200.5(b). Maura was appellant's employee, so her knowledge and participation is imputed to appellant.

Viewing this matter, as we must, in the light most favorable to the Department's determination, we must conclude that substantial evidence supports the finding that there was a violation as charged in count 11 of the accusation.

II

Appellant contends that there is not substantial evidence showing that Patti (counts 13 and 15) or Gloria Ibarra Maura (Ibarra) (counts 18 and 22) "loitered" within the meaning of section 25657, subdivision (b) (25657(b)). Section 25657(b) provides:

It is unlawful:

¶ . . . ¶

(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.

Appellant asserts that in prior decisions, the Appeals Board has held a solicitation violation must be found in order to find that a person "loitered" within the meaning of section 25657(b). Because the "required" finding of a solicitation violation is missing, appellant argues, there can be no section 25657(b) loitering violations. In

addition, appellant says, the ordinary meaning of "loiter" is to "linger idly by the way," "to idle," or "to loaf" and there was no evidence presented of Patti or Ibarra idling or loafing.

Appellant appears to equate "solicitation violation" with a violation of section 24200.5(b) or 25657, subdivision (a) (25657(a)).⁴ Although the accusation originally included charges of section 25657(a) violations, these charges were among the counts dismissed. Appellant concludes, therefore, that there is no basis for finding that the women loitered in violation of section 25657(b).

A "solicitation violation" however, is not limited to those situations that fall under section 25657(a). Both section 24200.5(b) and section 25657(b) also prohibit solicitation activities. "Loitering" is not what is prohibited by section 25657(b); it is loitering "for the purpose of begging or soliciting."

In any case, finding a violation of section 25657(b) is not dependent on finding a violation of one of the other solicitation provisions. Even if it were, appellant has conceded that Ibarra solicited by not contesting the Department's determination that the charges of count 16 were sustained (see fn. 2, *ante*), and in this opinion we have already concluded that count 11, regarding solicitation by Patti, should be sustained.

Appellant also asserts that loitering was not established because there was no evidence that the women "were lingering idly by or loafing." (App. Br. at p. 8.) Loitering

⁴Section 25657, subdivision (a), provides:

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.

may be shown by a number of things a woman might be doing before soliciting, appellant argues, such as the solicitor sitting at the bar not drinking, but there was no such evidence introduced. Since no evidence was presented of what the women were doing before Posada walked in, appellant argues, there is no way to prove that the women were loitering.

Evidence of what the women were doing before the investigators came in would be difficult, if not impossible, to provide. However, on July 23, Patti greeted them as they came in, sat in a booth with them, and began soliciting. During the whole course of the investigator's time there, Patti did nothing other than sit with the investigators and solicit drinks. She had no other duties there, and someone soliciting drinks is not just an ordinary patron with lawful business there. It would be difficult to conceive a term for what Patti did other than loitering for the purpose of soliciting alcoholic beverages.

Ibarra's actions were similar to those of Patti. She approached the investigators shortly after they arrived, and when they declined to buy a raffle ticket, she joined them and started soliciting alcoholic beverages. She received money in a folded napkin from the server for each beer she solicited. She also had no other duties in the premises. It seems inescapable that she was allowed to loiter for the purpose of soliciting.

There is, however, another problem with the four counts that charged violations of section 25657(b). Two of them, 15 and 22, duplicate the charges in two other counts, 13 and 18. Counts 13 and 18 charge that "respondent-licensee employed or knowingly permitted . . . [Patti and Ibarra] to loiter . . . for the purpose of begging or soliciting . . . in violation of Business and Professions Code Section 25657(b)." Counts 15 and 22 charge that "respondent-licensee's agent or employee, Maura Esther Alvarez De Dios, employed or knowingly permitted" Patti and Ibarra to loiter in violation of

section 25657(b). But charging that the licensee's employee permitted the illegal acts is the same as charging the licensee with permitting them.

It is well settled that a pleading alleging that defendant committed a certain act is simply an allegation that in legal effect the defendant is responsible for the act -- i.e., that defendant through his agent committed the act or that defendant personally committed it. Either can be proved under an allegation that "defendant" committed the act.

(*Cooper v. State Board of Equalization* (1955) 137 Cal.App.2d 672, 679 [290 P.2d 914].)

There was no substantial evidence establishing that the licensee personally permitted the violations; the evidence was that the licensee's employee, Maura Esther Alvarez de Dios, personally permitted the violations. Although Alvarez de Dios was the person found to have permitted the violations, the only liability with which the Alcoholic Beverage Control Act is concerned is that of the licensee. Alvarez de Dios could possibly be liable for some criminal charge or perhaps even a tort claim, but under section 25657(b), no matter who committed the violation, it is only the licensee who bears responsibility for it and who is penalized for the violation by suspension or revocation of his license.

Although counts 13 and 18 are stated differently from counts 15 and 22, they all charge the same person, the licensee, with the same two violations. In other words, counts 13 and 18 duplicate counts 15 and 22. The Department's decision found four violations when there were only two.

When duplicative charges occur in the criminal law context, the situation is resolved by allowing a punishment or penalty to be imposed on the basis of only one of the two counts. That is, instead of treating the duplicate counts as two violations, for purposes of imposing the penalty, they are treated as just one violation.

In an analogous situation involving the ABC Act, the Department imposed discipline on a licensee who was found to have violated both a license condition and a Department rule by showing sexually explicit films on the licensed premises. The appellate court held that "where a condition imposed on a license duplicates a department rule, relevant statute or ordinance, the department may impose discipline for one or the other violation, but not for both." (*Cohan v. Department of Alcoholic Bev. Control* (1978) 76 Cal.App.3d 905, 911 [143 Cal.Rptr. 199].)

Applying that principle to this case, it would mean that only four counts were established instead of six. When a penalty has been imposed on the basis of several violations, and some of those violations are found not to have been established, it is appropriate to have the penalty reconsidered. (*Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 277-278 [269 Cal.Rptr. 404]; *Kirkpatrick v. Civil Service Com.* (1981) 116 Cal.App.3d 930, 932 [172 Cal.Rptr. 405].) Therefore, we will remand this matter to the Department for reconsideration of the penalty.

ORDER

The decision of the Department is reversed as to penalty and the matter is remanded to the Department for reconsideration of the penalty.⁵

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

Xavier Gallardo Portalanza
Dbá El Sol De La Noche
1302 W. Francisquito Ave, Ste B
West Covina, CA 91790-4660

FILE: 41-476040

REG: 11074232

On-Sale Beer and Wine Eating Place License
Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on October 10, 2011, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on March 29, 2011, before Administrative Law Judge John Lewis and the written arguments of the parties, and good cause appearing, the following decision is hereby adopted:

FINDINGS OF FACT

The Findings of Fact as set forth in the Administrative Law Judge's Proposed Decision of April 18, 2011, are hereby adopted as Findings of Fact for this decision and by this reference are incorporated herein as if set forth in full.

CONCLUSIONS OF LAW

Conclusions of Law 1, 2, 3, 5, 6, 8 and 10, inclusive, as set forth in the Administrative Law Judge's Proposed Decision of April 18, 2011, are hereby adopted as Conclusions of Law for this decision and by this reference are incorporated herein as if set forth in full. The following additional Conclusions of Law are hereby adopted:

4. (a) Cause for suspension or revocation of Respondent's license was not established as to Counts 1 and 6 of the Accusation for violation of Section 24200.5(b). The evidence concerning the price of the beers served is inconsistent and somewhat confusing. Although there is conflicting evidence

regarding whether the waitress Magana was even employed by the licensee on July 9, 2010, even if she were there, the evidence concerning whether she was aware or should have been aware of the solicitation by Patti and/or Rosi is very weak. Beyond a single instance in which Patti allegedly solicited the investigator while Magana was at their table, all other transactions on that date took place outside the presence of any employees.

- (b) Cause for suspension or revocation of Respondent's license was established as to Counts 11 and 16 of the Accusation by reason of the matters set forth in Findings of Fact paragraphs 10, 11, 12 and 19, for violation of Section 24200.5(b). The evidence established that on July 23, 2010 (Count 11), an employee of the premises, waitress Maura, was present when Patti solicited the investigators. Moreover, Maura received payment from one of the investigators and returned some change to the investigator while surreptitiously handing part of the change to Patti. With respect to the activities on August 20, 2010 (Count 16), the evidence established that employee/waitress Maura received payment for the investigator and surreptitiously returned change to Ibarra.
 - (c) While no evidence established that any of the excess money charged for drinks made its way to the licensee, this is not a requirement. The statute simply prohibits a licensee from permitting any person to solicit the purchase of alcoholic beverages under "any commission, percentage, salary, or other profit-sharing plan, scheme or conspiracy." Since the women soliciting the drinks received some portion of the price charged for those drinks, there is sufficient evidence that this is some sort of commission, percentage or profit-sharing plan or scheme. Moreover, because the evidence established that employees of the licensee were aware of the activities involved, such knowledge is imputed to the licensee. (*Wright v. Munro* (1956) 144 Cal.App.2d 843.)
9. (a) Cause for suspension or revocation of Respondent's license was not established as to Counts 3, 5, 8, 10 and 20 of the Accusation for violation of Section 25657(b).
- (b) With respect to Counts 13, 15, 18 and 22 of the Accusation, cause for suspension or revocation of Respondent's license was established for violation of Section 25657(b). As stated previously (Conclusions of Law 4(c)), the knowledge of employees of a licensee are imputed to the licensee. Because there is evidence that employees were directly involved in several transactions (as evidenced by the surreptitious return of a portion of the purchase price to

the female solicitors) and in others were in positions to reasonably have been aware of the solicitation activities, there is sufficient evidence to support a finding that Respondents "knowingly permitted" the illegal activities.

11. Cause for suspension or revocation of Respondent's license was not established as to Count 23 of the Accusation for violation of Rule 143. Like section 25657(a), a necessary element to establish a violation of Rule 143 is an employment relationship. There was insufficient evidence that Patti was an employee of Respondent. The offering for sale of raffle tickets, by itself, is not enough in this case to establish employment.

PENALTY

Based upon the foregoing, Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 17, 19, 20, 21 and 23 are dismissed; Counts 11, 13, 15, 16, 18 and 22 are sustained.

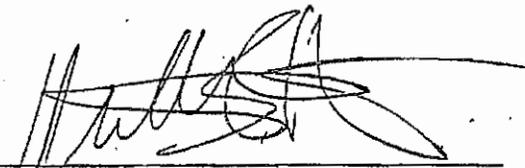
The Department recommends that Respondent's license be revoked with the revocation stayed for a period of three years and a sixty (60)-day suspension.

There was much confusion in this case, given the conflicts regarding the price of alcoholic beverages, whether one of the waitresses was even at the premises on the first date of the investigation, and simply the similar names of many of the people involved. However, despite all that, the Department did establish illegal solicitation activities on two of the three dates alleged. Thus discipline is warranted.

The Department did establish that an employee of the licensee was plainly aware of what was going on and directly participated on several occasions. Given that the license was issued only seven month prior to the investigation commencing and violations occurring, Respondent needs to address these issues immediately. In contrast, however, the number of incidents proven was small. On balance, the discipline imposed herein is reasonable.

Respondent's license is revoked, with said revocation stayed for a period of three (3) years. In addition, the license is suspended for a period of twenty (20) days.

Dated: October 10, 2011


Matthew D. Botting
General Counsel

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION
AGAINST:

Xavier Gallardo Portalanza
Dba El Sol De La Noche
1302 W. Francisquito Avenue, Ste B
West Covina, CA 91790

FILE: 41-476040

REG: 11074232

Off-Sale Beer and Wine License

under the Alcoholic Beverage Control Act.

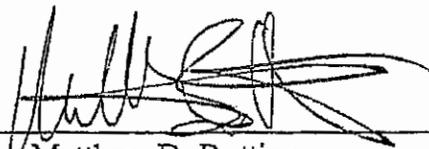
ORDER ON MOTION FOR RECONSIDERATION

On June 15, 2011, the Department of Alcoholic Beverage Control submitted a Motion for Reconsideration in the above-entitled matter pursuant to Government Code Section 11521.

The Director of the Department of Alcoholic Beverage Control, having reviewed the moving papers and the proposed decision in this matter, and good cause appearing, hereby orders as follows:

1. The Motion for Reconsideration is granted.
2. The Certificate of Decision certifying that the Department adopted the proposed decision in this matter, issued May 23, 2011, is rescinded.
3. The Department rejects the proposed decision and will decide the case itself pursuant to the provisions of Government Code Section 11517(c)(2)(E).

Dated: June 17, 2011



Matthew D. Botting
General Counsel

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

FILE : 41-476040

REG. : 11074232

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Administrative Hearing Office, adopted said proposed decision as its decision in the case therein described on May 23, 2011.

THIS DECISION SHALL BECOME OPERATIVE JULY 11, 2011.

Sacramento, California

Dated: May 23, 2011



Matthew D. Botting
General Counsel

Pursuant to Government Code Section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9 of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capital Mall, Suite 1245, Sacramento, CA 95814.

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

RECEIVED
APR 28 2011
Alcoholic Beverage Control
Legal Unit

IN THE MATTER OF THE ACCUSATION AGAINST:

Xavier Gallardo Portalanza
dba El Sol De La Noche
1302 W. Francisquito Ave.
Suite B
West Covina, CA 91790

Respondent,

On-sale Beer & Wine Eating Place License.

} FILE: 41-476048
}
} REG: 11 074 232
}
} LICENSE TYPE: 41
}
} WORD EST: 47,000
}
} REPORTER:
} Melissa Tressen
} Kennedy Court Reporters
}

PROPOSED DECISION

Administrative Law Judge John W. Lewis heard this matter at Cerritos, California, on March 29, 2011.

Valoree Wortham, Staff Counsel, represented the Department of Alcoholic Beverage Control [Department].

Armando Chavira, attorney at law, represented Xavier Gallardo Portalanza. [Respondent].

The Department seeks to discipline Respondent's license on grounds that he employed or permitted several named individuals to solicit or encourage others to buy drinks and employed or permitted named individuals to loiter for the purpose of begging or soliciting patrons to purchase alcoholic beverages for them in violation of Business & Professions Code Sections 24200.5(b), 25657(a), 25657(b) and Rule 143. (Exhibit 1)

The Accusation was amended without objection as follows:

Count 23 was added to the Accusation alleging that on or about July 23, 2010, Patti solicited a drink in violation of Rule 143.

Additionally, Count 21 was later amended by striking the word "Patricia". (The names of the individuals involved became very confusing as the case proceeded and should have been presented in a clear and concise manner.)

Oral and documentary evidence was received at the hearing and the matter was argued and submitted for decision on March 29, 2011.

FINDINGS OF FACT

1. The Accusation was filed on January 25, 2011.
2. Department issued a type 41 license (On-sale Beer & Wine Eating Place) to Respondent at the above-identified location [Licensed Premises] on January 5, 2010.
3. There is no record of prior disciplinary action against this license.

(July 9, 2010)

[Counts 1 through 10]

4. On the evening of July 9, 2010, Department Supervising Investigator Anthony Posada and Investigator Zavala went to the premises in an undercover capacity to conduct an investigation. They entered the premises and took seats at a booth. They each ordered a Bud Light beer from a person Posada identified as being Maribel Magana (Magana). Investigator Posada described Magana as a bartender. Respondent Portalanza and Magana both testified that she (Magana) was employed at the premises as a waitress. Magana testified that she was not at the premises on July 9, 2010 and that she did not begin working there until about July 23, 2010.
5. A short time later the investigators were approached by a female identified only as "Patti". Patti asked if she could join the investigators. Posada told her yes. Magana then approached their booth and served the Bud Light beers to Posada and Zavala. Patti asked Posada if he would buy her a beer. Posada agreed. Patti then ordered a Bud Light beer from Magana. Magana left and returned with a 12 ounce Bud Light beer that she served to Patti. Posada then handed Magana \$20.00. Magana placed \$9.00 in change on the table in front of Patti. Patti picked up the \$9.00 and placed it in her purse. Patti consumed the beer. (Note: The payment of \$11.00 for three beers is not consistent with subsequent payments and charges for beers and does not make sense. The Department did not acknowledge this discrepancy nor address it in any manner.)
6. Patti asked if she could bring a friend for Zavala. They agreed. Patti waived to a female who approached and sat with them. She was subsequently identified as "Rosi". Patti then asked Posada if he would buy Rosi a beer. Posada said no, and told Patti to have Rosi ask Zavala. Rosi then asked Zavala to buy her a beer. Zavala agreed. Rosi ordered and was served a 12 ounce bottle of Bud Light beer by Magana. Zavala then

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handed Magana a \$20.00 bill. Magana gave Zavala \$10.00 in change. Rosi began to consume the beer. Investigator Zavala did not appear and testify at the hearing. Posada was the Department's only witness.

7. Patti asked Posada to buy her a beer. Posada agreed and handed Patti a \$20.00 bill. Patti walked to the fixed bar and returned with a 12 ounce bottle of Bud Light beer and an unknown amount of currency. Patti placed the currency in her purse. Posada then asked Patti where his change was. Patti opened her purse, removed \$10.00, and handed it to Posada. Patti began to consume the beer.

8. Rosi then asked Posada for a beer. Posada told Rosi to ask Zavala. She did. Zavala agreed and handed Rosi a \$10.00 bill. Rosi went to the fixed bar and returned with a 12 ounce bottle of Bud Light beer. She did not offer or give Zavala any change. Rosi began to consume the beer.

9. Patti asked Posada to buy her a beer. Posada agreed and handed Patti a \$20.00 bill. Patti went to the fixed bar. She obtained a 12 ounce bottle of Bud Light beer and placed the change in her purse. Patti began to consume the beer. Posada then ordered a Bud Light beer from Magana. When Magana served Posada the beer she told him that would be \$5.00. Posada told Magana to get the money for the beer from Patti. Patti then gave \$5.00 to Magana for Posada's beer and \$5.00 to Posada. The investigators left a short time later.

(July 23, 2010)

[Counts 11 through 15 and Count 23]

10. On July 23, 2010, Investigators Posada and Zavala returned to the premises posing as customers. Patti greeted them and they sat in a booth. A female identified as Maura Esther Alvarez De Dios (Maura) approached and took their order of a Bud Light beer for each investigator. Posada described Maura as a bartender. Respondent testified that Maura was a waitress. Patti asked Posada to buy her a beer. Posada agreed. Posada handed Maura a \$20.00 bill. Maura served three 12 ounce bottles of Bud Light beer. Maura did not give any change. Patti began to consume the beer.

11. Patti asked Posada to buy her a drink. Posada agreed. Patti obtained a red plastic cup that contained a red colored liquid. The evidence is unclear as to how this was served, whether it was served at the table by Maura or whether Patti went to the fixed bar to get it. Patti told Posada that the red liquid was Clamato. Clamato is not an alcoholic beverage. After consuming this, Patti ordered another Clamato from Maura. Patti did not ask anyone to buy her this drink prior to ordering it. Patti asked Posada and Zavala if they wanted anything. Zavala said that he wanted a Bud Light beer. Patti was served another red cup containing a red liquid (Clamato) and Zavala was served a 12 ounce bottle of Bud Light beer. Posada handed Maura a \$20.00 bill. Maura gave Posada \$5.00

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in change. Posada then observed Maura give Patti a folded napkin that had a \$5.00 bill within it. At no time was the price of the Clamato established. Apparently Investigator Posada never inquired as to the cost of the Clamato. The Department did not inquire from waitress Magana or Respondent, both of whom testified, what the cost of a Clamato drink was or better yet whether it was in fact served at the premises.

12. Patti asked Posada to buy her a beer. Posada agreed. Patti ordered a Bud Light beer from Maura. At this time Posada and Patti got up and left the table to dance. As he was getting up Posada placed two \$5.00 bills on the table. Upon seeing this Patti took one of the \$5.00 bills. Maura approached Patti and Posada while they were dancing. Maura told Patti that she was short \$5.00. Patti informed Maura that she (Patti) already took her \$5.00.

(August 20, 2010)
[Counts 16 through 22]

13. On August 20, 2010, Investigators Posada and Zavala again returned to the premises posing as customers. They each ordered Bud Light beers and were charged \$5.00 for each beer.

14. The investigators were approached by a female later identified as Gloria Ibarra Maura (Ibarra). Ibarra asked the investigators if they wanted to buy any raffle tickets for a meal platter. They declined. Ibarra asked Posada to buy her a beer. Posada agreed and handed Ibarra a \$20.00 bill. Ibarra walked to the fixed bar and returned empty handed. A female subsequently identified as Patricia Araceli Ramirez Velarde (Ramirez) approached and placed a 12 ounce bottle of Bud Light beer in front of Ibarra. Ramirez handed \$10.00 to Posada. Ramirez then handed a folded napkin with currency in it to Ibarra. Ibarra placed the napkin in her bra area. Ibarra began to consume the beer.

15. Ibarra again asked Posada to buy her a beer. Posada agreed. Ibarra ordered a Bud Light beer from Maura Esther Alvarez De Dios (Maura). Posada gave Maura a \$10.00 bill. Maura served Ibarra a 12 ounce Bud Light beer and handed Ibarra a folded napkin with some currency in it. Ibarra placed the napkin in her blouse/bra area. Ibarra began to consume the beer.

16. The back-up team was summoned to initiate enforcement action. Ibarra was searched and two \$5.00 bills were recovered from her bra area by a female investigator. The recovered money was not presented as evidence and it is unclear if the bills were found wrapped in napkins. A steno pad was found behind the bar that had four names on it and some other writing. This apparently had to do with the sale of raffle tickets.

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17. Magana testified that she worked as a waitress at the premises. Exhibit A shows Magana wearing what she testified to as being her waitress uniform. Exhibit B shows Maura Esther Alvarez De Dios (Maura) also wearing a waitress uniform as testified to by both Magana and Respondent. Despite the obvious fact that Magana and Maura were attired in waitress uniforms, Investigator Posada, even after being presented with Exhibits A and B, testified that none of the females at the premises were wearing uniforms at any time.

18. Magana testified that she was not at the premises on July 9, 2010. She did not begin working there until about July 23, 2010.

19. Respondent testified that Magana and Maura were both waitresses. Respondent testified that he does not know Ibarra (Exhibit C) or Patricia Ramirez (Exhibit D) and they are not employees.

CONCLUSIONS OF LAW

1. Article XX, Section 22 of the California Constitution and California Business and Professions Code Section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation or causing or permitting of a violation of any penal provisions of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 24200.5 provides that "the department shall revoke a license . . . (b) [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."

4. Cause for suspension or revocation of Respondent's license was **not** established as to Counts 1, 6, 11, and 16 of the Accusation by reason of the matters set forth in Findings of Fact, paragraphs 4 through 19, for violation of Section 24200.5(b). There was no evidence presented to establish that Respondent employed or permitted any person to solicit drinks. Further, there was no evidence to establish any type of commission, percentage, salary, or profit-sharing plan, scheme or conspiracy. The pricing of the drinks and/or beers did not make any sense or follow any particular pattern. There was no evidence to establish that anything made its way to Respondent. It is not known if the investigation itself was lacking or if it was a failure to properly question the witness but one thing is certain; this was far from being a solid case.

5. Section 25657(a) provides that it is unlawful “[f]or 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.”

6. Cause for suspension or revocation of Respondents’ license was not established as to counts 2, 4, 7, 9, 12, 14, 17, 19, and 21 of the accusation by reason of the matters set forth in Findings of Fact, paragraphs 4 through 19, for violation of Section 25657(a). An essential element of this section is an employment relationship with Respondent. There was no evidence presented to establish that the individuals involved in these counts (Patti, Rosi, and Ibarra) had any employment relationship with Respondent. There was no evidence of any of them performing waitress type duties such as clearing tables or serving customers. Also, Patti was observed placing money into her purse on several occasions. If she was in fact working at the premises she would probably not be carrying her purse around with her.

7. As to Counts 12 and 14, it is not known which of these two counts, if either, applied to the “Clamato”. Section 25657(a) requires that the solicitation be of an alcoholic beverage. Clamato is not an alcoholic beverage and there was no evidence to show otherwise. Also, there was no solicitation at all with the second Clamato drink. The Department did not specify whether Count 12 or 14 had to do with the Clamato or the beer. It is not the job of the court to make sense of the Department’s case. It is the Department’s burden to prove each count by a preponderance of the evidence.

8. Section 25657(b) provides that it is unlawful “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 or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.”

9. Cause for suspension or revocation of Respondent’s license was not established as to counts 3, 5, 8, 10, 13, 15, 18, 20, and 22 of the accusation by reason of the matters set forth in Findings of Fact, paragraphs 4 through 19, for violation of Section 25657(b). First, there was no evidence to establish that any of the individuals involved in these counts (Patti, Rosi, or Ibarra) were employees of Respondent. The offer for sale of a raffle ticket does not establish employment. Nor does the hearsay statement of Patti, who was not present at the time of the enforcement action. Further, there was insufficient evidence to establish that Respondent knowingly permitted the loitering for the purpose of begging or soliciting. Respondent credibly testified that he did not know Patti, Rosi or Ibarra and that they were not employees.

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10. Section 143, title 4, California Code of Regulations [Rule 143], provides that “[n]o 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*.” (Emphasis added.)

11. Cause for suspension or revocation of Respondents’ license was not established as to count 23 of the accusation by reason of the matters set forth in Findings of Fact, paragraphs 4 through 18, for violation of Rule 143. Although it was never clearly established on the record, it is assumed that this added count had to do with the Clamato and Patti. On the other hand, as alleged by the Department at the beginning of the hearing when this count was added, it could just as easily be referring to a beer. Something such as this should not be left for speculation by the trier of fact.

A necessary element of Rule 143 is an employment relationship. As previously noted, there was not a preponderance of evidence to establish that Patti was an employee of Respondent. Further, there was no clear evidence dealing with the payment, if any, of the first Clamato, if in fact the Clamato was the subject of count 23. As to the second Clamato, there was no evidence that there was a solicitation at all.

PENALTY

The Department recommends that Respondent’s license be revoked with the revocation stayed for a period of three years and a sixty day suspension.

In order to impose a penalty, the accusation must first be sustained. Such a finding must be supported by a preponderance of the evidence. The evidence must be reasonable in nature, creditable and of solid value. Inferences based only on mere possibility, suspicion, speculation, imagination, guesswork, supposition conjecture or surmise must be rejected.

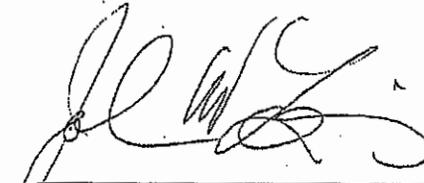
The Department’s case is sorely lacking. As previously noted it is not known if is because the investigation itself was lacking or if it was a failure to properly question the witnesses and present the case. In either case, if there is any doubt as to any particular point it should not be resolved in the Department’s favor because the Department carried the burden of proof.

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ORDER

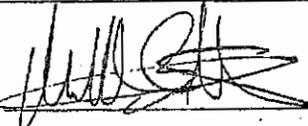
The accusation is dismissed.

Dated: April 18, 2011



John W. Lewis
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt:

By:  for the Director
Date: 5-17-11