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

AB-9250
File: 40-343033 Reg: 10074042

MARIA VICTORIA HERNANDEZ and MARTIN HERNANDEZ MURILLO,
dba Dino's Bar
646 N. Avalon Blvd., Wilmington, CA 90744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 6, 2012
Los Angeles, CA

ISSUED JANUARY 17, 2013

Maria Victoria Hernandez and Martin Hernandez Murillo, doing business as Dino's Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their on-sale beer license, conditionally stayed the order of revocation, subject to three years of discipline-free operation, and imposed a 30-day suspension, for numerous acts of drink solicitation.

Appearances on appeal include appellants Maria Victoria Hernandez and Martin Hernandez Murillo, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated March 8, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on July 9, 1998. On December 28, 2010, the Department instituted a 27-count accusation against appellants charging multiple acts of drink solicitation on August 21, August 27, and September 3, 2009.

Testimony of Los Angeles Police Sergeant Lifernando Garcia concerning the violations charged was presented at an administrative hearing held on December 6, 2011. Appellants presented no witnesses.

Subsequent to the hearing, the Department issued its decision which sustained all of the counts of the accusation: seven counts (1, 4, 10, 15, 16, 19, and 20) charged violations of Business and Professions Code section 24200.5, subdivision (b);[2] three counts (7, 11, and 23) charged violations of section 25657, subdivision (a);[3] seven counts (2, 5, 8, 12, 17, 21, and 24) charged violations of section 35657, subdivision

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[2]Section 24200.5 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.

Unless otherwise indicated all statutory references are to the Business and Profession Code.

[3]Section 25657, subdivision (a) provides that 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);[4] eight counts (3, 6, 9, 13, 14, 18, 22, and 25) charged violations of section 23804;[5] and two counts (26 and 27) charged violations of section 23402.[6]

Appellants have filed a timely appeal, and make the following contentions: (1) the imposition of penalties for violations of conditions and for violations of statutes identical to the condition violations violated appellants' due process rights; (2) the Department did not prove that the licensees employed or knowingly permitted anyone to loiter on the premises for the purpose of begging or soliciting the purchase of alcoholic beverages.

DISCUSSION

I

Appellants contend that the Department violated its due process rights by

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[4]Section 25657. 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.

[5]Section 23804:

A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license.

[6]Section 23402:

No retail on-or off-sale license, except a daily on-sale general licensee holding a license issued pursuant to Section 24045.1, shall purchase alcoholic beverages for resale from any person except a person holding a beer manufacturer's, wine grower's, brandy manufacturer's, or wholesaler's license.

Appellants have not contested the Department's decision with respect to the charges under this statute.

penalizing it twice for the same alleged conduct.

No useful purpose would be served by reiterating the detailed exposition of facts set forth in Findings of Fact 6 through 17 of the Department's decision. Appellants have not challenged the accuracy of any of the those factual findings. The findings record numerous acts of solicitation in the three days of the investigation, including two by appellants' bartender. The women involved routinely ordered Bud Light beer, for which the investigating officers were charged $10. The bartender collected $3 for each of the women's beers, and the $7 difference was retained by the women. In the case of multiple orders, the net proceeds were divided among the women at the table. Drinks purchased for the officers' consumption cost $3.50 each, except for one order which cost $10 for three beers.

Appellants' license contained conditions when it issued. Under section 23804, a violation of a condition is grounds for suspension or revocation of a license. Condition 2, which appellants were charged with violating, provides: "No employee or agent shall solicit or accept any alcoholic or non-alcoholic beverage from any customer while in the premises."[7] Counts 3, 6, 9, 13, 14, 18, 22, and 25 charged violations of that condition, and, as noted above, the Department sustained those counts, as well as all other counts, all but two of which involved the solicitation of drinks.

Appellant cites and quotes from the court's decision *Cohan v. Department of Alcoholic Beverage Control* (1978) 76 Cal.App. 3d 905, 911 [143 Cal.Rptr. 199], which

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[7]We are unable to find any support in the record for appellants' assertion in their brief (at p. 5) that the license conditions were imposed pursuant to sections 24200.5, subdivision (b) and 25657. The license itself does not state the reason they were imposed, other than the recital that the department objected to the issuance of an unrestricted license and appellants wished to allay the Department's concerns. Quite obviously, the Department's concerns were about solicitation.

held that the Department was not permitted to impose multiple penalties for conduct which violates both a condition and a Department rule. Even though the present case involves violations of a condition and a statute, rather than a condition and a rule, the Department appears to take the view that the principal stated in *Cohan* is, nonetheless, equally applicable in such a case.[8]

That said, however, it is not at all clear that multiple penalties were in fact imposed in this case. Only a single penalty, one embracing all of the unlawful conduct found to have taken place, was imposed. Given the broad spectrum of conduct evinced by the evidence, we think it was probably the only way the Department could effectively deal with the situation. The notion of itemizing for purposes of penalty assessment each solicitation, and assigning some individualized penalty for each, strikes us as impractical if not impossible. By the same token, there is no certainty that the penalty set by the Department would be any different if the condition violations were severed from the other 19 statutory violations itemized in the decision.

The California Supreme Court has acknowledged the broad discretion accorded the Department in its determination of an appropriate penalty. (See, e.g., *Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) We think that discretion was exercised appropriately in this case.

It should also be noted that the violations of section 24200.5, subdivision (b), involve penalties significantly different from that singled out by the license condition. That section mandates revocation for its violation, while the other solicitation statutes,

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[8]In *Maria Victoria Hernandez and Martin Hernando Murillo*, AB-9251, a case pending on the current calendar, and involving the same licensees, the decision specifically excluded any penalties for condition violations flowing from the same conduct which violated statutory prohibitions against drink solicitation.

as well as section 23804 with respect to license conditions, are optional as to suspension or revocation.

All this leads us to conclude that appellants have not made a case of multiple punishment within the principles expressed in *Cohan*, *supra*.

II

Appellants contend in part B of their brief that the Department failed to prove that the licensees employed or knowingly permitted anyone to loiter in the premises for the purpose of soliciting the purchase of alcoholic beverages for the person soliciting.

This Board's decisions and case law clearly establish that a licensee has an affirmative duty to maintain an orderly business. (*Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 119-120 [28 Cal.Rptr. 74]; *Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405]; Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 534 [1 Cal.Rptr. 446]; *Flores* (1995) AB-6499.)

Appellants appear to challenge only those counts where the Department found violations of section 25657, subdivision (b) (counts 5, 8, 12, 17, 21, and 24).[9] They argue that there was no testimony establishing that any of the alleged "B-Girls" were on salary, and that the events that took place on August 21, 2009 and September 3, 2009 did not involve any employees of appellants.[10]

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[9]They do not challenge the counts under section 25657, subdivision (a) (counts 7, 11, and 23).

[10]Appellants assert: "What is astonishing is the activities that took place on August 21, 2009 and September 3, 2009, did not involve any employees of the appellant." (App. Br. at p. 9.) This ignore the fact that the employee who solicited drinks and charged the standard price of $10 for Bud Light beer on August 21, 2009, was (continued...)

This is simply not true, and even if it were, it does not help appellants. In fact, when Claudia, appellants' bartender, solicited drinks from Sgt. Garcia on August 27, 2009 after going off duty, she charged him $10 for her beer, the same price a woman known as "Daisy" charged the officers when they bought beers for her and her friends on the first and third days of the investigation. Coincidence? We do not think so. Lilia, appellants' other bartender, also demonstrated knowledge of the scheme and its ground rules by giving the $7 change for the beers the officers purchased for Claudia, not to the officers, but to Claudia. Thus, it cannot be said that no employees were involved in the solicitation activity on the two dates referred to. To the contrary, the actions of the two bartenders compel the inference of knowledge and cooperation in the scheme on the part of both. Whether Daisy and her friends were or were not employees becomes irrelevant, since it is obvious their solicitation activities were known to and approved by the very persons appellants placed in charge of the premises.

The evidence having established knowledge and complicity on the part of both bartenders, it is not difficult to draw an inference that Daisy and her friends were employed, even if not in the traditional sense, or, at a minimum, were permitted, to solicit drinks. That the licensees may not have been present when all of the solicitation activity occurred affords them no solace. The acts and knowledge of their bartenders is imputed to them under established legal principles. (See *Harris v. Alcoholic Beverage Control Appeals Bd.* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629.])

Viewing the events as a whole, it is impossible not to conclude that appellants'

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[10](...continued)
appellants' bartender.

bartenders knew of and condoned, and thereby permitted, multiple acts of drink solicitation by women who loitered in the bar for that purpose. Although the record does not reflect any evidence showing actual knowledge on the part of the licensees, it cannot be denied that they benefitted from the scheme, and the knowledge of their bartenders, the persons in charge, is imputed to them.

For all these reasons, we have concluded that the appeal lacks merit.

ORDER

The decision of the Department is affirmed.[11]

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

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[11] 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.