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

AB-9279
File: 48-454305 Reg: 11075024

ALZ, LLC, dba El Puerto Bar
826 North Avalon Boulevard, Wilmington, CA 90744,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 2, 2013
Los Angeles, CA

ISSUED JUNE 11, 2013

ALZ, LLC, doing business as El Puerto Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for acts of drink solicitation and conduct of entertainers violative of a Department rule governing conduct and attire, violations of Business and Professions Code section 24200.5, subdivision (a); 25657, subdivisions (a) and (b); and Department rule 143.3.[2]

Appearances on appeal include appellant ALZ, LLC, appearing through its counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

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[1]The decision of the Department, dated July 5, 2012, is set forth in the appendix.

[2]All statutory citations are to the Business and Professions Code unless otherwise stated.

PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 3, 2007. On May 5, 2011, the Department instituted a 63-count accusation against appellant charging numerous acts of drink solicitation violative of Business and Professions Code sections 24200.5, subdivision (b)[3] and 25657, subdivisions (a) and (b),[4] and numerous acts of lewd conduct on the part of female entertainers in violation of various subdivisions of Department rules 142 and 143,[5] occurring on six different days in May, June, July, and August, 2010.

An administrative hearing was held on April 24, 2012, at which time documentary evidence was received and testimony concerning the violation charged was presented

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[3]Section 24200.5 provides, in pertinent part:

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.

[4]Section 25657 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.

(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]Rule 143 addresses drink solicitation, while rules 143.2 and 143.3 address various kinds of attire and conduct related to actual or simulated sexual behavior on the part of employees and/or entertainers.

by Los Angeles police officers Adriana Bravo, Stephen Moor, Lifernando Garcia, Felipe Benavidez, and John Hayes. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the evidence supported the charges in 45 counts of the 63-count accusation.[6]

Appellant filed a timely notice of appeal in which it raises the following issues: (1) Rule 143.3 is unconstitutionally vague and ambiguous; (2) the Department failed to establish that the Bud Light solicitations violated Business and Professions Code sections 25657, subdivisions (a) and (b); (3) solicitation counts 9, 10, 12, and 13 were not supported by substantial evidence; (4) counts 17 through 22 must be reversed because there was no showing that the premises was exercising the privileges of the license, i.e., engaging in the sale of alcoholic beverages; (5) the penalty of revocation imposed with respect to the conduct charged in counts 23 through 27 is excessive; and (6) the penalty of revocation imposed with respect to the conduct charged in counts 28 through 32 is excessive.

DISCUSSION

I

At the close of the administrative hearing before the Department, appellant raised only two issues [RT 149-150]: (1) counts which related to solicitations involving Bud 55 should be dismissed; and (2) counts involving solicitation by undercover police officers should be dismissed. After addressing these two issues (on which appellant prevailed), appellant's counsel stated [RT 150-151]:

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[6]The charges which were sustained included 26 counts charging violations of rules 143, 143.2 and 143.3, 3 counts charging violations of section 25657, subdivision (a), 7 counts charging violations of section 25657, subdivision (b), and 9 counts charging violations of section 24200.5, subdivision (b).

> I'll submit on the rest, your honor. I can sit here and go through endless arguments about details, but I think your honor is well aware of bar girl solicitation statutes and is certainly more fit to decide these types of cases without my having to nauseate him into my usual -- submitted.

With the exception of arguments directed at the penalty, none of the issues raised in appellant's brief were raised at the administrative hearing. We have carefully reviewed the hearing transcript with regard to the Department's findings, and are satisfied that they are supported by substantial evidence. Since the penalty had not been determined before appellant's closing argument, it, and it alone, remains a viable issue.

Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Appellant has offered neither explanation of justification for its failure to raise these issues at the administrative hearing. Consequently, we address only the issues regarding penalty.

II

At the close of the hearing, Department counsel urged the ALJ to order outright revocation:

> (Ms. Casey): There is nothing that this licensee -- there is nothing your Honor can do that would make this licensee change his behavior and

> his business model. He has decided that this is how he wants to run his business, and the Department is requesting for multiple solicitations, multiple B-girl activity, and for the lewd conduct, the penalty of outright revocation of the license of ALZ LLC.

The ALJ did just that, stating:

> Respondent has been given ample opportunity to clean up his business and prevent these types of violations. By his own actions, or inactions as the case may be, he has demonstrated that he has no intention of preventing these violations. As far as he is concerned, he will do whatever is necessary to bring in customers. Permitting this license to continue is contrary to public welfare and morals.

Appellant attacks the revocation order on two fronts: (1) Appellant argues that the rule 143.3 violations charged in counts 23 through 27 and 28 through 32 cannot support an order of revocation because its prior disciplinary history related only to drink solicitation. Therefore, it argues, since the Department's penalty schedule (4 Cal. Code Regs., §144) prescribes a 30-day suspension for a first offense, the revocation order must be reversed if based on the alleged lewd conduct alone. Since the order of revocation is not broken down among the various counts, the case must be remanded to the Department for reconsideration; and (2) appellant argues that the solicitation activities alleged on counts 33 through 41 and 42 through 46 of the accusation are not supported by substantial evidence since the drinks solicited - Bud Light beer - were not shown to be alcoholic beverages.

Thus, appellant argues, the Department's discretion is limited "to fit the penalty to the violation, both in type and degree of egregiousness," and, therefore, the Board should remand the case to the Department for a reconsideration of the penalty "since much of the accusation should be reversed" (App.Br. at p.23).

There is much that is wrong with appellant's arguments on the penalty issue. First, all of its major premises are false. It is untrue that rule 144 calls only for a 30-day

suspension for a first violation. The rule provides for a penalty ranging from a 30-day suspension to a revocation. It is equally untrue that much of the decision should be reversed. Appellant's attorney had the opportunity to tell the ALJ what issues needed to be addressed, where any weaknesses lay in the Department's case, or why there were reasons for mitigating any penalty. By electing not to do so, appellant waived the reasons it may have believed it had for relief on appeal.

Thirdly, the notion that Bud Light beer, the brand and beverage which is almost universally the beverage involved in b-girl solicitations, lacks alcoholic content ignores reality. The Board has over the years heard numerous appeals in cases where the beer involved was Bud Light. (See, e.g., *Patel* (2000) AB-7449.) That Bud Light beer is an alcoholic beverage is a matter of common knowledge. There are any number of web sites which address the alcohol content of beers, including Bud Light beer.[7] Bud Light's brewer, Anheuser Busch, even publishes an internet website for Bud Light which states "ARE YOU OF LEGAL DRINKING AGE?" and "WE NEED TO CHECK YOUR ID," and includes a chart to assist in checking legal age.

The Appeals Board may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

We are unaware of any requirement in an accusation matter involving multiple

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[7]See, e.g., *www.alcoholcontents.com; www.real beer.com; www.beer100.com.*

violations that the Department must identify specific penalties for specific violations. The number and kind of violations established in this case would appear easily to support a penalty of outright revocation. Indeed, nine of the counts which were sustained charged violations of section 24200.5, subdivision (b), which provides that revocation for its violation is mandatory.

The conduct that gave rise to this matter occurred in 2010, only one year after appellant's license was subjected to a stayed order of revocation for violation of several of the same statutes and rules violated in this case, including section 24200.5. The observations of Department counsel and the ALJ concerning appellant's unwillingness to comply with the law were well founded.

ORDER

The decision of the Department is affirmed.[8]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[8] 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.