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

AB-9332
File: 48-438808 Reg: 11074651

MARIA DEL ROSARIO MARTINEZ, dba Captain's Cabin
11665 Victory Boulevard, North Hollywood, CA 91606,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 7, 2013
Los Angeles, CA

ISSUED DECEMBER 26, 2013

Maria Del Rosario Martinez, doing business as Captain's Cabin (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license (with the revocation stayed to permit a person-to-person and premises-to-premises transfer of the license), and suspended it for 40 days, and indefinitely thereafter until the license transfers, for permitting drink solicitation activity in violation of Business and Professions Code sections 24200.5, subdivision (b) and 25657, subdivision (b).

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

Appearances on appeal include appellant Maria Del Rosario Martinez, appearing through her counsel, Donald J. Boss, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on May 11, 2006. On March 24, 2011, the Department instituted a 28-count accusation against appellant charging that on five separate dates in 2010, appellant employed or permitted individuals to engage in drink solicitation activity within the premises, in violation of sections 24200.5(b)[2] and 25657(a) and (b),[3] and permitted employees to accept a drink while working in the

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[2]Section 24200.5 states, in relevant 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.

[3]Section 25657 states, in relevant part:

> It is unlawful:
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> (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.

licensed premises, in violation of rule 143.[4]

At the administrative hearing held on April 10, 2012, documentary evidence was received and testimony concerning the violations charged was presented by Felipe Benavidez of the Los Angeles Police Department (LAPD). At the further administrative hearing held on September 27, 2012, documentary evidence was received and further testimony concerning the violations charged was presented by Felipe Benavidez, as well as by Wildren Martines and Lisbeth Mendez, appellant's employees; Gloria Alvarez, a customer at the licensed premises; and Maria Martinez, the appellant/licensee.

Subsequent to the hearing, the Department issued its decision which determined that only counts 9 and 11 were sustained: for violations of section 24200.5(b) — permitting individuals to solicit or encourage others to buy them drinks under a commission, percentage, salary, or other profit sharing scheme — and section 25657(b) — permitting individuals to loiter in or about the licensed premises for the purpose of begging or soliciting patrons to purchase alcoholic beverages for them. The remaining 26 counts were dismissed.

Testimony established that on April 2, 2010, two undercover officers entered the

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[4]Rule 143 states, in relevant part:

> No 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.

(Cal. Code Regs., tit. 4, § 143.)

licensed premises and were approached by two women who asked the officers to buy them beers. (Counts 1-8.) The ALJ found there was no evidence that the licensee or her employees were aware that these drinks had been solicited, so these counts were dismissed.

On April 29, 2010, the same two officers returned to the licensed premises and ordered two beers from a waitress, for which they paid $10 total. The waitress asked if they wanted to buy Gloria a beer, and when they said yes she served the beer to Gloria, took the officer's $10 bill, and gave $6 to Gloria. In front of the waitress, Gloria pocketed the money. When the waitress later returned to ask if they wanted more drinks, and the officers said yes, the waitress brought three beers, Officer Benavidez paid, and the waitress gave $6 change to Gloria — which she pocketed. Later, Gloria asked Benavidez to buy her a beer, he gave her a $10 bill which she took to the bar counter, she paid for the beer and kept the change. (Counts 9-12.)

Counts 10 and 12 were dismissed: the first drink was not solicited; the third solicitation took place outside the presence of any employee; and there was no evidence that Gloria was an employee of the licensed premises. Counts 9 and 11 were sustained: for the waitress having permitted drink solicitation, and for permitting Gloria to loiter for the purpose of drink solicitation. Ultimately, these were the only two counts of the accusation which were sustained.

On June 17, 2010, two officers repeated the undercover operation. (Counts 13-18.) The ALJ found there was no evidence that any employee was aware of the solicitations of one woman, so counts 13 -16 were dismissed; there was no evidence that the two friends of the woman solicited drinks, so counts 17 and 18 were dismissed; additionally, in regards to counts 14, 16, and 17, there was no evidence that any of the

women were employed by the licensed premises.

On June 21, 2010, a third undercover operation took place. (Counts 19-22.) The ALJ found there was no evidence that the licensee or her employees were aware that these drinks had been solicited, so these counts were dismissed.

On July 8, 2010, a final undercover operation took place. (Counts 23-28.) The ALJ found that some beers, but not all, were solicited, but that there was no evidence that the appellant or any of her employees were aware of it; there was no evidence that the individual who may have solicited was employed at the licensed premises. Accordingly, these counts were dismissed.

Appellant filed a timely appeal raising the following issues: (1) The decision is not supported by substantial evidence; (2) the Department's primary witness was not credible; (3) the undercover operation constituted entrapment; and (4) the penalty is excessive. Issues 1 and 2 will be discussed together.

DISCUSSION

I & II

Appellant contends that counts 9 and 11, the two counts which were sustained, are not supported by substantial evidence.

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 that the testimony of Officer Benavidez does not constitute substantial evidence because even though he participated in the investigation he had difficulty remembering exact details, and was forced to refresh his recollection by reviewing his report on six occasions. (App.Br. at p. 4.) Appellant also maintains that it was improper for Benavidez to testify in English about conversations which occurred in Spanish during the undercover operation — that an interpreter should have been used.

Since Officer Benavidez' testimony, if believed, is evidence of the solicitation activity, the issue is really one of credibility, and the ALJ is the person who makes that determination. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) In this case, the ALJ clearly chose to accept the testimony of the officer, and our own review of the record satisfies us that he made the right choice. The ALJ also made a ruling that since Benavidez is fluent in Spanish, he was allowed to

testify at the administrative hearing, in English, about the conversations which took place in Spanish during the undercover operation. Appellant has cited no cases, and we know of none, to support his claim that this was error.

Appellant's brief relies on references to details in the hearing transcript to impeach the testimony of Officer Benavidez. However, little would be served by addressing each and every factual contention made by appellant. The ALJ clearly understood the substance of the testimony and made a credibility determination. We cannot say that his resolution of the disputed facts was in any way erroneous. Looking at the record as a whole, we find that substantial evidence supports the Department's decision.

III

Appellant contends that Gloria, the individual named in counts 9 and 11, was entrapped into soliciting drinks from Officer Benavidez. This issue was not raised at the administrative hearing.

It is settled law 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. (*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]; *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Beverage Control Appeals Board* (197 Cal.App.2d 1182, 187 [17 Cal.Rptr. 167].)

It is true that an exception exists for pure questions of law. (See, e.g., *In re P.C.* (2006) 137 Cal.App.4th 279, 287 [40 Cal.Rptr.3d 17].) However, the argument

appellant presents in this matter — that Gloria was entrapped into soliciting drinks from Officer Benavidez — is primarily a question of fact. Since appellant did not raise this issue at the administrative hearing, this Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, p. 458.)

IV

Appellant contends the penalty of revocation, with a period of suspension to permit a person-to-person and premises-to-premises transfer of the license, is excessive.

Appellant maintains that the penalty is excessive because only 2 of the 28 counts of the accusation were sustained. She cites *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 930[5] for the proposition that 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. (App.Br. at p. 10.)

Appellant fails to discuss, however, that at the time of the undercover operation on April 29, 2010 — the date of the activity from which counts 9 and 11 arose — the licensed premises was serving a 3-year stayed revocation, with the stay being in effect only so long as there was no further cause for disciplinary action. The following Order,

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[5]Appellant cites this case incorrectly, and without pinpoint cites. We find a case by the same name at a different page, however, which states a similar, but somewhat different proposition:

> It is well settled that in cases involving the imposition of a penalty or other disciplinary action by an administrative body, when it appears that some of the charges are not sustained by the evidence, the matter will be returned to the administrative body for redetermination in all cases in which there is a "real doubt" as to whether the same action would have been taken upon a proper assessment of the evidence. [Citations.]

(*Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 277-278 [269 Cal.Rptr. 404].)

dated June 23, 2009 (pursuant to a Stipulation and Waiver signed June 16, 2009) was in place at the time of the undercover operation:

> Wherefore, it is hereby ordered that the license(s) issued to respondent(s) at the above-mentioned premises be revoked, with said revocation stayed for a period of **three years** from the effective date of the Department's decision until **June 23, 2012**, upon the following conditions:
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> 1. That the license be suspended for a period of **45 days**.
> 2. That no cause for disciplinary action occur within the stayed period.

(See Exhibit 5.) Appellant knew, or should have known, she risked revocation if any cause for disciplinary action occurred during this 3-year period.

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].)

The propriety of a penalty, including whether aggravating or mitigating factors in a particular case justify a higher or lower penalty, is vested in the Department's discretion. But the Department "does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion." (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594 [400 P.2d 745].)

The ALJ discusses the penalty issue at length in his Proposed Decision, and explains his rationale for imposing an aggravated penalty:

> The Department requested that the Respondent's license be revoked, noting that the Respondent had been previously disciplined for permitting

> illegal drink solicitation. In fact, at all times covered by the accusation, the Respondent's license was under a stayed revocation for illegal drink solicitation. The Respondent did not recommend a penalty in the event that the accusation were sustained.
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> Rule 144 provides for a penalty ranging from a 30-day suspension up to revocation for illegal drink solicitation. Section 24200.5(b), on the other hand, mandates a penalty of revocation for any violation of its provision. This mandate may be satisfied, however, by a stayed revocation as well as an outright revocation.
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> The Respondent's license has been the subject of two prior disciplinary decisions for illegal b-girl activity. The first one took place in 1999 and is too remote to be considered in formulating a penalty in this case. The second one, however, took place in 2009, slightly more than one year before the violations described herein. As noted by the Department, the violations at issue in this case took place while the license was under a stayed revocation imposed as a result of this prior. Further, the Respondent's employees were turning a blind eye to drink solicitation which were taking place within a few feet of them. While such intentional ignorance may create plausible deniability (as evidenced by the large number of dismissals outlined above), it demonstrates an unwillingness to comply with the law. Such an attitude runs contrary to the affirmative obligation imposed on all licensees to ensure that their premises are run in a lawful manner.
>
> Accordingly, an aggravated penalty is appropriate. Given that the Department was only able to establish two counts (arising from one solicitation), outright revocation is too harsh. This creates a practical problem — the Respondent was placed on a stayed revocation last time as a way of ensuring that she complied with the law from that point forward. She did not. There is no reason to believe that imposing a second stayed revocation would be any more successful. [fn. omitted.] The penalty recommended herein balances these competing factors and complies with rule 144.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. The penalty comports with the Department's penalty guidelines pursuant to rule 144, and appellant has not shown that the Department abused its discretion in imposing an aggravated penalty. We agree with the ALJ that revocation of a license on the basis of only two established counts would be too harsh if it were not for the existing stayed revocation; but since the first stayed revocation did

not induce compliance with the law, there is little reason to believe a further stay would be any different.

ORDER

The decision of the Department is affirmed.[6]

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

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[6]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.