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

AB-9356
File: 40-343033 Reg: 12077273

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

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 5, 2013
Los Angeles, CA

ISSUED FEBRUARY 3, 2014

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 license for having permitted drink solicitation in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivision (b), in conjunction with section 24200, subdivision (b).

Appearances on appeal include appellants Maria Victoria Hernandez and Martin Hernandez Murillo, appearing through their counsel, Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J.

[1]The decision of the Department, dated April 17, 2013, is set forth in the appendix.

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FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on July 9, 1998. On July 30, 2012, Department instituted a 34-count accusation against appellants charging drink solicitation activity in violation of Business and Professions Code sections 24200.5, subdivision (b)[2], and 25657, subdivisions (a) and (b.)[3] A first amendment to the accusation was filed on November 19, 2012, striking 12 of the original 34 counts, amending five of the remaining counts, and adding six new counts. A first amended accusation filed on December 30, 2012, alleged 24 counts, again charging violations of sections 24200.5, subdivision (b) and 25657, subdivisions (a) and (b).

At the administrative hearing held on February 20, 2013, documentary evidence

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[2]Section 24200.5, subdivision (b) provides, in pertinent part:

> Not withstanding 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, subdivisions (a) and (b) provides, in pertinent part:

> 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 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 such 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.

was received and testimony concerning the violations charged was presented by Los Angeles Police Sgt. Lifernando Garcia. Martin Hernandez Murillo, owner and co-licensee testified on behalf of appellants. Testimony established numerous instances of drink solicitations and commission payments that took place over the course of the three days of the undercover investigation.

Subsequent to the hearing, the Department issued its decision which sustained twelve counts of the accusation, and dismissed the remaining counts.[4]

Appellants have filed a timely appeal making the following contentions: (1) The findings with respect to count 18 are not supported by substantial evidence; (2) there are no findings with respect to counts 23 and 24 showing that the employee in question was at the premises on the date of the alleged violation; and (3) the penalty is excessive.

There are limitations on our review:

> Our review "is limited to a determination of whether the Department has proceeded without or in excess of its jurisdiction; whether the

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[4]24 counts of drink solicitation activity were alleged in the First Amended Accusation. The counts which were sustained, and the violations charged were as follows: count 1 (section 24200.5(b)); count 2 (25657(b));count 3 (24200.5(b)); count 4 (25657(b); count 5 (24200.5(b)); count 6 (25657(b)); count 15 (24200.5(b)); count 16 (count 25657(b); count 17 (24200.5(b)); count 18 (25657(b)); count 23 (24200.5(b)); count 24 (24200.5(b)).

> Department has proceeded in the manner required by law; whether the Department's decision is supported by its findings; whether those findings are supported by substantial evidence; or whether there is relevant evidence which, in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the Department." [Citations.]
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> Certain principles guide our review. ... We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor this court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary , although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for the consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

DISCUSSION

I

Count 18 of the first amended accusation relates to events of May 6, 2011, the third and final day of the LAPD investigation. Appellants contend with respect to this count that the evidence was insufficient to show that their employee, Noemi Quintero, "affirmatively employed or knowingly permitted" Marisela Diaz to loiter in the premises for the purpose of soliciting patrons or customers to purchase alcoholic beverages for her, in violation of section 25657, subdivision (b). (App.Br. at p. 7.) They claim Quintero neither employed nor had knowledge of Diaz's alleged activity. They further assert that the Department did not present any evidence that Diaz did actually loiter, rather than be in the premises just as any other patron. Significantly, appellants do not deny Quintero was an employee.

We agree with the Department that appellants' claims "are a misrepresentation of the record and disingenuous at best." (Dept.Br. at p. 8.) Appellants' rely on the decisions in *Garcia v. Munro* (1958) 161 Cal.App.2d 425, 429 [326 P.2 894], and *Manuela Garcia Flores* (2013) AB-9251. Neither is helpful to appellants.

In *Garcia v. Munro*, *supra*, the woman soliciting happened to be the bartender, and the court found there was no evidence she was employed to solicit drinks, had neglected her bartending duties, or "lingered idly by or was loafing on the job." And, in *Flores*, *supra*, the Board concluded that there was insufficient evidence the woman in question was an employee or that the bartender knew she was soliciting drinks, and the mere fact that she was sitting with other patrons was not evidence the woman was loitering.

This case is very different; Diaz's only activity appears to have been sitting with patrons, soliciting drinks, and accepting payment from a waitress for each drink she ordered. (Findings of Fact 18 through 21). Also sitting at the table with Diaz and also soliciting drinks was another woman, Yadira Funez:

> FF 18: A waitress, Noemi Quintero, approached the table. In front of Quintero, Funez asked Sgt. Garcia to buy her a beer. He agreed and Funez ordered a beer from Quintero. Sgt. Garcia ordered a Pacifico beer at the same time and handed $20 to Quintero. Quintero took the money and went to the bar counter. She returned with the two beers , which she served to Funez and Sgt. Garcia, and some change. Quintero gave $6 of the change to Funez and the remaining $6 to Sgt. Garcia. Funez placed the money in her purse and began to consume her beer.
>
> FF 19: Funez solicited three more beers from Sgt. Garcia. Each time she placed her order with Quintero. Each time Quintero served Funez a beer and handed her $6, which Funez placed in her purse.
>
> FF 20: Diaz asked Ofcr. Lopez to buy her a beer. He agreed and she ordered a Bud Light from Quintero. Ofcr. Lopez ordered a Victoria beer at the same time and handed Quintero a $20 bill. Quintero went to

> the bar counter and returned with the two beers which she served to Diaz and Ofcr. Lopez. Quintero gave $6 to Diaz, who placed it in her boot, and $6 to Ofcr. Lopez. Diaz began to consume her beer.
>
> FF 21: Diaz solicited three more beers from Ofcr. Lopez. Each time she ordered a Bud Light beer from Quintero, who served it to her. Quintero gave Diaz $6 of the change.

The evidence is not in dispute as to Quintero's conduct; she clearly was a full participant in the commission scheme. As to Diaz, there was no evidence of anything she did other than sit with patrons and solicit drinks, in return for a $6 payment for each drink she solicited. She was employed to solicit drinks; "employment" can include financial compensation in some manner other than salary. Quintero's payment of $6 to Diaz for each drink she solicited proves both payment for services and knowledge on Quintero's part that Diaz was soliciting drinks.

II

Count 23 alleges that appellants' bartender, Diana Cruz, permitted Katherine Castellanos to solicit drinks pursuant to a commission, percentage or profit sharing scheme, in violation of section 24200.5, subdivision (b). Count 24 alleges that Cruz employed or knowingly permitted Castellanos to loiter in the premises for the purpose of soliciting drinks, a violation of section 35657, subdivision (b). Appellants challenge the findings on these two counts, claiming that the findings relating to those counts (Findings of Fact 16-24) do not support the conclusion Cruz knew what Castellanos was doing, and do not even refer to Cruz.

Findings of Fact 22 and 23 relate to the Castellanos solicitations:

> FF 22: ... Katherine Castellanos came over and sat down. Castellanos asked Sgt. Cabrera if he would buy her a beer. He agreed. [Dora] Haydee stated that she wanted one too. Sgt. Cabrera handed $20 to Haydee, who took it to the bar counter. She returned with two beers and some change. Haydee served one of the beers to Castellanos and

> handed her $6. Haydee kept the second beer and the other $6 for herself.
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> FF 23: Including the beers described above, Haydee solicited a total of five beers from Sgt. Garcia. Each time Sgt. Garcia paid, but Haydee received $6 of the change.
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> FF 24: Castellanos solicited an additional beer from Garcia. He gave $10 to Quintero, who went to the bar counter and returned with a Bud Light beer. Quintero served the Bud Light beer to Castellanos. She also gave Castellanos $6.

The Department argues that Sgt. Garcia had already identified Cruz as the bartender who had received payment for the beers solicited by Castellanos, and that knowledge on her part was shown by her having "already split up" the change that Haydee took back to the table, citing to testimony on page 60 of the hearing transcript. From this, argues the Department, the ALJ could infer knowledge on the part of Cruz, and counts 23 and 24 were properly sustained.

We do not agree with the Department's inference of knowledge on Cruz's part from having "already split up" the change. Sgt. Garcia was seated 15 to 20 feet from the bar [RT 99], and his view of the bar was at times obstructed. [RT 101]. He was not asked, and did not say, whether he saw Cruz divide the change:

> Q. And now going back to when Dora got the change from the bartender, who was the bartender on this occasion?
>
> A. On this one -- I believe this one, it was Cruz.
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> Q. And now when Dora arrived at the table, were those -- the $6 that she kept for herself and the $6 that she gave to Castellanos, was that already split up, or did Dora split that up herself?
>
> Q. It was already separated.

We do not believe the Department can fairly draw the inference that bartender Crux divided the change before giving it to Dora, when it is equally possible that Dora

herself separated her $6 of the change from the $6 she gave to Castellanos before she arrived at the table where Sgt. Garcia and the other women were seated. We also believe count 23 must fall, since there is no evidence the bartender knew Haydee was soliciting; we cannot sustain a finding of drink solicitation where there is no evidence the bartender knew of the solicitations. Both counts 23 and 24 are directed at the bartender's participation, and there is not substantial evidence of any knowledge on his part of the drink solicitation

For these reasons, we believe counts 23 and 24 should have been dismissed for lack of substantial evidence.

III

Appellants' argument that the decision must be remanded to the Department for reconsideration of the penalty consists of a single paragraph in its brief (App.Br. at p. 6):

> Here, Counts 18, 23, and 24, allege that the licensee violated Business and Professions Code Sections 24200.5, subdivision (b) and 25657, subdivision (b). The Department sustained the counts as justification for its decision to revoke Hernandez's license. The Department, however, did not present substantial evidence to support the decision to sustain Count 18, nor did it make the findings necessary to sustain Counts 23 and 24. Because these counts should not have been sustained, the Department's penalty decision must be remanded for reconsideration.

As the preceding discussion indicates, we believe appellants should prevail with respect to counts 23 and 24. This by no means should be read to think we believe a remand would be appropriate.

2. Of the six counts charging violations of section 24200.5, subdivision (b), which were sustained by the Department, only one of them (count 23) was even appealed. Section 24200.5, subdivision (b) mandates revocation. The record of this

case shows that the licensed premises was rife with drink solicitation, and severely lacking any effective licensee control. The ALJ said as much, in ordering revocation and rejecting appellants' plea for mitigation:

> The Department requested that the Respondents' license be revoked given (a) the number of violations, (b) the clear evidence that the Respondents' employees were aware of the violations (and even participated in them by directly paying commissions in connection with some of the solicitations), and (c) the two prior disciplinary decisions for illegal solicitation. The Respondents argued that, if the accusation were sustained, a mitigated penalty was warranted given that the violations were permitted by Martin Hernandez's brother in Hernandez's absence, particularly in light of the Respondent's promise of stricter oversight in the future.
>
> Unfortunately for the Respondents, it was their responsibility to ensure that the Licensed Premises was run in a lawful manner at all times whether they were present or not. They cannot now simply blame someone else for what are clearly ongoing violations -- multiple violations in 2009 (registration #10074042), multiple violations in 2010 (registration #11074835) and multiple violations in 2011 in the case at hand. While the Respondents' promise to do a better job in the future might have carried some weight in connection with the first violation, it rings hollow in connection to the third. The penalty recommended herein complies with rule 144.

As the ALJ observed in Findings of Fact 25 and 26 , co-licensee Hernandez has not managed the licensed premises for approximately three years. He turned the operation of the premises over to his brother, and did not supervise him at all. Appellants abandoned their responsibilities, and their promises that things will be better in the future are unpersuasive.

A remand for reconsideration of penalty is unnecessary unless there is a real doubt as to whether the same action would have been taken on a proper assessment of the evidence. (*Miller v. Eisenhower Medical Center*(1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 826.] Viewing the case as a whole, we seriously doubt the Department would be inclined to alter its penalty order simply because a small part of its case was

overturned on appeal.

ORDER

The decision of the Department is reversed with respect to its findings and conclusions concerning counts 23 and 24 of the first amended accusation.[5] Its decision is affirmed in all other respects.

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

[5] 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.