

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

AB-9360

File: 47-329528 Reg: 12077385

MIGUEL SILVA, dba El Palenque Restaurant
17010 East Gladstone Street, Azusa, CA 91702-4357,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 6, 2014
Los Angeles, CA

Redeliberated April 3, 2014
Sacramento, CA

ISSUED APRIL 15, 2014

Miguel Silva, doing business as El Palenque Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his on-sale general public eating place license for violation of Business and Professions Code section 24200.5, subdivision (b), and 25657, subdivisions (a) and (b).

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

¹The decision of the Department, dated June 5, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on May 6, 1997. On August 21, 2012, the Department instituted a 21-count accusation against appellant charging in 20 of those counts that he employed a number of individuals, on as many as six separate dates over a span of two and one-half years, for the purpose of engaging in drink solicitation activities under a commission, percentage, salary, or other profit-sharing scheme, in violation of Business and Professions Code sections 24200.5, subdivision (b),² and 25657, subdivisions (a) and (b),³ in conjunction with section 24200, subdivisions (a) and (b).

²Section 24200.5, subdivision (b), 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.

³Section 25657, subdivisions (a) and (b) provide 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) 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.

An administrative hearing was held on January 24, 2013, March 28, 2013, and April 19, 2013, at which times documentary evidence was received and testimony concerning the violations charged was presented by five Department agents. Appellant's manager testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the charges in fourteen of the counts had been established and dismissed the remaining seven counts.⁴

Appellant filed a timely notice of appeal in which he contends that none of the counts which were sustained were supported by substantial evidence.

DISCUSSION

Appellant argues in his brief that none of the counts of the accusation which were sustained are supported by substantial evidence. Thus, even though the factual circumstances vary with respect to each count or group of counts, the basic questions presented to this Board are whether the evidence presented by the Department was such as to constitute substantial evidence supporting the charge in a specific count.

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

⁴Counts 2, 3, 4, 5, 7, 8, 9, 11, 12, 14, 15, 17, 18, and 20 were sustained. Counts 1, 6, 10, 13, 16, 19, and 21 were dismissed. Of the counts which were sustained, counts 2, 5, 9, 12, 15, and 18 charged violations of section 24200.5, subdivision (b); count 3 charged a violation of section 25657, subdivision (a); and counts 4, 7, 8, 11, 14, 17, and 20 charged violations of section 25657, subdivision (b).

determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of facts and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage 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. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage 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 [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].)

The Department's investigation spanned a period beginning as early as July 9, 2010, and concluding on January 19, 2012. The number of visits is not known, but Department agents admitted there were visits where no solicitation activity was observed, and no reports written. The accusation charged solicitation activity on six separate days during the investigation: July 9, 2010 (count 1); February 4, 2001 (counts 2-4); November 18, 2011(counts 5-9); January 5, 2012 (counts 9-11); January 6, 2012 (counts 12-17); and January 19, 2012 (counts 18-20). Despite the extended period

covered by the investigation, the scheme was essentially unchanged throughout. Each beer or mixed drink purchased by and for an investigator cost \$4, while each beer or mixed drink solicited cost \$10. The woman who solicited the beer or mixed drink received \$6 for each beer purchased on her behalf, and sometimes \$6, sometimes \$7 for a mixed drink. In many instances, the bartender facilitated the division of money between the agent and the solicitor, either by being directly involved or by looking the other way when it occurred.

Appellant's brief does not address the overall picture displayed by the findings and evidence. Instead, the brief selectively addresses individual transactions, attempting to explain away the circumstances relating to the drink solicitations and divert attention from the fact that appellant's own employees were actively facilitating the illegal conduct. Our review of the record leads us to conclude that all but one (count 4) of the counts which were sustained were supported by substantial evidence.

Counts 2-4 (Findings of Fact 8-10)

FF8: On February 4, 2011, Agent Dolisa Perez and her partner entered the Licensed Premises. They sat at the bar counter and ordered two Modelo beers, for which they were charged \$4 each. After consuming their beers they moved to a nearby table.

FF9. Agent Perez noticed a woman named Elisa who was sitting with patrons and, from time to time, clearing tables and getting drink orders. At one point, as Elisa was walking past the table, Agent Perez struck up a conversation with her. During this conversation Elisa asked Agent Perez to buy her a beer. Agent Perez agreed and handed a \$20 bill to Elisa. Elisa took the money to the bar counter and obtained a Corona beer and a Modelo beer. She returned to the table and handed the Modelo beer to Agent Perez along with \$6 of the change. Elisa kept the Corona for herself and placed the remaining change in her bra.

FF10. Agent Perez and Elisa subsequently played a game of pool, after which the agents exited.

Department Agent Perez testified that, on two occasions, one in January 2011, the second in February 2011, she observed a female named Elisa working at the premises. On each occasion, Elisa was sitting with patrons, taking bar orders, clearing bottles and putting them in the trash, taking money to the counter and returning with drink orders. During the February visit, which took place in the late night, early hours of the morning, Perez spoke to Elisa, saying, "Oh, you're working hard." Elisa responded that she was there to make money, and then asked Perez to buy her a beer. Perez ordered a beer for each of them, and paid with a \$20 bill. Elisa took the money to the bar, had a brief discussion with the bartender, and returned to the table where Perez was sitting. Elisa sipped from her beer, and placed an undetermined amount of money in her bra, explaining, "This is for me. I'm soliciting."⁵ Agent Perez received \$6 change; the bar and/or Elisa netted \$14.00 for the two beers.

Appellant disputes testimony given by Agent Perez concerning whether he or his manager were in a position to see or hear the solicitation by Elisa, and contends there is no evidence Elisa was an employee. However, appellant does not dispute Agent Perez's testimony that Elisa was acting as an employee while clearing tables, and taking drink orders. This activity took place in the plain sight of both the owner and manager of appellant, both of whom were sitting near the bar area only 10 feet away from Agent Perez. If, as appellant contends, Elisa was not an employee, what did appellant and his manager think she was doing?

⁵The ALJ overruled appellant's objection and admitted the statement as administrative hearsay and as an exception to the hearsay rule under Evidence Code section 1241 (explaining conduct at the time engaged in such conduct).

We are satisfied that counts 2 and 3, which charged a violation of section 24200.5, subdivision (b), and section 25657, subdivision (a), were properly sustained, based on evidence Elisa was acting as an employee when she solicited a beer from Agent Perez.

Count 4, charging a violation of section 25657, subdivision (b), turns on whether Elisa could be said to be loitering when playing a game of pool with Agent Perez, or whether the time spent playing one game of pool is considered sufficiently inconsistent with the duties she was performing as a waitress to constitute loitering. Since no solicitation followed the game of pool, we think it cannot be said, at least at that time, she was loitering for the purpose of soliciting. Therefore, we think count 4 must be reversed.

Counts 5-8 (Findings of Fact 11-17)

FF11. On November 18, 2011, District administrator Gerardo Sanchez and Supv. Agent Enrique Alcalá entered the Licensed Premises. They went to the bar counter and ordered two Bud Light beers from the bartender, Vicky. Vicky served them the beers and charged them a total of \$8.

FF12. When D.A. Sanchez went to the restroom, Supv. Agent Alcalá struck up a conversation with a woman who identified herself as Trini. Trini was sitting with a woman who identified herself as Wendy.

FF13 When D.A. Sanchez returned, Trini Asked Wendy to talk to him. During the course of the conversation Wendy asked D.A. Sanchez to buy her a beer. He agreed and Wendy ordered a beer from Vicky. Vicky served a Bud Light beer to Wendy, which D.A. Sanchez paid for with a \$20 bill. Vicky took the money and returned with some change. She placed the change on the bar counter in front of D.A. Sanchez. Wendy grabbed a \$10 bill from the pile and called Vicky over. The two of them discussed her portion of the change and further change was made. Ultimately, D.A. Sanchez received the remaining change and calculated that he paid \$8 for Wendy's beer.

FF14. At about the same time, Trini asked Supv. Agent Alcalá to buy her a beer. He agreed and she ordered a Bud Light beer from Vicky. When Vicky served the beer to Trini, Supv. Agent Alcalá handed her a \$20 bill. Vicky obtained \$16 in change and placed it on the counter near him. In front of Vicky, Trini reached across and took \$6 of the change.

FF15. Wendy subsequently solicited a second beer from D.A. Sanchez. He agreed and Wendy ordered a beer from Vicky who served it to her. D.A. Sanchez paid with a \$20 bill. Vicky took the money and obtained some change, \$10 of which she handed to D.A. Sanchez and \$6 of which she gave to Wendy.

FF16. Vicky subsequently asked Supv. Alcalá if he wanted another beer. He said that he did. Trini asked him if he would buy her another beer. Vicky was within three feet of them at the time. He agreed and Trini ordered a beer from Vicky. After confirming that he wanted two beers, Vicky served one beer to Supv. Agent Alcalá and another beer to Trini. Supv. Agent Alcalá paid for the beers with a \$20 bill. Vicky took the money to the register and obtained some change. She placed the change on the counter in two piles--\$6 in front of Supv. Agent Alcalá and \$6 in front of Trini. Trini picked up the money in front of her and kept it.

FF17. The agents exited the premises sometime later.

Appellant challenges the findings on counts 5, 7, and 8, which are based on the November 18, 2011 visit, arguing that Supv. Agent Alcalá's testimony "fell short" of saying that Vicky "observed or witnessed" the solicitations.⁶ He does not claim there were no solicitations. Vicky's actions in handling the change from the \$20 bills tendered by the agents (see RT 107, 111) is convincing evidence that she was cooperating with Wendy and Trini in a solicitation scheme. Her acts and conduct are imputed to appellant under established legal principles.

Counts 9-11 (Findings of Fact 18-22)

⁶Appellant has not challenged the findings with respect to count 6, which alleges that Wendy was employed for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages.

FF18. On January 5, 2012, D.A. Sanchez and Supv. Agent Alcalá returned to the Licensed Premises. They sat at the bar counter and ordered two Bud Light beers. The bartender, Marlen Sanchez-Ramirez served them the beers and charged them \$8.

FF19. Supv. Agent Alcalá and Mary Carmen Rodriguez-Reyes struck up a conversation during which she asked him to buy her a drink. He agreed and she ordered a mixed drink from Sanchez-Ramirez. Sanchez-Ramirez grabbed a bottle of Sauza tequila, poured some into a glass, then added soda. She served the drink to Rodriguez-Reyes. Supv. Agent Alcalá paid with a \$20 bill. Sanchez-Ramirez took the money, made some change, and returned. She placed \$10 of the change in front of Supv. Agent Alcalá and the rest in front of Rodriguez-Reyes. Rodriguez-Reyes began to consume her drink.

FF20. Rodriguez subsequently asked Supv. Agent Alcalá if he wanted another beer. He said that he did. Rodriguez ordered a beer for him from Sanchez-Ramirez. She then asked Supv. Agent Alcalá if he would buy her another drink. He agreed. Sanchez-Ramirez, who was across the bar counter from them, obtained a beer and mixed another tequila and soda. She served the drinks to Supv. Agent Alcalá and Rodriguez-Reyes, respectively. Supv. Agent Alcalá paid with a \$20 bill. Sanchez-Ramirez took the money and obtained some change. She placed \$10 of the change in front of Supv. Agent Alcalá and placed the rest in front of Rodriguez-Reyes, who began to consume her drink.

FF21. D.A. Sanchez ordered a tequila and soda from Sanchez-Ramirez. She mixed the drink by pouring some Sauza tequila in a glass, then adding some soda to it. The glass she used was bigger than the glass she used when she made the same drink for Rodriguez-Reyes. D.A. Sanchez was charged \$4 for his drink.

FF22. Later, Rodriguez-Reyes asked Supv. Agent Alcalá if he would buy her another drink. He agreed and she asked him if he wanted another beer. He said that he did and Rodriguez-Reyes ordered the two drinks from Sanchez-Ramirez. Sanchez prepared another tequila and soda for Rodriguez-Reyes and obtained a beer for Supv. Agent Alcalá, which she served to them. Supv. Agent Alcalá paid with a \$20 bill. Sanchez-Ramirez took the money and obtained some change. She placed \$6 of the change in front of Supv. Agent Alcalá and \$7 in front of Rodriguez-Reyes.

The findings with respect to these counts show that active solicitation continued into 2012, and followed the usual pattern of part of the change going to the Department

agent and another part to the solicitor. This pattern was clearly not the product of chance, and appellant's attempt to divert attention from the scheme fails utterly.

Appellant concedes that the Rodriguez-Reyes solicitations occurred (she is referred to in the transcript and in appellant's brief as "Carla"), but asserts that the absence of an actual "hand-to-hand" delivery and the absence of proof that more than the actual cost of the drink went into the register could mean the bartender believed the money she placed in front of Rodriguez was only a generous tip. There is no evidence offered by any witness that the Department agents were "tipping" the b-girls. Any "tipping" was the bartender's distribution of the change in carrying out appellant's commission scheme.

Counts 12-17 (Findings of Fact 23-28)

FF23. On January 6, 2012, D.A. Sanchez and Supv. Agent Alcalá once again entered the Licensed Premises. They ordered two Bud Light beers from the bartender, Vicky. She served them the two beers and charged them a total of \$8.

FF24. Rodriguez-Reyes was sitting at the bar counter with a woman who identified herself as Saira. Supv. Agent Alcalá began talking to Rodriguez-Reyes while D.A. Sanchez began talking to Saira. Rodriguez-Reyes asked Supv. Alcalá if he would buy her a drink. He agreed and she placed her order with Vicky. Vicky mixed a tequila and soda and served it to Rodriguez-Reyes. Supv. Agent Alcalá paid Vicky with a \$20 bill. Vicky took the money and returned with some change, which she placed on the counter. Rodriguez-Reyes reached across and took some of the change, leaving Supv. Agent Alcalá with \$10. Rodriguez-Reyes placed the money in her purse.

FF25. Supv. Agent Alcalá told Vicky that he wanted the same type of drink as Rodriguez-Reyes and a beer. He watched while she mixed a tequila and soda in a large glass. She served the drink and a beer to him and charged him \$8.

FF26. Rodriguez-Reyes asked Supv. Agent Alcalá if he would buy her another drink. He agreed and she ordered a drink from Vicky. Vicky

mixed a tequila and soda and served it to Rodriguez-Reyes. Supv. Agent Alcala paid with a \$20. She took the money and obtained some change, which she placed on the counter between Supv. Agent Alcala and Rodriguez-Reyes. In front of Vicky, Rodriguez-Reyes took \$7 from the pile. Supv. Agent Alcala received the remaining \$10 of the change.

FF27. Rodriguez-Reyes subsequently asked Supv. Agent Alcala if he would buy her another drink. He agreed and she ordered the same tequila drink from Vicky. Vicky mixed a tequila and soda and served it to Rodriguez-Reyes. Supv. Agent Alcala paid with a \$20 bill, which Vicky took to the register. She returned with some change and placed it in two piles on the counter, \$10 near Supv. Agent Alcala and \$7 near Rodriguez-Reyes. Rodriguez-Reyes picked up the money and began to consume her drink.

FF28. During her conversation with D.A. Sanchez, Saira pointed to his beer and asked him if he wanted another one. He indicated that he did. Saira asked him if he would buy her one as well and he agreed. Saira called over Vicky and ordered a Bud Light for D.A. Sanchez and a Remy for herself. Vicky grabbed a glass, filled it with ice, added a splash of soda, then poured something from a brown bottle. D.A. Sanchez did not see the label, but it was consistent with bottles containing Remy Martin cognac. Vicky served the mixed drink to Saira and a Bud Light to D.A. Sanchez, who paid with a \$20 bill. Vicky obtained some change and gave \$6 of it to D.A. Sanchez. Vicky gave several bills (a \$5 bill among them) to Saira at the same time.

Appellant argues that Supv. Agent Alcala's testimony does not rise to the level of substantial evidence because the bartender, Vicky, was not in a position to overhear the solicitation by Trini. Vicky, it must be recalled, was the bartender during one of the earlier days in the investigation, and was the person who divided the change from the investigator's \$20 bill into two portions, one of which was for the woman who was soliciting drinks. The pattern of soliciting had not changed, and there is no evidence Vicky ever withdrew from the solicitation scheme and conspiracy.

Counts 18-20 (Findings of Fact 29-36)

FF29. On January 19, 2012, Supv. Agent Posada and his partner entered the Licensed Premises. They sat at a table near the front door and

ordered two Bud Light beers, which they were served. Each of the beers cost \$4. They subsequently moved to one of the pool tables.

FF30. D.A. Sanchez and Supv. Agent Alcalá entered approximately 20 minutes later and went to the bar counter. They ordered two Bud Light beers, for which they were charged \$8. Rodríguez-Reyes entered the Licensed Premises and took a seat next to them.

FF31. Rodríguez-Reyes asked Supv. Agent Alcalá to buy her a drink. He agreed and she ordered Buchanan's Scotch whisky. Sanchez-Ramirez poured some whisky in a glass and served it to Rodríguez-Reyes. Supv. Agent Alcalá paid Sanchez-Ramirez with a \$20 bill, who took it to the register. While there, she called over Rodríguez-Reyes and spoke to her. Rodríguez-Reyes returned to her seat, followed by Sanchez-Ramirez. Sanchez placed \$17 in change on the bar counter. Rodríguez-Reyes indicated she could not take her money because there were police officers inside the Licensed Premises. Supv. Agent Alcalá left the \$17 on the bar counter.

FF32. Supv. Agent Posada ordered a whisky and soda. Sanchez-Ramirez served it to him and charged him \$7.

FF33. Rodríguez-Reyes subsequently asked Supv. Agent Alcalá if he would buy her another drink. He agreed and she ordered a drink from Sanchez-Ramirez. Sanchez-Ramirez poured some Buchanan's Scotch whisky and some soda into a glass and served it to Rodríguez-Reyes. Supv. Agent Alcalá paid Sanchez-Ramirez with a \$20 bill. Sanchez-Ramirez placed some change on the counter next to the change which was already there and told the two of them to take care of it.

FF34. Supv. Agent Alcalá sent a text message to Supv. Agent Posada asking him to leave because he had been recognized. Supv. Agent Posada and his partner did so a short time later.

FF35. When Rodríguez-Reyes went to the restroom, Supv. Agent Alcalá asked Sanchez-Ramirez to make him a mixed drink like Rodríguez-Reyes'. He specifically stated that he wanted it served in the same size glass. Sanchez-Ramirez poured some Buchanan's Scotch whisky, then asked him what kind of soda he wanted. He told her, "Sprite." Sanchez-Ramirez poured some Sprite in the glass and served it to him. She charged him \$3.

FF 36. Upon returning from the restroom, Rodríguez-Reyes asked Supv. Agent Alcalá to buy her another drink. He agreed and Rodríguez-Reyes ordered a drink from Sanchez-Ramirez. Sanchez-Ramirez made another mixed drink using Buchanan's Scotch whisky and served it to Rodríguez-

Reyes. Supv. Agent Alcalá paid with a \$20 bill. Sanchez-Ramirez took the money and obtained some change which she placed on the bar counter. Supv. Agent Alcalá told Rodriguez-Reyes that the police officers were gone and asked her if she wanted her money. Rodriguez-Reyes indicated that she did. In front of Sanchez-Ramirez, Supv. Agent Alcalá counted out \$7 from the first pile of money, \$7 from the second pile of money, and gave all of it to Rodriguez-Reyes. Supv. Agent Alcalá asked Rodriguez-Reyes if he had paid her for all her drinks. Rodriguez-Reyes indicated that he had not; she was still owed for the third drink. Supv. Agent Alcalá counted out another \$7 from the change and gave it to Rodriguez-Reyes. Sanchez-Ramirez was in a position to see and hear all of this.

Vicky was, once again, the bartender when multiple acts of drink solicitation took place at the bar where she was working. It defies credulity to believe Vicky did not know the solicitations were occurring, given her actions on previous days where drink solicitation occurred while she was the bartender. As the Department notes in its brief, a licensee has "the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee." (*Munro v. Alcoholic Beverage Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 (5 Cal.Rptr. 527].)

Appellant was subject to a suspended order of revocation during the entire period of the investigation which led to this case. The evidence that women were actively soliciting beers and mixed drinks, not every day, perhaps, but often enough that the Department undercover agents had no difficulty discovering that the conduct was occurring and on-going. The findings are detailed and supported by the record. Given appellant's prior disciplinary history, and evidence that the previous order was ignored, the Department's order of revocation was appropriate.

ORDER

The decision of the Department is affirmed in all respects except with respect to Count 4, which we have concluded was not supported by substantial evidence. The decision is reversed as to Count 4.⁷

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

⁷This 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.