

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

AB-9369

File: 40-70845 Reg: 13078407

IRENE G. PENA, dba 3 Rositas Bar
516 North Avalon Boulevard, Wilmington, CA 90744,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 1, 2014
Los Angeles, CA

ISSUED JUNE 19, 2014

Irene G. Pena, doing business as 3 Rositas Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked her license for permitting drink solicitation activities within the licensed premises, in violation of Business and Professions Code sections 24200.5, subdivision (b); and 25657, subdivisions (a) and (b).

Appearances on appeal include appellant Irene G. Pena, appearing through her counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department dated September 6, 2013, as corrected on October 3, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on February 6, 1979. On April 19, 2013, the Department instituted a 21-count accusation against appellant. The accusation was amended on July 29, 2013 to add two additional counts. The accusation charged that appellant employed or permitted individuals to engage in drink solicitation activity within the premises, in violation of sections 24200.5, subdivision (b);² that appellant employed one or more individuals for the purpose of drink solicitation and paid them a commission for this activity in violation of section 25657, subdivision (a);³ and that appellant employed or permitted individuals to loiter in the licensed premises for the purposes of drink solicitation activities, in violation of section 25757, subdivision

²Section 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.

³Section 25657(a) states:

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

At the administrative hearing held on July 30, 2013, documentary evidence was received and testimony concerning the violations charged was presented by Los Angeles Police Department (LAPD) officers Liferlando Garcia and Francisco Lopez. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged in counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, and 20 had been proven. Counts 1, 14, 15, 16, 17, 19, 22, and 23 were dismissed.

Appellant then filed a timely appeal raising the following issue: the Department's decision is not supported by substantial evidence.

DISCUSSION

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

⁴Section 25657(b) states:

[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.

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 Bev. Control v. Alcoholic Bev. 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].)

Counts 1 - 8 and 22 - 23:

On March 18, 2011, LAPD officers Garcia and Lopez visited the licensed premises in an undercover capacity. They ordered two beers from the bartender, paid \$4 for each beer, and then took a seat at a table. Subsequently, Lopez was approached by Norma, who asked Lopez to buy her a beer. He agreed and gave her \$20 which she took to the bar. She ordered a beer from the bartender, returned to the table, handed \$10 to Lopez, and kept \$7 for herself. It was not established that Norma was an employee at the premises, or that any employee was aware of this solicitation.

Norma later brought another female named Jasmine to the table. Jasmine asked Garcia to buy her a beer, he agreed, and Jasmine ordered a beer from a waitress identified as Blanca. Blanca was handed \$20 by Garcia. She returned with Jasmine's beer, gave \$10 to Garcia, and handed \$7 to Jasmine. Blanca was observed taking drink orders and money at another table and returning with change.

Lopez got up to use the restroom. Norma asked Garcia if he would buy beers for

her and the waitress, Blanca. He agreed, and Norma ordered two beers from Blanca. Blanca brought two Bud Light beers to the table and Garcia handed her \$20. Blanca took the money, returned with change, then gave \$7 to Norma and kept \$7 for herself. She and Norma each consumed some of their beer, then Blanca left.

Jasmine asked for a second beer, Garcia agreed, and Jasmine ordered a beer from Blanca. Garcia gave \$20 to Blanca, she returned with change, and gave \$10 to Garcia and \$7 to Jasmine.

Norma asked for a second beer, Garcia agreed, and Norma ordered a beer from Blanca. Garcia gave \$20 to Blanca, she returned with change, and gave \$10 to Garcia and \$7 to Norma.

Jasmine asked for a third beer, Garcia agreed, and Blanca brought Jasmine a Bud Light beer. Garcia gave \$20 to Blanca, she returned with change, and gave \$10 to Garcia and \$7 to Jasmine. Garcia left the premises shortly thereafter, having remained in the premises for approximately two hours.

As Lopez was returning to the table he was approached by a transgender person, "Erica," who asked if Lopez would buy her a beer. He agreed and she ordered a beer from the bartender. Lopez handed the bartender \$10. The bartender placed \$7 on the bar in front of Erica and she put it in her pocket. Norma approached Erica and got into a verbal altercation with her for soliciting a beer from Lopez. Lopez told them to calm down, and he left the premises shortly thereafter with Garcia.

Counts 9 - 13:

Officer Garcia returned to the premises on March 24, 2011. He sat at the bar, ordered a Tecate beer from the bartender, and paid \$4 for it. Garcia was approached by Erica, whom he knew from the previous visit, and she asked him to buy her a beer.

The bartender was about four feet away. Garcia agreed and Erica ordered a Bud Light from the bartender. Garcia gave the bartender \$20, the bartender gave him \$10 change, and gave \$7 to Erica. Subsequently Erica asked for a second beer but Garcia refused and said he had to leave.

Garcia exited the premises and returned about an hour later and sat at the bar again. He ordered a Tecate beer from the bartender, and paid \$4 for it. Garcia was approached by Maria Elena who asked him to buy her a beer. He agreed and she ordered a Bud Light from the bartender. Garcia gave the bartender \$10. The bartender returned with \$7 change which she handed to Maria Elena. Maria Elena put the money in her purse and drank her beer. Maria Elena subsequently solicited four additional beers from Garcia. Each time she received \$7 in commission from the bartender after Garcia paid.

Counts 14 - 17:

Officers Garcia and Lopez returned to the premises on April 1, 2011 and sat at a table eight to ten feet from the bar. Lopez went to the bar and ordered two Victoria beers from the bartender. He was charged \$4 for each beer. A female named Ximena joined them and asked Lopez if he would invite her for a beer. He agreed and gave her \$20. She went to the bar, returned with a beer and some change, gave \$10 to Lopez, and kept \$7, which she put in her purse. It was not established that any employee heard the solicitation or was aware that Ximena kept a \$7 commission.

An individual named Alejandra joined them and asked Lopez to buy her a beer. He agreed and gave her \$20. She went to the bar, returned with a beer and some change, gave \$10 to Lopez, and kept \$7, which she put in her bra. Alejandra subsequently solicited four more beers from Lopez and each time she kept \$7 in

commission. It was not established that any employee heard these solicitations or was aware that Alejandra received commissions.

Counts 18 - 21:

On May 6, 2011, Officer Garcia returned to the premises with Sergeant Cabrera. They stood at the bar and ordered Modelo beers from the bartender, Maria Lopez. A male bartender, Mr. Vasquez, was also behind the bar.

Garcia spoke to Maria Elena, whom he knew from the visit on March 24th, and introduced her to Cabrera. She offered to call a friend to sit with Cabrera. An individual who introduced herself as Alejandra, but who was later identified as Miriam Molina, asked Cabrera to buy her a beer, and Maria Elena asked Garcia to buy her a beer. Both officers agreed to do so. The women ordered bottles of Select 55 from the bartender and Garcia paid with a \$50 bill. The bartender brought back change, gave \$30 to Garcia, placed \$7 in front of Maria Elena, and \$7 in front of Alejandra. The women both placed the money in their purses.

Maria Elena asked for a second beer, Garcia agreed, she ordered a beer from the bartender, and Garcia gave him \$10. The bartender served Maria Elena a beer and gave her \$7 which she placed in her purse. Subsequently, she solicited two additional beers and was paid \$7 in commission each time by the bartender.

Alejandra asked for a second beer from Cabrera, he agreed, and she ordered a Select 55 from the bartender. Cabrera paid the bartender with a \$50 bill. The bartender gave Cabrera \$40 in change and gave Alejandra \$7. The evidence did not establish that Select 55 is an alcoholic beverage.

The Department found that counts 2, 4, 7, 9, 11, 18, and 20 — for violation of section 24200.5(b) — had been established. We agree. Appellant argues that the

evidence was insufficient to establish that the bartender overheard these individuals soliciting alcoholic beverages from the undercover police officers, but this is irrelevant. In each of these counts, either a bartender or waitress handed a commission directly to the person who solicited the drink. It was not necessary to establish that the bartender or waitress overheard the solicitation. Since appellant's employees paid a commission to these women, the obvious conclusion is that appellant's employees had an agreement with various women to pay a commission for soliciting alcoholic beverages from patrons.

The Department also found that counts 3, 6, 8, 10, and 13 — for violation of section 25657(b) — had been established. We agree. Appellant contends that the evidence was insufficient to establish that the patrons were loitering. However, the testimony established that each time an officer purchased a beer for himself he paid \$4, while each time an officer paid for a drink for a person who solicited a beer he paid \$10 — with the beer costing \$3 and the solicitor receiving \$7 as a commission.

In *In re Flores* (2008) AB-8713, the Board addressed the issue of loitering and concluded that when a commission scheme is found, it follows that the bartenders and waitresses have "knowingly permitted" the solicitors to loiter for purposes of soliciting drinks:

These facts provide substantial evidence to support finding violations of both statutes cited above. Not only do they show the plan or scheme of paying a commission for each drink solicited, they also show that the bartenders were not merely innocent or ignorant bystanders. The complicity of the bartenders is obvious; without their complicity, the women would not have received commissions on the beers they solicited. There can be no question that the bartenders "knowingly permitted" these women "to loiter in . . . [the] premises for the purpose of . . . soliciting" drinks. It is hard to imagine a more obvious illegal "bar girl" operation.

It is well settled in Alcoholic Beverage Control Act case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Equally well settled is a licensee's vicarious responsibility for the unlawful on-premises acts of his or her employees. (*Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315]; *Mack v. Dept. of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629].) The permitting of this drink solicitation activity by the bartenders and waitresses is properly imputed to the appellant.

The Department concedes that counts 5 and 12 — for violation of section 25657(a) — were not established. (See Reply Br. at p. 12.) There was no evidence that Norma was an employee, nor were there any findings which support the conclusion that Maria Elena was employed by appellant. These counts should be dismissed in addition to counts 1, 14, 15, 16, 17, 19, 21, 22, and 23, already dismissed by the Department.

Section 24200.5, subdivision (b), provides that the Department *shall revoke* a license "[i]f 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." (Emphasis added.) Revocation, therefore, is appropriate in this case.

ORDER

The decision of the Department is affirmed as to all counts except counts 5 and 12, which are dismissed.⁵

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

⁵This 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.