

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

AB-9394

File: 42-403342 Reg: 13078232

CRUZ ZAMORA LARA and RAMON PENA OLIVAS,
dba Club Reseda
18436 Saticoy Street, Reseda, CA 91335,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 4, 2014
Los Angeles, CA

ISSUED SEPTEMBER 30, 2014

Cruz Zamora Lara and Ramon Pena Olivas, doing business as Club Reseda (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for permitting drink solicitation activity, in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b); as well as for appellant Lara having pled nolo contendere to a public offense involving moral turpitude, in violation of section 24200, subdivision (d).

Appearances on appeal include appellants Cruz Zamora Lara and Ramon Pena Olivas, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated November 19, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine license was issued on December 24, 2003. On March 26, 2013, the Department instituted a 29-count accusation against appellants charging that appellants 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 that appellant Lara had pled nolo contendere to a public offense involving moral turpitude., *i.e.*, possession of an unconventional pistol, in violation of section 24200, subdivision (d). A first amended accusation was filed on June 21, 2013, adding three additional counts, and a second amended accusation was filed on September 18,

²Section 24200.5(b) states, in relevant part:

. . . the department shall revoke a license:

¶ . . . ¶

(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 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) 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.

2013.

At the administrative hearing held on September 18, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Jose Monzon, an officer with the Los Angeles Police Department (LAPD). Appellants presented no witnesses.

After the hearing, the Department issued its decision which determined that 25 of the drink solicitation charges had been proven.⁴ Appellants' license was therefore revoked. Six of the drink solicitation counts were dismissed.⁵ In addition, the Department sustained count 29, constituting a separate cause for revocation, for having pled nolo contendere to a crime of moral turpitude.

Appellants then filed this appeal making the following contentions: (1) Appellant Lara's nolo contendere plea did not constitute a moral turpitude conviction; (2) the Department abused its discretion in admitting a felony complaint as evidence; and (3) the Department's decision — as to the drink solicitation counts — is not supported by substantial evidence.

DISCUSSION

I

Appellant contends that her conviction under Penal Code section 31500 does not constitute a crime of moral turpitude meriting revocation under Business and Professions Code section 24200(d).

⁴Counts 1-10, 13-14, 16-25, and 30-32 were sustained.

⁵Counts 11-12, 15, and 26-28 were dismissed.

Business and Professions Code section 24200, subdivision (d), provides as grounds for revocation of an alcoholic beverage license "[t]he plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude."

It is undisputed that appellant pled nolo contendere to a violation of Penal Code section 31500. That section states, in relevant part:

[A]ny person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any unconventional pistol is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170.

On November 14, 2012, appellant Lara pled nolo contendere to a violation of this section for possession of an unconventional pistol. She was sentenced to serve 54 days in jail (consisting of 36 days already served plus 18 days for good behavior), placed on three years' probation, and ordered to pay a fine.

The question before the Board is therefore one of pure law: does violation of a statute prohibiting possession of an unconventional pistol constitute a crime of moral turpitude?

This Board reviews questions of law de novo.

"It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.] Accordingly, we are not bound by the trial court's interpretation. [Citation.]" (*Rudd v. Cal. Casualty Gen. Ins. Co.* (1990) 219 Cal.App.2d 948, 951-952 [268 Cal.Rptr. 624].) An appellate court is free to draw its own conclusions of law from the undisputed facts presented on appeal.

(*Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578].)

On this point, however, we agree with the ALJ. His reasoning is brief and astute and relies on the proper authorities:

Whether a conviction for possession of an unconventional pistol under Penal Code section 31500 (formerly Penal Code section 12020(a)) is a crime involving moral turpitude or not has never been directly addressed. *People v. Garrett* [(1987) 195 Cal.App.3d 795 [241 Cal.Rptr. 10]], and, more recently, *People v. Gabriel* [(2012) 206 Cal.App.4th 450 [141 Cal.Rptr.3d 784]], discuss section 12020(a) as part of their analyses of other, similar laws. Both cases come to the conclusion that a violation of section 12020(a) is a crime involving moral turpitude. [*Garrett, supra*, 195 Cal.App.3d at p. 800; *Gabriel, supra*, 206 Cal.App.4th at pp. 457-458.] By extension, a violation of section 31500 is also a crime involving moral turpitude since it carries forward — without any change — the provisions of section 12020(a) as they relate to unconventional pistols.

(Conclusions of Law ¶ 8.) We see no flaw in this analysis, and believe the ALJ properly applied the law.

II

Appellants contend the Department abused its discretion in admitting Exhibit 3, a felony complaint involving multiple individuals involved in illegal drug activities, including appellant Lara. The charges were dropped as to Lara, and she pled nolo contendere instead to a violation of Penal Code section 31500, discussed above, which was not part of that original felony complaint. Appellants maintain that the exhibit should have been excluded under Evidence Code section 352.

Evidence Code section 352 provides in pertinent part:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

An exercise of discretion under section 352 will be disturbed on appeal only if the trial court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 [36 Cal.Rptr.2d 235].) The trier of fact is accorded broad discretion in ruling on the

admissibility of evidence, and the ruling will be reversed only if there is a clear showing of an abuse of discretion. (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038 [228 Cal.Rptr. 768].) "The admission or rejection of evidence by an administrative agency is not grounds for reversal unless the error has resulted in a miscarriage of justice. [Citation.] In other words, it must be reasonably probable a more favorable result would have been reached absent the error. [Citation.]" (*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2009) 176 Cal.App.4th 1249, 1254 [98 Cal.Rptr.3d 559].)

During the discussion on whether or not to admit Exhibit 3 the ALJ observed:

Certain allegations were made, and they were dismissed. A different count was added to which Mr. [*sic*] Lara entered a plea. Those documents are part of the same case. I don't think that admitted [*sic*] it is going to be more prejudicial than probative rather, I think, it explains what happened in the other documents - - for those other reasons, it refers to a dismissal of a count, but if we take out Exhibit 3, we have no way of knowing what was being dismissed.

(RT at p. 14.)

Appellants cite no case law or other evidence in support of their contention that the admission of Exhibit 3 constitutes an abuse of discretion. Appellants have not demonstrated an abuse of discretion, only a difference of opinion between themselves and the ALJ. A difference of opinion, however, is insufficient reason to support reversal. (See *Santina v. Gen. Petroleum Corp.* (1940) 41 Cal.App.2d 74, 77 [106 P.2d 60] ["Where any error is relied on for a reversal it is not sufficient for appellant to point to the error and rest there."].)

The erroneous admission of evidence is not reversible error unless the error resulted in a miscarriage of justice. (*Lone Star, supra*, at p. 1254.) Appellants have

shown nothing of the sort. Therefore, even if we were to conclude that it was error to admit Exhibit 3 — which we do not believe it was — appellants have not established that it is *reversible* error. Appellants' contention is without merit, and the ALJ acted properly within his discretion in admitting Exhibit 3 for foundational purposes.

III

Appellants contend the Department's decision — as to the drink solicitation counts — is 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 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 [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].)

Testimony at the administrative hearing established that on four occasions — August 30, October 5, October 12, and October 26, 2012 — appellants' licensed premises was visited by undercover LAPD officers.

Counts 1 - 4:

On August 30, 2012, Officer Monzon entered the licensed premises with his partner, sat at the bar, and ordered a Modelo beer for which he paid \$5. He was approached by Carla De La Virgen who invited him to join her and her friend Angelica. He moved to their table and sat down. Carla asked Monzon to buy them beers. Monzon asked Angelica if she wanted a beer and she said yes.

Monzon handed a \$20 bill to Carla who stated it would be \$25. He handed her another \$5. She went to the bar counter and returned with two beers and some change. She handed a beer and some money to Angelica, kept the other beer for herself, and handed \$15 in change to Monzon. Monzon could not determine whether she kept any money for herself.

Waitress Dina Rodriguez approached the table and asked Monzon if he was going to invite Carla and Angelica to a beer. This solicitation was not pled in the accusation. Later, Carla and Angelica each asked Monzon to buy them beers and he agreed. Monzon handed money to Rodriguez, who went to the bar and returned with two beers and some change. Rodriguez handed one beer and \$7 to Carla, and the other beer and \$7 to Angelica.

Angelica asked Monzon to buy her another beer. He agreed and handed \$10 to Rodriguez. Rodriguez obtained a beer from the bar, brought it to Angelica, and handed her all the change. Later Angelica asked for another beer, and again Rodriguez

handed Angelica \$7 along with her beer.

Counts 5 - 8:

Officer Monzon returned to the premises on October 5, 2012 with his partner Officer Coreas. They sat at the bar and ordered two Corona beers for which they were each charged \$5.

The officers were approached by Gabriela Correa, who struck up a conversation and said she would return with a friend later. When she returned she was accompanied by Vero. Gabriela said they were not allowed to sit at the bar so they all moved to a table.

At the table, Gabriela and Vero each asked Officer Coreas to buy them beers. He agreed, called over waitress Alejandra, and they each ordered a Bud Light beer. He asked Alejandra how much it would be, and she said \$20. He handed Alejandra a \$20 bill. Alejandra obtained the beers from the bar, handed Gabriela and Vero the beers, and handed all the change to Gabriela. After Alejandra left, Gabriela handed some of the change to Vero.

Later, Gabriela called Alejandra over and ordered two more beers. When neither Gabriela nor Vero offered to pay for the beers, Monzon handed \$20 to Alejandra. Alejandra went to the bar, obtained two beers, and handed one beer and \$7 to each of the women.

Three additional times during the evening, Gabriela and Vero asked the officers for another beer. Each time, the officers paid with a \$20 bill, and each time the women received \$7 apiece along with their beers.

Counts 9 - 7 and 30 - 31:

Monzon and Coreas returned to the licensed premises on October 12, 2012, sat

down at the bar, and ordered two Corona beers from the bartender, Lilly. They were charged \$5 each for the beers. Gabriela joined them and asked Coreas to buy her a beer. He agreed, and asked if she had a friend for Monzon. Gabriela left and then returned with Rosie. Rosie asked Monzon to buy her a beer. He agreed and handed \$20 to Lilly. Lilly asked if it was just for Rosie's beer or if he was also paying for Gabriela's — indicating that it would be \$10 for each beer. Monzon signaled that he was paying for both beers. Lilly obtained the beers, gave one beer and \$7 to Rosie, and gave the other beer and \$7 to Gabriela.

Later, the officers and both women moved to a table. The waitress, Alejandra, asked the officers if they were going to buy the women more beers. Monzon said he would if they wanted more. Rosie and Gabriela each said they wanted another beer. He agreed, and one of the officers handed \$20 to Alejandra. She returned with two beers, then handed one beer and \$7 to each woman.

A woman named Ceci joined them, and waitress Dina Rodriguez came over and asked if the officers were going to buy the women any more drinks. In response, all three women asked the officers to buy them another beer. The officers agreed, then ordered two Coronas for themselves and three Bud Light beers for the women. Monzon and Coreas each handed Rodriguez \$20, and she obtained the five beers from the bar. She then served the two Coronas to the officers, and gave one Bud Light and \$7 to each of the three women.

A few minutes later, waitress Alejandra returned to the table and asked if they needed anything else. Rosie and Ceci each ordered another Bud Light. Alejandra returned with the beers and Monzon gave her some money. She returned with some change and handed \$7 each to Rosie and Ceci.

Another waitress, Veronica, came over and asked if they needed anything else. Gabriela and Ceci each asked Coreas if he would buy them a beer. He agreed, and handed some money to Veronica. She went to the bar and returned with the beers and some change. She handed one beer and \$7 to each of the women.

Alejandra returned to the table. Gabriela asked Coreas to buy her a beer. Rosie and Ceci each asked Monzon to buy them beers. Both officers agreed. Coreas handed Alejandra \$20 and Monzon gave her \$30. As Alejandra was going to the bar, Ceci called out and asked Alejandra to bring her two beers. Alejandra returned with four beers — handing one beer and \$7 to Gabriela, one beer and \$7 to Rosie, and two beers and \$14 to Ceci.

Counts 18 - 28 and 32:

Officers Monzon and Coreas returned to the licensed premises on October 26, 2012 and sat down at a table. They were approached by a woman who identified herself as Mari. Rodriguez came over to take their order and each officer ordered a Corona beer. She asked if they were going to buy a beer for Mari. In response, Mari ordered a Bud Light. Coreas gave Rodriguez a \$50 bill. Rodriguez went to the bar and returned with the three beers and some change. She handed \$30 in change to Coreas and later handed \$8 to Mari.

Monzon asked Rodriguez if she was going to sit with them, and she said that she would if he would invite her to a beer. He agreed, and handed her \$20. She obtained a beer from the bar and gave \$10 of the change to Monzon.

Monzon was waved over to another table by Marina Sanchez. They had a conversation during which Marina asked him to buy her a beer. He agreed, and they returned to his table. Monzon asked Marina what she wanted, and she said she

wanted a Corona. Mari asked Coreas if she and Rodriguez could get one too. Coreas agreed, and handed a \$50 bill to Rodriguez. Rodriguez took the money to the bar and returned with three beers and some change. She handed one beer and \$8 to Marina, one beer and \$8 to Mari, \$10 in change to Coreas, and kept one beer and \$8 for herself.

Mari later asked Monzon why he liked Corona. He said that he liked it but that he was willing to give Bud Light a try. He went to the bar and ordered a Bud Light from the bartender, Lilly. She said it would cost \$10. He then informed her it was for himself, and Lilly said it would cost \$5 — the higher cost only applied if it was for one of the women.

Monzon returned to the table. Later, he went to the restroom and was stopped by Gabriela. They had a conversation and he told her he would be leaving soon. She replied that he had to buy her one more before he left. They went to the bar and stood next to Rosie, who, when she found out he was leaving, asked Monzon to buy her one as well. The bartender, Lilly, was directly across the bar from them during this conversation. Gabriela and Rosie each ordered a beer from the bartender. Monzon gave the bartender \$20. The bartender gave one beer and \$8 to each of the women. Monzon and Coreas later exited the premises.

Appellants' 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 appellants' own bartenders and waitresses were actively facilitating the illegal conduct. An examination of the record reveals that a pervasive solicitation scheme, involving appellants' employees, existed at these

premises.

A reasonable inference to be drawn from the bartender's distribution of the \$8 surcharge on solicited beers directly to each of the women is that the bartender is a participant in the drink solicitation scheme and conspiracy. How otherwise would the bartender — and on previous occasions, the waitresses — have known to distribute the money in that manner? Additionally, Lilly, the bartender, stated to Officer Monzon that the beer cost a different amount depending on whether it was for him or for one of the women. Under settled law, the acts and knowledge of the bartender and waitresses are imputed to the employer. (See *Yu v. Alcoholic Bev. etc. 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. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291]; *Wright v. Munro* (1956) 144 Cal.App.2d 843 [301 P.2d 997].)

We have thoroughly reviewed the record and are satisfied that the sustained counts pertaining to drink solicitation activity are supported by substantial evidence.

ORDER

The decision of the Department is affirmed.⁶

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

⁶This 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.