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

AB-9510
File: 48-416988; Reg: 14081138

IRENE TORRES and RAMON LEDEZMA TORRES,
dba La Fiesta Bar
136 East Anaheim Street, Long Beach, CA 90813,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: December 3, 2015
Los Angeles, CA

Appearances: *Appellants*: Armando H. Chavira, counsel for Irene Torres and Ramon Ledezma Torres.
Respondent: Jennifer M. Casey, counsel for the Department of Alcoholic Beverage Control.

OPINION

Irene Torres and Ramon Ledezma Torres, doing business as La Fiesta Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] revoking their license (with the revocation conditionally stayed for a period of three years provided no cause for disciplinary action occur within that time) and concurrently suspending their license for 20 days, for permitting drink solicitation activities within the premises, and permitting individuals to loiter for the purpose of drink solicitation, in

[1]The decision of the Department, dated April 10, 2015, is set forth in the appendix.

violation of Business and Professions Code sections 24200.5, subdivision (b) and 25657, subdivision (b).

We affirm the ALJ's decision but express serious concerns about the manner of enforcement in this case and an apparent "suspect pattern" of selective enforcement focused on Hispanic licensees in drink solicitation cases generally by the Department.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale public premises license was issued on September 27, 2004. On September 8, 2014, the Department instituted a 14-count accusation against appellants, charging that appellants employed or permitted individuals to engage in drink solicitation activity within the premises, and permitted individuals to loiter for the purpose of drink solicitation, in violation of Business and Professions Code sections 24200.5(b)[2] and 25657(b).[3]

At the administrative hearing held on February 24, 2015, documentary evidence

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[2]Section 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.

[3]Section 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.

was received and testimony concerning the violation charged was presented by Agent Carlos Valencia and Supervising Agent Anthony Posada of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on three occasions — December 6, 2013, December 13, 2013, and January 17, 2014 — appellants' licensed premises was visited by undercover Department agents.

Counts 1 and 2: On December 6, 2013, Agents Valencia and Posada entered the premises and sat at the bar. There were two bartenders behind the bar, later identified as Norma Cabrera and Jane Doe #1. The agents were approached by Marlene Munguia — on the public side of the bar — and they ordered a Bud Light beer and a Corona beer from her. Munguia called to Jane Doe #1 and ordered the beers. Jane Doe #1 gave the beers to Munguia, and she served them to the agents. Posada paid Munguia with a $10 bill, and she gave the money to Jane Doe #1. The total charge for two beers was $7.50, and Agent Posada received $2.50 in change. (RT at p. 14.) No charges arose from these facts.

Munguia then asked Agent Valencia if he would buy her a beer. He agreed, and Munguia ordered a Miller 64 from Jane Doe #1. Valencia gave her $20, which she handed to Jane Doe #1. Munguia then received the change from the bartender. Munguia placed part of the change in her purse, and handed Valencia $10 in change. Altogether, the charge for Munguia's beer was $10 — including the amount she placed in her purse. The bartender, Jane Doe #1, was not present when Munguia solicited the beer, nor did she see her place the change in her purse. No charges arose from these facts.

After consuming her beer, Munguia asked Agent Valencia if he would buy her

another beer. He agreed, and asked for another Corona for himself. Munguia ordered the beers from bartender Cabrera, and the beers were served. Valencia placed four $5 bills on the counter in front of him. Cabrera took the money, went to the register, then returned and handed the change to Munguia. Munguia kept some of the money and handed $4 to Valencia. Altogether, Agent Valencia was charged $16 for the two beers — including the amount kept by Munguia. Cabrera was present behind the bar during this time. (Counts 1 and 2.)

Counts 3 and 4: On December 13, 2013, Agents Valencia and Posada returned to the licensed premises, posing as customers, and sat at the bar. They ordered a Modelo beer and a Bud Light beer. The total charge was $7.50 for two beers. Munguia approached Valencia and said "buy me a beer later," then she returned to sit with other customers.

Later, Munguia approached Agent Valencia and asked him to buy her a beer. He agreed, and she ordered a Miller 64 from bartender Marura Cornejo. Valencia placed $20 on the bar in front of him. Cornejo took the money to the register, then returned with some change, which she handed to Munguia. Munguia placed some of the money in her purse, and put $8 in front of Valencia as his change. Altogether, Agent Valencia was charged $12 for Munguia's beer — including the amount she placed in her purse. Cornejo was present and observed these activities.

Counts 5 through 8: Later on the evening of December 13, 2013, Agent Valencia was approached by Mariela Isabela, who asked him to buy her a beer. He agreed. Munguia then asked Valencia to buy her another beer, and he agreed to this as well. Isabela ordered a Bud Light beer for herself, and a Coors for Munguia, from a bartender identified as Rosa. Rosa served the beers to Isabela and Munguia, and

Valencia placed a $20 bill on the counter in front of him. Isabela grabbed the money and handed it to Rosa, who in turn handed it to another bartender — Erlinda Enamorado. Enamorado went to the register and returned with an unknown amount of money. She placed part of the change in Isabela's purse and part of it in Munguia's purse. Valencia received no change. Altogether, Agent Valencia paid $20 for two beers — including the unspecified amounts placed in the purses of Isabela and Munguia by Enamorado — compared to the $7.50 paid for two beers purchased for himself and Agent Posada earlier in the evening.

Counts 9 and 10: On the same night, December 13, 2013, Agent Posada was approached by Lupita, who asked him to buy her a beer. He agreed. Bartender Cornejo was on the other side of the bar, and in a position to hear the conversation. Lupita pointed to a Bud Light bottle and said "I want one." Cornejo served the beer to Lupita, and Posada placed a $20 bill on the bar in front of him. Cornejo took the money to the register, returned, and put the change in front of Lupita. Lupita placed some of the money in her purse and handed Posada $8. Altogether, Agent Posada was charged $12 for Lupita's beer — including the amount she placed in her purse. Cornejo observed this from the other side of the bar.

Counts 11 and 12: On January 17, 2014, Valencia and Posada returned to the licensed premises posing as customers for a third time. They sat at the bar and ordered beers. Munguia then approached Valencia and asked him to buy her a beer. He agreed, and Munguia ordered a Miller 64 from bartender Cornejo. Cornejo served the beer, picked up a $20 bill from the counter, went to the register, returned with change which she placed on the bar, then walked away. Munguia picked up the change, put some of it in her purse, then placed $8 in front of Valencia. These counts

were not found to have been established, and were dismissed.

Counts 13 and 14: Later on the evening of January 17, 2014, Munguia asked Agent Valencia to buy her another beer, and he agreed. Munguia ordered a Miller 64 from a bartender identified as Cindy. Cindy served her the beer, picked up a $20 bill from in front of Valencia, then handed it to bartender Cornejo. Cornejo went to the register, then handed an unknown amount of change to Cindy. Cindy handed part of the change to Munguia, which she placed in her purse, and $8 to Valencia. Altogether, Agent Valencia was charged $12 for Munguia's beer — including the amount she placed in her purse.

After the hearing, the Department issued its decision which determined that counts 1 through 10 and 13 through 14 had been proved, and no defense had been established. Counts 11 and 12 were dismissed.

Appellants then filed a timely appeal contending the 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 § 23804; *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 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 Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Count 1 of the accusation alleges that bartender Cabrera permitted Munguia to solicit others to buy her drinks under a commission scheme, in violation of Business and Professions Code section 24200.5(b). Count 2 alleges that Cabrera permitted Munguia to loiter in the premises for the purposes of drink solicitation, in violation of Business and Professions Code section 25657(b). The apparent objective of these interrelated statutes is consumer protection, to make sure the customer is not *overcharged* rather than, or more than, to protect customers from drinking too much alcohol. “The evil the statute [§ 24200.5] is designed to meet is the use of the bar for ‘a purposeful and *commercial exploitation* of the customer’ (*Greenblatt v. Martin* (1960) 177 Cal.App.2d 738, 742, [2 Cal.Rptr. 508, 511].) It is *immaterial that the drink purchased for the employee is non-alcoholic*, particularly when the price charged is exorbitant for such drinks (*id*.).” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1964) 224 Cal.App.2d 468, 471-472, [36 Cal.Rptr. 697], emphasis added (upholding drink solicitation charge for customer ordering and served only orange juice)).[4]

[4]Assuming this to be the primary purpose behind the anti-solicitation drink laws, one wonders why enforcement seems, at least judging by the cases that come before the Board, lax in ritzier neighborhoods where martini’s and other premium cocktails approach $15 each.

Appellants maintain that bartender Cabrera was not present when Munguia asked Agent Valencia to buy her the second beer on December 6, 2013, and that the amount of money exchanged was not established. The administrative law judge (ALJ) found, however, that the evidence established that the bartender was aware of the solicitation scheme because she gave the change directly to Munguia — an individual who was not an employee. It is irrelevant whether the bartender heard Munguia ask for this second drink, because, after taking $20 from the agent in payment for the beer, Cabrera handed the change directly to Munguia, and then Munguia handed Agent Valencia only $4. It is similarly unnecessary to establish exactly how much was paid for the beer and how much was kept by Munguia. The fact remains that altogether Agent Valencia paid $16 for Munguia's beer, including the amount she placed in her purse. Munguia was not an employee, so this was not a tip, and the total amount was far more than the cost of beers purchased for the agents alone — when they paid $7.50 for two beers earlier in the evening. Loitering by Munguia was established because there was no evidence presented that she was involved in any employee-type duties.

We believe these two counts were established by sufficient evidence. We note, however, that this would be a much stronger case if testimony had been elicited to establish exactly how much the agent was charged for Munguia's beers. The record and the ALJ's proposed decision are sorely lacking in these details.

This, however, does not change the fact that substantial evidence still exists, in spite of the sketchy details, to establish that appellants' bartender participated in a solicitation scheme, and the agent was charged an inflated price for the beer purchased for the soliciting individual — who was permitted to loiter in the premises for the purpose of participating in the solicitation activity.

To cause reversal, an error must be prejudicial and it must appear that a different result would have been probable if such error did not exist. (Code Civ. Proc., § 475; see *Paterno v. State of Cal.* (1999) 74 Cal.App.4th 68, 104 [87 Cal.Rptr.2d 754].) There is no presumption of injury from an error, but the burden is on the appellant to show that the error was sufficiently prejudicial to justify reversal. (*Kyne v. Eustice* (1963) 215 Cal.App.2d 627, 635-636 [30 Cal.Rptr 391].) We do not believe the lack of detail in this case rises to the level of reversible error.

Count 3 alleges that bartender Cornejo permitted Munguia to solicit drinks in exchange for a commission, in violation of Business and Professions Code section 24200.5(b). Count 4 alleges that Cornejo permitted Munguia to loiter for the purpose of drink solicitation, in violation of Business and Professions Code section 25657(b).

Appellants maintain that these counts were not established. The ALJ found, however, that the bartender was aware of the solicitation scheme because Cornejo, after receiving $20 from Agent Valencia, handed all of the change directly to Munguia — an individual who was not an employee, and therefore was not entitled to a tip. Valencia received only $8 in change from Munguia — establishing that her beer, plus the amount she put in her purse, cost $12 — far more than the cost of beers purchased earlier in the evening for the agents alone. Loitering was established because there was no evidence presented that Munguia was involved in any employee-type duties.

We believe these two counts were established by sufficient evidence. However, once again, additional testimony regarding the price of the beer purchased for Munguia would have made a stronger case. Again, this does not constitute reversible error. Substantial evidence still exists, in spite of the deficiency in detail, to establish that appellants' bartender participated in a solicitation scheme, and the agent was charged

an inflated price for the beer purchased for the soliciting individual — who was permitted to loiter in the premises for the purpose of participating in the solicitation activity.

Count 5 alleges that bartender Enamorado permitted Isabela to solicit drinks in exchange for a commission, in violation of Business and Professions Code section 24200.5(b). Count 6 alleges that Enamorado permitted Isabela to loiter for the purpose of drink solicitation, in violation of Business and Professions Code section 25657(b). Count 7 alleges that Enamorado permitted Munguia to solicit drinks in exchange for a commission, in violation of Business and Professions Code section 24200.5(b). Count 8 alleges that Enamorado permitted Munguia to loiter for the purpose of drink solicitation, in violation of Business and Professions Code section 25657(b).

Appellants maintain that these counts were not established. The ALJ found, however, that the bartender was aware of the solicitation scheme, as evidenced by her placing money directly into the purses of Isabela and Munguia — two individuals who were not employees, and therefore not entitled to tips. Agent Valencia, after giving the bartender $20, received no change whatsoever — establishing that each beer cost $10, including the amount put into each woman's purse. This was far more than the beers purchased for the agents themselves, earlier on the evening of December 13, 2013, which cost $7.50 for two beers, not $20. Loitering was established because there was no evidence presented that either Isabela or Munguia were involved in any employee-type duties.

We believe these four counts were established by sufficient evidence, although, yet again, we are left wishing for additional details in the record to make this a stronger case. Once again, this does not rise to the level of reversible error because substantial

evidence still exists to establish that appellants' bartenders participated in a solicitation scheme, and the agent was charged an inflated price for the beers purchased for the soliciting individuals — who were permitted to loiter in the premises for the purpose of participating in the solicitation activity.

Count 9 alleges that bartender Cornejo permitted Lupita to solicit drinks in exchange for a commission, in violation of Business and Professions Code section 24200.5(b). Count 10 alleges that Cornejo permitted Lupita to loiter for the purpose of drink solicitation, in violation of Business and Professions Code section 25657(b).

Appellants maintain that these counts were not established. The ALJ found, however, that Cornejo was aware of the solicitation scheme, because, after receiving $20 from Agent Posada, she placed all of the change in front of Lupita — an individual who was not an employee, and was therefore not entitled to a tip — and Lupita then handed Posada only $8, establishing that her beer cost $12, including the amount she put in her purse. Loitering was established because there was no evidence presented that Lupita was involved in any employee-type duties.

We believe these two counts were established by sufficient evidence, although additional testimony about the amount charged would have been helpful. This is not reversible error because substantial evidence still exists, in spite of the deficiency in detail, to establish that appellants' bartender participated in a solicitation scheme, and the agent was charged an inflated price for the beer purchased for the soliciting individual — who was permitted to loiter in the premises for the purpose of participating in the solicitation activity.

Count 11 alleges that Cornejo permitted Munguia to solicit a drink in exchange for a commission, in violation of Business and Professions Code section 24200.5(b).

Count 12 alleges that Cornejo permitted Munguia to loiter for the purpose of drink solicitation, in violation of Business and Professions Code section 25657(b).

The ALJ found that these counts were not established because bartender Cornejo was not present during the solicitation and she did not participate in any way after she walked away. Counts 11 and 12 were properly dismissed.

Count 13 alleges that Cindy permitted Munguia to solicit a drink in exchange for a commission, in violation of Business and Professions Code section 24200.5(b). Count 14 alleges that Cindy permitted Munguia to loiter for the purpose of drink solicitation, in violation of Business and Professions Code section 25657(b).

Appellants maintain that these counts were not established. The ALJ found, however, that Cindy was aware of the solicitation scheme, because, after receiving $20 from Agent Valencia, she handed the money to bartender Cornejo, who then handed Cindy change. Cindy then gave part of the change to Munguia — an individual who was not an employee, and was therefore not entitled to a tip — and $8 to Valencia. Agent Valencia was charged $12 total, including the amount kept by Munguia — much more than the amount paid by the agents when ordering beers only for themselves. Loitering was established because there was no evidence presented that Munguia was involved in any employee-type duties.

We believe these two counts were established by sufficient evidence, although additional testimony, with details about the price of the beer, would have make a stronger case. Yet again, this is not reversible error because substantial evidence still exists, in spite of the lack of detail, to establish that appellants' bartender participated in a solicitation scheme, and the agent was charged an inflated price for the beer purchased for the soliciting individual — who was permitted to loiter in the premises for

the purpose of participating in the solicitation activity.

The ALJ reached the following conclusions of law:

> 3. Section 24200.5 provides that 'the department shall revoke a license . . . (b) [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."
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> 4. Cause for suspension or revocation of Respondent's [*sic*] license was established as to counts 1, 3, 5, 7, 9, and 13 of the Accusation by reason of the matters set forth in Findings of Fact, paragraphs 5 through 12, for violation of Section 24200.5(b). A preponderance of the evidence established that there were different employee bartenders who were aware of and directly involved in the solicitation scheme. The change for the solicited beers was given directly to the female solicitor and even at times placed directly in to the purse of the solicitor by the bartender. Each time the officers were charged an inflated price for each drink solicited. The solicitor received an unknown amount of money for each beer solicited while the premises received the profits generated by the increased sales of the beer.
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> 5. Section 25657(b) provides that it is unlawful "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 or [*sic*], or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting."
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> 6. Cause for suspension or revocation of Respondents' license was established as to counts 2, 4, 6, 8, 10 and 14 of the accusation by reason of the matters set forth in Findings of Fact, paragraphs 5 through 12, for violation of Section 25657(b). There was no evidence to establish that Munguia, Isabela and Lupita were employees of the premises. They were never seen performing employee duties such as serving customers or cleaning tables. They were never observed on the employee side of the fixed bar. They were never observed to purchase anything with their own money. Lastly, they always had their purses with them. Employees would normally place their purse in a secure location behind the bar. Even though they were not employees they were permitted to loiter in the business for the purpose of soliciting patrons to buy them beers. The bartenders were aware of their solicitations and even assisted in their activity. There was no evidence that any bartender asked them to leave at any time. They were permitted to loiter and solicit.

(Conclusions of Law ¶¶ 3-6.)

Appellants' brief does not refute the ALJ's conclusions, but rather, selectively attempts to explain away the circumstances relating to the drink solicitations, and divert attention from the fact that appellants' own bartenders were actively facilitating the illegal conduct by handing money directly to the women involved or putting money in their purses. 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 bartenders' distribution of the surcharge on solicited beers directly to each of the women involved is that the bartenders were participants in the drink solicitation scheme and conspiracy. How otherwise would these bartenders have known to distribute the money in that manner? Under settled law, the acts and knowledge of the bartenders 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 are supported by substantial evidence. And, notwithstanding the dearth of detail in the record about the amount charged for the beers, there is no reversible error.

Having said that, however, we have two concerns about the enforcement of drink solicitation laws in this case and others. First, the undercover agents here (who we assume are being reimbursed by the taxpaying public for the cost of drinks they ordered and "tips" they paid) did not, as mentioned, bother to ask the price. Not asking the price leads to suspicion (or perhaps a permissible but not necessary inference) that the officers are encouraging illegal activity by giving it a "wink and nod," an appearance of

going along with the scheme. A better practice would be to instruct agents to ask the price of the drinks they purchase — both so that they can testify to these details at the hearing and establish a stronger record, and so the appearance of condoning the solicitation activity can be avoided.

Our second serious concern is about a feature the Board has noticed appears common to drink solicitation appeals — they overwhelmingly involve Hispanic surname licensees. A sampling of cases on our official website involving prosecutions for drink "solicitation" strongly suggests our perception of this skewed enforcement against Hispanic licensees comports with reality[5] and raises serious public policy and legal questions.

To begin with, is drink solicitation a practice peculiar to Hispanic-owned bars in Hispanic neighborhoods?[6] If so, what is the evidence showing this? If not, why do these drink solicitation sting operations seem so concentrated on this identifiable

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[5]A review of all the "drink solicitation" appeals on our website shows that 78 out of 91 cases – or 85.7% – were against Hispanic surnamed owners or were operating in or near Hispanic neighborhoods, while only 13 out of 91 appeals – or 14.3% – were against non-Hispanic licensees or establishments. (<www.abcappealsbd.ca.gov. /abc_decisions.htm>; reviewed December 30, 2015.) We understand, of course, that what comes before the Board on appeal is a small fraction of the cases actually prosecuted by the Department, but it is reasonable to infer, barring some unforseen (and unknown at least to the Board) circumstance, that the appeal figures should be roughly proportional in the breakdown between Hispanic and non-Hispanic licensees to the total offenses charged, whether appealed or not.

[6]Apparently not. "[Solicitation] . . . practices are not unique to bars in the Latino community; for example, the LAPD says women are employed to do the same thing in establishments in the Korean community. And in Little Saigon in Orange County, hostesses at coffee houses are employed to encourage customers to order pricier fare, including drinks." Jennings, *'Buy a lady an overpriced drink?' L.A. police say bar scam is widespread, L.A. Times* (Nov. 13, 2015) (<http://www.latimes.com/local/crime/la-me-1113-nuisance-bar-20151113-story.html> [as of Dec. 17, 2015].)

group? Understandably, if law enforcement focuses resources on a particular group or neighborhood to catch persons for specified illegal activity through undercover stings, it is likely there will be more reported violations of those laws there than reported for groups or neighborhoods where law enforcement has a lesser presence or is not conducting sting operations for the same prohibited activity. Referencing the predictable result of greater violations obtained from previous skewed public budget allocations as a rationale for continuing to devote the same or equal resources in the future to the same objectives against the same targeted group as in the past, results in a self-perpetuating project dependent on the Möbius band mechanism of taxpayer monies. One is visually reminded of the "vacuum cleaner beast" in the Beatles movie "The Yellow Submarine," a cartoon character who, with his long, vacuum cleaner nose wanders around the "sea of monsters" sucking everything he encounters up his snout until he finally vacuums himself up and disappears.[7] Will this be the inevitable result of enforcement of drink solicitation laws against a targeted community of licensees — no more licensees of that kind in that community and hence no need of future enforcement of those laws there?

If a neutral criterion cannot be shown to animate and explain this apparent lopsided disparity in the administrative prosecution of drink solicitation offenses between Hispanic and non-Hispanic licensees, the constitutional guarantee to equal

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[7] "Even if [the Department's and law enforcement's] objective is to make [Hispanic] communities safer, the increased concentration of law enforcement in [those] communities is not necessarily in the[ir] best interests . . .. This is because the costs, including threats to the community residents' civil liberties, can outweigh the benefits. This selective law enforcement is partially responsible for the disproportionate [conviction, administrative penalties against, and] incarceration of minorities." (Butler, *Retribution, for Liberals* (1999) 46 *UCLA L. Rev*. 1873, 1882, footnotes omitted.)

protection of the laws is implicated. (*Oyler v. Boles* (1962) 368 U.S. 448, 456 [82 S.Ct. 501] (noting that the selective enforcement of any law "based on an unjustifiable standard such as race, religion, or other arbitrary classification" denies equal protection); see also *Wayte v. United States* (1985) 470 U.S. 598, 630 [105 S.Ct. 1524]: "If the Government intentionally discriminated in defining the pool of potential prosecutees, it cannot immunize itself from liability merely by showing that it used permissible methods in choosing whom to prosecute from this previously tainted pool." *Id*. at 630 (dis. op. of Marshall, J.) We strongly suggest the Department look into this situation to assure that our drink solicitation laws are not being administered "with an evil eye and an unequal hand." (*Yick Wo v. Hopkins* (1886) 118 U.S. 356, 373-374 [6 S.Ct. 1064.)

ORDER

Despite our aforementioned concerns, the decision of the Department is affirmed.[8]

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

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[8]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.