ISSUED MARCH 5, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ABEL D. NAVARRO dba El Torero 6822 Eastern Avenue Bell Gardens, CA 90201, Appellant/Licensee, v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6532 File: 40-205859 Reg: 94030410 Administrative Law Judge at the Dept. Hearing: David B. Rosenman Date and Place of the Appeals Board Hearing: January 11, 1996 Los Angeles, CA

Abel D. Navarro, doing business as El Torero (appellant), appealed from a decision of the Department of Alcoholic Beverage Control[1] which unconditionally revoked appellant's on-sale beer license for permitting his employees to solicit drinks under a commission, percentage, salary or other profit-sharing plan, permitting his employees, or other persons, to loiter in the licensed premises for the purpose of begging or soliciting patrons to purchase alcoholic beverages, and allowing an employee to accept alcoholic beverages purchased by a patron for consumption by the employee, in violation of Business and Professions Code §§24200.5(b) and 25657(b), Penal Code

[1]The decision of the department dated March 23, 1995 is set forth in the appendix.

§303a, and Title 4, §143, California Code of Regulations (Department Rule 143).

Appearances on appeal included Joan H. Allan, counsel for appellant; and John P. McCarthy, counsel for the department.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on August 3, 1987. Thereafter, the department instituted an accusation against appellant on July 7, 1994.

An administrative hearing was held on February 1, 1995, at which time oral and documentary evidence were received. The record was held open for receipt of certified copies of documents relating to the appellant's alleged prior license discipline, and written final argument.

At that hearing, it was determined that on March 18, 1994, appellant employed or permitted a woman by the name of "Mary" to loiter, solicit, and encourage patrons to buy her drinks in the licensed premises (findings 5-8).

It was also determined that on March 22, 1994, appellant employed or permitted Lidia Lopez to loiter in the licensed premises for the purpose of begging or soliciting patrons to buy her drinks (findings 11-14).

Finding 1a and 1b establish that appellant suffered two prior violations for the same offenses charged in this matter, and that appellant's license was under a stayed revocation when the present violations occurred. It was further decided, partly through the Department's own concession, that counts 1-4 and counts 10-19 of the original accusation were not supported by sufficient evidence and thus were dismissed.

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Subsequent to the hearing, the department issued its decision which unconditionally revoked appellant's license. Appellant filed a timely notice of appeal.

In his appeal, appellant raised the following issues: (1) there was no substantial evidence to prove employment either of "Mary" or Lidia Lopez, or that appellant permitted either of these women to solicit patrons; (2) the penalty of revocation was an abuse of discretion on the part of the department because it was based on prior violations.

DISCUSSION

I

Appellant contended that there was no substantial evidence to prove that appellant employed either "Mary" or Lidia Lopez, or knowingly permitted either of these women to solicit patrons.

The United States Supreme Court in Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477, 95 L.Ed. 456, defined "substantial evidence" as:

> "...more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The court in Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871, 269 Cal. Rptr. 647, stated:

> Substantial evidence "...is not synonymous with 'any' evidence, but is evidence which is of ponderable legal significance. It must be reasonable in nature, credible, and of solid value.... Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a

lot of extremely weak evidence might be 'insubstantial.'"

The court in Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874, 197 Cal.Rptr. 925 set forth the procedure for determination of the issue of "substantial evidence":

"...When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of the appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination...."

In this matter, the investigative report which was admitted into evidence by stipulation of the parties (R.T. 8) established substantial evidence on which the department could base its decision.

The record showed that on March 18, 1994, Investigators Curtis and Lambey entered the premises at approximately 9:45 p.m. They each ordered 12 oz. Budweiser beers and were charged $3 each. Curtis then began speaking with a female at the bar. She introduced herself as "Mary" and told him she worked at the bar on Fridays, Saturdays, and Tuesdays, and that all the girls work for drinks, in that they didn't receive pay from the owner.[2] "Mary" then asked Investigator Curtis for a beer. Curtis agreed and they walked to the bar together. Mary ordered a "lite" beer and received a 12 oz. bottle from the bartender. Curtis paid with a $20 bill and the bartender rang up

[2]"Mary's" statement is hearsay (Evidence Code §1200) but pursuant to Government Code §11513(c), such evidence may be used to explain other proper evidence.

the sale and returned with $17 in change. The bartender placed $6 in front of Mary and $11 in front of Curtis. Mary picked up the $6. After finishing her first beer, "Mary" asked Curtis for a second beer. Curtis agreed. He paid with nine one-dollar bills, and once again the bartender handed $6 in change to "Mary" [exhibit 1].

There was no contradictory evidence offered by appellant regarding the incident with "Mary." Neither appellant or his witness, who appeared at the administrative hearing, were at the premises the night of the violation (R. T. 17). Appellant and his witness each testified that no one by the name of "Mary" worked at the premises (R.T. 11, 24).

The record also showed that on March 22, 1994, at approximately 11:30 p.m., Investigator Pacheco entered the premises, went to the bar, and ordered and received a 12 oz. Budweiser beer from the bartender, for which he paid $3. While he was at the bar, Pacheco introduced himself to a woman sitting next to him whose name was Lidia Lopez; she asked him if he would buy her a beer. Pacheco agreed. The bartender served Lopez a 12 oz. beer with a white plastic cup. Pacheco paid the bartender with a $10 bill. The bartender rang up the sale and placed a total of $7 in front of Pacheco, Lopez immediately took $6 from the change and handed $1 to Pacheco. Lopez did this in the presence of the bartender and placed the $6 in her left boot. When Pacheco asked if her beer cost $6, she told Pacheco "Si" (yes). She also told Pacheco she was working and was a premises employee.[3] Pacheco left to make a phone call. When he returned he sat next to Lopez again and she again asked him for another beer. A

[3]The statement is hearsay but proper under Government Code §11513(c).

transaction identical to the one described above transpired. Pacheco left again and when he returned, he observed Lidia serving beers to various unidentified male patrons and taking empty bottles from patrons back to the bar. Pacheco also observed her sitting with a male patron who purchased a beer for her [exhibit 1].

Appellant was not present at the establishment during the time Lidia Lopez solicited Pacheco (R. T. 17) and both appellant and his witness, Monica Castillo, testified that no one by the name of Lidia Lopez worked at the premises (R. T. 11, 24). However, Monica Castillo (a waitress at the premises on March 22, 1994) testified that she was absolutely sure she heard the investigator invite Lopez for a drink (R. T. 33) and yet she didn't hear the bartender's, investigator's, or Lopez's conversation (R. T. 31). Castillo further testified that Pacheco gave Lidia money after buying her a beer, but she could offer no explanation why the investigator would give money to Lopez (R. T. 32).

Where there are conflicts in the evidence, the appeals board is bound to resolve conflicts of evidence in favor of the department's decision, and must accept all reasonable inferences which support the department's findings (Gore v. Harris (1964) 29 Cal.App.2d 821, 40 Cal.Rptr. 666). See Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 67 Cal.Rptr. 734, 737; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439, 102 Cal.Rptr. 857--a case where there was substantial evidence supporting the department's as well as the license-applicant's position; and Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 248 Cal.Rptr. 271.

We determine there was substantial evidence, considering the record as a whole, to support the crucial findings.

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Appellant argues that appellant had no knowledge of the violations. However, knowledge of the violations of law are imputed to an employer where such violations are committed by employees of appellant. Such vicarious responsibility is well settled by case law (Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172, 17 Cal.Rptr. 315, 320; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504, 22 Cal.Rptr. 405, 411; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149, 2 Cal.Rptr. 629, 633.

II

Appellant contended that the penalty of revocation was an abuse of discretion on the part of the department because it was based on prior violations.

The appeals board will not disturb the department's penalty orders in the absence of an abuse of the department's discretion (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287, 341 P.2d 296). However, where an appellant raises the issue of an excessive penalty, the appeals board will examine that issue (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785, 97 Cal.Rptr. 183).

The department had the following factors to consider: (1) the solicitations were open and in the presence of the bartender, (2) the alcoholic beverages served to the soliciting females were twice as expensive as the alcoholic beverages served to the

investigators, (3) the illegal conduct of the employees, including the bartender, was sufficient to impute their illegal conduct to appellant, and (4) at the time of the violations, appellant was under a probationary order of revocation of his license for the same type of violations as found in the instant case.

We determine that the penalty was within reasonable boundaries and within the discretion of the department.

CONCLUSION

The decision of the department is affirmed.[4]

RAY T. BLAIR, JR.,CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.