ISSUED FEBRUARY 11, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BOK SUN SONG dba The Red Baron 1815 South Main Street Santa Ana, CA 92707, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB- 6657 File: 40-241338 Reg: 95033479 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: November 6, 1996 Los Angeles, CA

Bok Sun Song, doing business as The Red Baron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which unconditionally revoked her on-sale beer license because appellant employed or permitted various persons to solicit drinks in the licensed premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code

[1]The decision of the Department dated April 18, 1996, is set forth in the appendix.

§§24200.5, subdivision (b), and 25657, subdivision (b), and Rule 143 of Chapter 1, Title 4, California Code of Regulations (Rule 143).

Appearances on appeal include appellant Bok Sun Song, assisted by Hee Jae Vencius; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on May 1, 1990. Thereafter, the Department instituted an accusation against appellant on July 19, 1995, alleging violations of the statutes and rule prohibiting the solicitation of drinks in a licensed premises.

An administrative hearing was held on March 12, 1996, at which time oral and documentary evidence was received. The Administrative Law Judge (ALJ) determined that appellant had employed or permitted persons to solicit drinks.

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

In her appeal, appellant contends that the ALJ improperly prevented her from testifying and that there was insufficient evidence to show that she knowingly permitted solicitation activities to occur or that she employed anyone to solicit drinks.

DISCUSSION

I

Appellant contends that the ALJ should have arranged for a qualified translator to allow appellant to testify instead of allowing appellant's sister, Ms. Vencius, to serve as translator.

At the beginning of the hearing before the ALJ, appellant's counsel asked to have an interpreter provided for appellant; he had not requested one previously [RT 4-5]. Appellant herself, however, decided to have her sister, Ms. Vencius, interpret [RT 6]. Ultimately, appellant's counsel called only Ms. Vencius to testify [RT 53].

We can quickly reject appellant's contention, since appellant is not justified in complaining about a situation that she and her attorney created, by failing to make a timely request for a qualified translator prior to the day of hearing.

II

Appellant contends that there was insufficient evidence presented to show that she employed or knowingly permitted women to solicit drinks in the licensed premises.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the

manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

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. (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; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of

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[2]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

At the hearing, two officers of the Santa Ana police department testified that six different women had solicited drinks from them on three different occasions over an 11-day period. The officers also testified that they observed each of the women in question performing duties such as taking drink orders, serving drinks, collecting money from patrons, and cleaning tables [RT 15, 18, 22, 37, 41, 42]. The officers were required to pay more for the beers solicited by the women than they were required to pay for beers they ordered for themselves [RT 19].

Appellant apparently only speaks Korean, so Ms. Vencius, appellant's sister, helped appellant by dealing with the managers and other employees at the premises, most of whom spoke Spanish [RT 60-61]. Ms. Vencius testified that, at least since a prior disciplinary incident involving solicitation of drinks in 1993, she had understood that the waitresses were not allowed to solicit drinks, and sometime thereafter she told the managers not to "let the girls drink and this kind of things [sic]" [RT 62-65]. She also testified that neither she nor appellant were regularly at the premises during operating hours. Appellant only went to the premises for about two hours in the morning to clean and Ms. Vencius went there from time to time to communicate with the staff; the rest of the time, one of two managers was in sole charge [RT 61, 66].

Appellant appears to admit that drink solicitation occurred since she says in the Conclusion of her opening brief: "Acknowledging the need for the State to impose a penalty, straight revocation of the license would be inappropriate, too harsh and unfair under the circumstances." Appellant presented no testimony or evidence regarding the violations themselves. Rather, appellant argues in mitigation that neither she nor Ms. Vencius fully understood what "B-girl problems" were.

There is substantial evidence that women solicited drinks in the premises. Ms. Vencius testified that she talked to the employees about the problem of solicitation [RT 66] and that signs had been posted specifically prohibiting the solicitation of drinks [RT 57]. These statements indicate rather clearly that appellant was on actual notice that solicitation was occurring in the premises.

Appellant's main argument seems to be that she did not knowingly permit drink solicitation at the premises, since she didn't really understand what "B-girl problems" were and since neither she nor Ms. Vencius were regularly at the premises during operating hours. These circumstances, however, do not exonerate appellant from responsibility for violations occurring at the premises. A licensee has a duty to make sure that such violations do not occur. (See Ballesteros v. Alcoholic Beverage Control Appeals Board (1965) 234 Cal.App.2d 694 [44 Cal.Rptr. 633, 637] and cases cited therein.) A licensee who chooses, for whatever reason, to be absent from the premises during operating hours, must still

bear responsibility for the acts of his or her employees. (Mantzoros v. State Board of Equalization (1948) 87 Cal.App.2d 140 [196 P.2d 657, 660].) Imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is a well-settled principle in Alcoholic Beverage Control Act case law. (See 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]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

Appellant's claim that she did not understand what constituted a violation of the anti-solicitation provisions is similarly unavailing. Ignorance of the law is never an excuse.

Having concluded that there is substantial evidence to support the findings that appellant permitted women to solicit drinks on the premises, however, does not end our inquiry. To come within the mandatory revocation-of-license provisions of §24200.5, subdivision (b), the record must contain substantial evidence that the solicitation was "under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy." A "profit-sharing plan" is "a system or process under which employees receive a part of the profits of [a] . . . commercial enterprise."[3] Therefore, to violate this particular statute there must be some

[3]See Webster's Third New International Dictionary (1986), p. 1811.

arrangement between employees and their employer to split the money raised as a result of soliciting drinks. The Department has shown that there was a difference between the amount paid by the investigators for beers that the women solicited and those that the investigators bought by and for themselves. However, the Department has failed to prove that the women soliciting drinks were actually employees of appellant or that any kind of "profit-sharing plan" existed as required by the statute. Unlike the typical case involving violation of this statute, there was no evidence here of any kind of token or marker used to keep track of the number of drinks solicited and which formed the basis for computing the percentage or commission of the money from solicitation that the licensee paid to the women who solicited the drinks. (See, e.g., Almaguer (1993) AB-6166 (note pads were seized as evidence of a plan or scheme); Rodriguez (1992) AB-6167 (markers were used to show drinks solicited); Perez (1992) AB-6095 (orange tickets were used as markers to show drinks solicited).)

Therefore, we conclude that Findings of Fact Counts 1, 4, 7, 10, 13, and 16 are not supported by substantial evidence, and consequently, Determination of Issues 1 and 4, to the extent they rely on Findings 1, 4, 7, 10, 13, and 16, are not supported by the findings.

CONCLUSION

The decision of the Department is reversed as to Determination of Issues 1 and as to Determination of Issues 4 to the extent that it relies on Findings of Fact

Counts 1, 4, 7, 10, 13, and 16, affirmed as to the remaining Determinations of Issues, and remanded for reconsideration of the penalty.[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.