ISSUED JUNE 12, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ALFREDO A. and BLANCA RENDON dba Chavela's Bar 114 West Holt Boulevard Ontario, CA 91761, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6926 File: 48-273779 Reg: 97038957 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: April 1, 1998 Los Angeles, CA

Alfredo A. and Blanca Rendon, doing business as Chavela's Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their on-sale general public premises license revoked for their having employed and permitted females to solicit drinks, and also ordered their license suspended for 15 days, for having held and offered for sale adulterated alcoholic beverages, 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 §24200.5, subdivision (b); 25657, subdivisions (a)

[1]The decision of the Department, dated July 17, 1997, is set forth in the appendix.

and (b); Penal Code §§303 and 347, subdivision (b); Rule 143 (4 Cal.Code Regs. §143); and Health and Safety Code §§ 110560 and 110620.

Appearances on appeal include appellants Alfredo A. and Blanca Rendon, appearing through their counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on August 10, 1992. Thereafter, the Department instituted an accusation against appellants charging that females in their employ solicited drinks in violation of the above-cited statutes and rule, and that on two occasions appellants held and offered for sale adulterated alcoholic beverages.

The solicitation counts of the accusation centered on the activities of Rosa Rodriguez and Olga Guzman. Counts 1 and 6 charged appellants with having employed or permitted the two women to solicit Department investigators Jorge Lopez and Sean Ramos to buy them drinks, in violation of Business and Professions Code §24200.5, subdivision (b) (solicitation of drinks pursuant to a commission, percentage, profit-sharing or other scheme, plan or conspiracy). Counts 2 and 7 charged appellants with having employed the two women to procure or encourage the purchase or sale of alcoholic beverages, in violation of Business and Professions Code §25657, subdivision (a). Counts 3 and 8 charged that appellants permitted the two women to loiter in the premises for such purpose. Counts 4 and 9 charged a violation of Penal Code §303 (payment of commission or percentage for

encouraging purchase or sale of alcoholic beverages, and counts 5, 10, and 11 charged violations of Rule 143.

An administrative hearing was held on May 15, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigators Jorge Lopez and Sean Ramos concerning the solicitation of drinks by the two females on September 5, 1996, and the seizures by the investigators of the allegedly adulterated beverages on February 9, 1996, and September 5, 1996.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his decision, which determined that counts 1, 2, 4, 5, 6, 8, and 11, all relating to solicitation of drinks, had been established, and, as to these violations, he ordered appellants' license revoked. Counts 3, 7, 9, and 10 were found not to have been established. The ALJ found as to count 3 that, since Rodriguez was an employee, she could not have been loitering, and, since Guzman was not an employee, her conduct did not come within counts 7, 9, and 10, which required that she be an employee. The ALJ also sustained both of the counts relating to the holding or selling of adulterated beverages, the bottles containing evidence of adulteration having been placed in evidence at the hearing. As to these counts, a 15-day suspension was ordered.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the decision is not supported by the findings and the findings are not supported by substantial evidence; (2) appellants did everything possible to prevent the occurrence of the misconduct alleged; (3) the

penalty constitutes cruel and inhuman punishment; and (4) the use by the Department of its own administrative law judges denied appellants due process.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence to support the findings, and contends the findings do not support the decision.

Appellant argues there is a "total absence of any substantial evidence to support the allegation that Ramirez [sic - Rodriguez] or Guzman was employed or permitted to do anything improper or illegal." (App.Br. 11.) Appellants make much of the fact neither appellant was present on the night in question. However, the evidence is undisputed that the solicitation occurred, that Rodriguez was an employee, that she admitted receiving a share of the purchase price of the beer, and that Hernandez, the bartender, paid a $3 commission to Rodriguez after charging Ramos $5 for the glass of light beer requested by Rodriguez. And, as the Administrative Law Judge observed, misconduct by employees of a licensee is imputed to the licensee by long-standing case law.

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

Appellants suggest that their employees were engaged in a conspiracy pursuant to which the employees were stealing money from the business, and that the furtive nature of their behavior was to conceal the activity from any "authority figure" who might be in the premises. Appellants' suggestion misses the mark, since it does not acknowledge that appellants still received two dollars for an eight-ounce glass of beer even after the payment of the commission to Rodriguez. In the words of the ALJ:

> "The evidence showed a smoothly working system participated in by respondents' bartender and one waitress. Nothing suggests that it was an isolated occurrence. If respondents were not themselves participants in the scheme, they at least benefited from it and permitted it to occur due to their own failure to supervise adequately." (Determination of Issues V, fifth para.)

Appellants also contend that the Department failed to prove that any of the beverages allegedly solicited was an alcoholic beverage, because the Department performed no chemical analysis to establish that the drinks contained in excess of one-half of one percent alcohol by volume.

This same argument was made to the ALJ, who rejected it, stating that neither Business and Professions Code §24200.5 nor Rule 143 by their terms require that the drink solicited contain alcohol. While this is true as to §24200.5 and Rule 143 (see Harris v. Alcoholic Beverage Control Appeals Board (1964) 228 Cal.App.2d 620 [39 Cal. App.2d 697, 699], Business and Professions Code §25657, subdivisions (a) and (b), upon which counts 2 and 8 were based, require by their terms that the drinks solicited be alcoholic beverages, as does Penal Code 303, the basis of count 4. This does not mean these counts were not established, however, since the ALJ also pointed out that the investigators were asked to buy

beer, were told by one of the two females that she was drinking light beer, and found open Bud Light containers behind the bar. This evidence, which is uncontradicted, supports the presumption that the drinks which were solicited were alcoholic beverages. (See Molina v. Munro (1956) 145 Cal.App.2d 601 [302 P.2d 818].)

Appellant also challenges the evidence relating to the allegedly adulterated bottles of distilled spirits, arguing that there is nothing to show the contaminants were toxic or dangerous to health.

Several of the bottles were seen to have insects floating around. Another had a piece apparently broken off from the pouring spout. Others had unidentified contaminants visible as solid objects within the liquid.

The applicable Health and Safety Code provisions (§§110545, 110560, and 110620), focus on food products which are adulterated. Section 110560, which is the most specific of the three, defines as adulterated any food which "consists in whole or in part of any diseased, contaminated, filthy, putrid, or decomposed substance ... ."

It does not seem unreasonable to consider the presence of dead or decaying insects in a bottle of distilled spirits an adulterated state.

More importantly, Penal Code §347b shifts to the defendant the burden of proving that the alcoholic solution did not contain any deleterious or poisonous substance, and appellants offered no evidence purporting to show that the foreign substances in the seized bottles were harmless.

The violation was established, and a 15-day suspension is not of a magnitude as to appear excessive.

Appellant Blanca Rendon testified that she had discussed with her employees the rules with regard to the sale and service of alcoholic beverages. She testified these rules included a complete prohibition against the solicitation of drinks, alcoholic or not, and denied any scheme or plan for her employees to solicit drinks from patrons.

However, the ALJ was free to disregard her testimony in light of the testimony of the two investigators as to what had occurred. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Nor is there any merit in appellants' argument that they did all they reasonably could to prevent the violations. The very fact that they left the employees unsupervised is enough to refute such a claim.

II

Appellants argue that since the original stipulation and waiver suggested revocation based upon all fifteen counts of the proposed accusation, and the Department did not prevail on four of those counts, the order of revocation constitutes cruel and unusual punishment.

As the Board has said many times, a disciplinary order in an administrative proceeding is not punishment.

Even though some of the counts were not sustained, the Department still proved a violation involving solicitaion of drinks pursuant to a commission scheme, which, under Business and Professions Code §24200.5, calls for revocation.

III

Appellant challenges the constitutionality of Business and Professions Code §24210, which authorizes the Department to assign cases to administrative law judges appointed by the Director.

The Appeals Board is barred by article III, §3.5, of the California Constitution from declaring an act of the Legislature unconstitutional. We therefore decline to consider this contention.

CONCLUSION

The decision of the Department is affirmed.[2]

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

---

[2] This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.