ISSUED SEPTEMBER 24, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ALFONSO AND HERMILA HERNANDEZ dba Tijuana Bar 2529 North Durfee Avenue El Monte, CA 91732, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6952 File: 40-150825 Reg: 97038778 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: July 8, 1998 Los Angeles, CA

Alfonso and Hermila Hernandez, doing business as Tijuana Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for employing or permitting persons to solicit drinks on the 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 §§ 24200.5, subdivision (b), and 25657, subdivision (b); Penal Code § 303a; and Rule 143 (4 Cal.Code Regs. § 143).

[1] *The decision of the Department, dated September 25, 1997, is set forth in the appendix.*

Appearances on appeal include appellants Alfonso and Hermila Hernandez, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on January 23, 1984. Thereafter, the Department instituted an accusation against appellants charging the violations mentioned above.

An administrative hearing was held on April 24 and August 13, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Anthony Pacheco concerning his visit to the premises on August 8, 1996; by Annette Asamoto, a criminalist assigned to the Los Angeles County Sheriff's Crime Lab, concerning the chemical analysis of beer seized by Pacheco; by Ernest Tapia, manager of Tijuana Bar, concerning tally sheets of beer sold at the premises; and by appellant Alfonso Hernandez regarding the tally sheets and the operation of the premises.

Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred as charged and ordered that appellants' license be revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: 1) The investigator unfairly entrapped the individuals named in the accusation and 2) the investigator's testimony was inadmissible hearsay and cannot be used to support the findings.

DISCUSSION

I

Appellants contend investigator Pacheco entrapped the two women named in the accusation as soliciting beers from him. Appellants argue the women were entrapped because Pacheco sat next to one of the women in the almost empty bar and engaged her in conversation instead of letting the woman approach him.

The test for entrapment has been stated in the California Supreme Court case of People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459], as follows:

> "We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d at 689-690) (fn. omitted)

There is nothing in the record that suggests any pressure or overbearing conduct. Simply sitting near the woman or women instead of across the room is not an action "likely to induce a normally law-abiding person to commit the crime."

We find no entrapment has been shown.

J.J

Appellants contend that the investigator 's testimony, which constitutes the only evidence of solicitation, is inadmissible hearsay and not sufficient by itself to support the findings.

There was no objection to Pacheco 's testimony at the hearing and appellants presented no evidence contradicting his testimony. Pacheco 's testimony concerning the statements made by the women was clearly evidence that could be considered by the ALJ.

Pacheco 's testimony regarding the women 's statements was offered not for the truth of what was said, but merely to show that the words of solicitation were said.

> *"There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence."*

(People v. Henry (1948) 86 Cal.App.2d 785, 789 [195 P.2d 478,480], quoted in Greenblatt v. Monroe (1958) 161 Cal.App.2d 596, 601-602 [326 P.2d 929, 933]; see also Los Robles Motor Lodge v. Department of Alcoholic Beverage Control (1966) 246 Cal.App.2d 198 [54 Cal.Rptr. 547].) Pacheco 's testimony was not hearsay.

CONCLUSION

The decision of the Department is affirmed.[2]

RAY T. BLAIR, JR., CHAIRMAN
BEN DAVIDIAN, MEMBER

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[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, before this final decision becomes effective, may 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.

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD