ISSUED MARCH 31, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

RAFAEL LOPEZ dba El Atoron 11119-21 Burbank Boulevard North Hollywood, California 91601, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6956 File: 40-124204 Reg: 96038160 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: February 3, 1998 Los Angeles, CA

Rafael Lopez, doing business as El Atoron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his on-sale beer license for having employed or permitted one Maria Valdivio to engage in unlawful drink solicitation activity inside 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 §§24200.5; 25657, subdivisions (a) and (b); 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 appellant Rafael Lopez, appearing through his counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on June 15, 1982. Thereafter, the Department instituted an accusation against appellant charging that he employed Maria Valdivio for the purpose of soliciting drinks; that she solicited a drink from Carlos Cruz, a patron; that Valdivio was permitted to loiter in the premises for the purpose of soliciting drinks; that appellant sold or furnished beer to two police officers and allowed them to consume it in an unlicensed room located west of the premises; and that appellant materially altered the premises without prior written assent of the Department.

An administrative hearing was held on July 21, 1997, at which time oral and documentary evidence was received. Los Angeles police officer Lorenzo Barbosa, the only witness presented by the Department on the solicitation issues, testified about his observations made during the course of an investigation at the premises.[2]

Subsequent to the hearing, the Department issued its decision which sustained the charges related to the employment of Valdivio for the purpose of drink solicitation, and her solicitation of drinks.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant

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[2] Department investigator Stuart Thompson testified regarding the alleged alteration of the premises. This charge was ultimately dismissed by the Department.

raises the following issues: (1) there was insufficient evidence to support the decision that Maria Valdivio was employed by appellant; (2) the Department improperly relied on hearsay evidence; (3) there was relevant evidence which was excluded from the hearing and which was available to the Department;[3] and (4) the penalty is excessive. Since Issues 1 and 2 are interrelated, they will be addressed together.

DISCUSSION

Appellant contends that there is no substantial evidence that he employed Maria Valdivio or that there was a commission, percentage or profit-sharing scheme for the purpose of soliciting drinks. He cites the testimony [RT 21, 25] of Officer Lorenzo Barbosa, one of two undercover police officers who were in the premises, and the only one to testify, that Valdivio was not an employee, but just another patron, and argues that Barbosa's opinion is the only conclusion which can be drawn from the evidence.

When, as here, 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].)

"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.

[3] Although this was set forth as an issue, there is nothing in the remainder of the brief on the point, and it will not be considered.

456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

The critical issue was framed by the Administrative Law Judge (ALJ) as follows:

> "Was Maria Valdivio employed by [appellant]? To answer the question, it is necessary to focus on the following pieces of evidence: (1) bartender Maria Carillo was given a $5 bill at the time Cruz purchased Valdivio a beer; (2) at that time Cruz bought nothing more than the one drink; (3) Carillo returned no change to Cruz or Valdivio; (4) Valdivio told Officer Barbosa that she worked at the premises and that $5 is paid by the customer for her beer; (4) [sic] Cruz told Officer Barbosa that he paid $2.50 for the beer he was drinking and $5 for Valdivio's beer; and (5) Carillo stated to Officer Barbosa words to the effect it's not their fault they have bar-girls there, the [appellant] makes them do it and then does not pay for their tickets.
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> "Most of that evidence is hearsay. What is not hearsay is that Cruz was seen to pay $5 for the beer he bought Valdivio and the bartender returned no change. Despite the fact both police officers paid $2.50 each for their beer and Cruz said he paid $2.50 for his beer, a price differential alone is not enough to establish bar-girl activity or a profit-sharing plan or scheme. In this case, however, the hearsay from both Valdivio and Cruz supplements and explains Barbosa's observation of the $5 payment for Valdivio's single beer. Cruz said that her single beer cost him $5. Valdivio said beer for her cost the customer $5. Not only do both statements explain Carillo's conduct in not returning change to Cruz, but they seriously undercut [appellant's] contention that the $5 payment might have been a single payment for the two beers Cruz said he bought for Valdivio that evening."

To the ALJ, the inference of employment was inescapable:

> "If [Valdivio's] beer cost a different amount from beer bought for himself by a patron, and the on-duty bartender knew of such a distinction, and the solicitor knew of it as well, a relationship between [appellant] and Valdivio is the only explanation. Couple that with Valdivio's explanatory hearsay statement that she has worked there for three months and is paid $30 cash each day, the relationship and payment plan are established."

In addition, the ALJ relied on an admission by the bartender, Carillo, made in the nature of a complaint to Officer Barbosa, that appellant was the reason bar-girls were present.

Our concern with the result in this case is with its excessive reliance upon hearsay evidence. We do not suggest that the testimony of a single police officer is insufficient to make out a violation of Business and Professions Code §24200.5. Nor do we suggest that where some of the officer's testimony rests on hearsay, it will be deemed deficient. But where, as here, such testimony is so crucially dependent upon internally inconsistent hearsay evidence and the inferences to be drawn from it, and there is nothing in the way of physical evidence either of employment or of a profit-sharing solicitation scheme,[4] we are unable to say that there is substantial evidence, in light of the entire record, that the charge of the accusation has been proven. Moreover, our review of critical portions of the evidence reveals weaknesses and flaws which appear to have escaped the ALJ's scrutiny, and which undermine his reasoning and the inferences he drew in reaching his decision.

Government Code §11513, subdivision (c), provides, in relevant part, that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding." In this case, the ALJ determined that the hearsay statements of Valdivio and Cruz supplemented and explained the conduct of the two of them that was seen and heard by Officer Barbosa.

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[4] The ALJ was aware of the fact that Barbosa found no physical evidence of record keeping or of employment of Valdivio, although Barbosa had searched for such evidence. In addition, we are impressed by Officer Barbosa's testimony that, based upon his own observations of Valdivio's conduct, he did not form the opinion she was an employee of the bar.

Carillo's statement that appellant caused the bar-girls to be present was cited as additional support for the inference of employment the ALJ drew from the evidence.

The question is whether the inference of employment drawn by the ALJ was reasonable. We do not think it was.

Ordinarily, in solicitation cases, the evidence of employment consists at least of evidence of the solicitor clearing tables, working behind the bar, even keeping her purse behind the bar. Here, we have nothing but Valdivio's hearsay statement to Officer Barbosa, unaccompanied by any corroborating evidence.

The evidence of solicitation and employment all came from a single witness, and rests, in large part, on statements he attributed to others. Because of the degree of dependency upon hearsay evidence, closer scrutiny of that testimony is warranted.

We do not believe that Valdivio's statement to Officer Barbosa that she assumed her pay came from the drinks she solicited fills the evidentiary void regarding employment. That statement is only her speculation. Against this, Officer Barbosa admitted that, based upon what he had observed, he himself did not initially believe Valdivio was an employee. And, finally, Valdivio's hearsay statement to Officer Barbosa that she was employed, unaccompanied by any evidence that she performed any of the duties typically associated with employment, such as serving and/or collecting for drinks, clearing tables, and the like, and otherwise uncorroborated, is insufficient to support a finding that she was an employee.

Perhaps the most significant flaw in the ALJ's reasoning is his mistaken belief that Valdivio said beer for her cost the customer $5 (Finding VII and Determination of Issues I, third paragraph). We have carefully reviewed the entire transcript, and nowhere do we find support for this finding. This mistaken assessment of the evidence

is incorporated in the ALJ's determination that no possible inference could be drawn from the facts but that Valdivio was employed by appellant: "If her beer cost a different amount from a beer bought for himself by a patron, and the on-duty bartender knew of such a distinction, **and the solicitor knew of it as well** ..." (emphasis supplied).

Nor do we think it all that clear that Cruz said he paid $5 for only one beer. He is quoted by Officer Barbosa as saying "her beer was $5" [RT 18]. This statement is ambiguous, since it could be understood as referring to more than one beer.

In addition, there are internal conflicts in Barbosa's testimony, most of which appears to have been based upon his report rather than an independent recollection (see RT 13, 14), which undermine another critical element of the ALJ's analysis of the evidence. Officer Barbosa testified that, after Valdivio asked the patron, Cruz, to buy her a beer, Carillo, the bartender, served Valdivio a Bud Light, collected $5 from Cruz, and gave him no change [RT 13-15]. On the basis of what he had seen and observed, and based upon his suspicions and his experience, he concluded there was probable cause "to conduct a detention of those individuals" [RT 15]. Yet, elsewhere in his testimony, he quoted Valdivio as admitting to him that she had solicited two drinks [RT 17, 22], and that each of the two bartenders, Carillo and Medelin, served her a drink [RT 17]. Further, Officer Barbosa quoted Cruz as stating he had purchased two drinks for Valdivio [RT 18], and he admitted that he did not know whether Cruz was paying for one beer or two with the $5 [RT 23].

For all of these reasons, it is our considered opinion that the record, viewed in its entirety, lacks substantial evidence in support of the decision.

ORDER

The decision of the Department is reversed.[5]

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

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[5] 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 order as provided by §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 §23090 et seq.