ISSUED SEPTEMBER 25, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GUADALUPE NIETO dba La Frontera 15025 Alondra Blvd. La Mirada, California 90638, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6969 File: 42-287820 Reg: 97039906 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: July 8, 1998 Los Angeles, CA

Guadalupe Nieto, doing business as La Frontera (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license, but stayed revocation subject to a two-year probationary period, a 10-day suspension, and other conditions, for having employed and permitted Veronica Diaz to loiter on the premises for the purpose of soliciting drinks, being contrary to the universal and generic public welfare and morals provisions of the California

[1]The decision of the Department, dated October 23, 1977, is set forth in the appendix.

Constitution, article XX, §22, arising from violations of Business and Professions Code §25657, subdivision (b); Penal Code §303, subdivision (a); and Rule 143 (4 Cal.Code Regs. §143). All of the statutory and rule violations involved a single act of solicitation of a Department investigator by Diaz.

Appearances on appeal include appellant Guadalupe Nieto, appearing through her counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on September 21, 1993. Thereafter, the Department instituted an accusation against appellant charging that appellant employed others under a profit-sharing plan to solicit drinks, that she permitted them to loiter in the premises to do so, and that drinks were in fact solicited and accepted.

An administrative hearing was held on August 21, 1997, at which time oral and documentary evidence was received. At that hearing, Department investigator Anthony Pacheco described how he was approached by a female named Veronica Diaz who asked him to buy her a drink, and the action of the bartender in making a notation on a sheet of paper near the cash register after serving the bottle of Budweiser Light beer Diaz had ordered. Pacheco was told by the bartender that the sheet recorded the drinks solicited by Diaz and others at the premises. Pacheco was charged $2.25 for his 12-ounce bottle of Budweiser beer, and $2.75 for Diaz's 7-ounce bottle of Budweiser Light beer.

Subsequent to the hearing, the Department issued its decision which sustained the charges of the accusation with respect to Business and Professions Code §25657, subdivision (b), Penal Code §303, subdivision (a),[2] and Rule 143, but which found that there had been no violation of Business and Professions Code §24200.5, subdivision (b), and dismissed that count.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) there is no substantial evidence to support the decision; (2) appellant was denied due process because the Administrative Law Judge was appointed by the Director pursuant to Business and Professions Code §24210; and (3) the penalty constitutes cruel and unusual punishment.

DISCUSSION

I

Appellant contends there is no substantial evidence to support the decision, arguing that she did not know nor could she have known of B-girl activity, and that she had posted signs prohibiting drink solicitation. Appellant further contends that Diaz was not an employee, and was not permitted to loiter.

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[2] Both the accusation and the proposed decision cite this statutory provision as "§303(a)". The reference is to one of two different Penal Code provisions which are commonly confused, and erroneously cited, as they seem to have been here. Section 303 prohibits employment for the purpose of soliciting drinks. Section 303a (incorrectly cited by the Department and the ALJ as §303(a)) prohibits loitering for the purpose of soliciting drinks. The findings, that respondent, through her barmaid, employed and permitted Diaz to loiter for the purpose of soliciting drinks, fit the proof requirements of §303, which requires employment, but not §303a, which is directed at the person who loiters, in this case, Diaz. In view of the fact that the penalty was presumably based on the course of conduct rather than the number of ways violations could be charged based upon a single act of solicitation, any error in this respect may be disregarded.

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

The testimony of investigator Pacheco, if believed, is amply sufficient to support the decision. His testimony clearly establishes solicitation, the bartender's role in it, and the bartender's employment of Diaz in the scheme. Whether appellant herself knew or suspected such conduct is, in the context of this case, irrelevant. Appellant's bartender knew what was occurring. That is enough.

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].)

Appellant did not present any witnesses in her behalf, and has not contested the findings that Diaz solicited beer from Pacheco, or the findings regarding the actions of the bartender. The mere presence of signs cautioning against drink solicitation are meaningless if not enforced, and here that appears to be the case. The bartender's action in charging more for a smaller container, and noting the sale on a list described by her as a record of drinks, is strong evidence of a solicitation scheme.

II

Appellant challenges the constitutionality of Business and Professions Code §24210, which authorizes the Department to delegate, to administrative law judges appointed by the Director of the Department, the power to conduct hearings and issue decisions.

The Appeals Board lacks the power to declare an Act of the Legislature unconstitutional. (Cal.Const., article 3, §3.5.) For that reason, we decline to consider this issue.

III

Appellant attacks the penalty - a stayed revocation and a 10-day suspension - as cruel and unusual punishment.

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].)

It is somewhat difficult to fairly address appellant's contention with respect to the penalty, since she has not indicated whether it is the stayed revocation, the 10-day suspension, or the combination of both which she deems so offensive to due process.

While revocation for a single act of solicitation might seem severe, there is evidence suggesting the licensee's possibly direct involvement: a list of the names

of several women who, according to the bartender, solicited drinks, located next to the cash register with other records of the business; appellant's contemporaneous presence at a table with five other women; a price differential on the drinks solicited - such that a penalty of stayed revocation conditioned upon compliance with terms of probation could not clearly be said to be an abuse of discretion.

The 10-day suspension is less onerous than the 15-day suspension the Department initially sought, described by Department counsel as its standard penalty for this kind of activity.

Given the range of penalties the Appeals Board has seen, and sustained, for similar violations, it cannot be said that the 10-day suspension is unreasonable.

CONCLUSION

The decision of the Department is affirmed.[3]

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

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[3]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.