ISSUED JUNE 23, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MARCELINO HERNANDEZ dba La Estrella 166 West Kern Street McFarland, California 93250, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7034 File: 42-226963 Reg: 97040557 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: May 6, 1999 Los Angeles, CA

Marcelino Hernandez, doing business as La Estrella (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her on-sale beer and wine public premises license, but stayed revocation, the stay conditioned upon an actual suspension of 45 days and a three-year probationary period, for having employed Dulce Cecilia Vasquez on the premises for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, and for Vasquez having solicited and accepted a drink, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22,

[1]The decision of the Department, dated January 15, 1998, is set forth in the appendix.

arising from a violation of Business and Professions Code §24200, subdivision (a), in conjunction with Business and Professions Code §25657, subdivision (a), and Rule 143,

Appearances on appeal include appellant Marcelino Hernandez, appearing through her counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on January 3, 1989. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor, the permitting a minor to remain in the premises, and the employment of a person for the purpose of soliciting or encouraging the purchase of alcoholic beverages.

An administrative hearing was held on November 13, 1997. Following the conclusion of the hearing, the Department entered a decision finding that appellant employed Dulce Cecilia Vasquez for the purpose of procuring or encouraging the purchase of alcoholic beverages, in violation of Business and Professions Code §25657, subdivision (a) (Count 3), and that Vasquez violated Department Rule 143 [4 Cal.Code Regs. §143], by soliciting (Count 5) and accepting (Count 6) a drink intended for her consumption.[2]

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[2] Because the Department did not present any evidence with respect to the counts of the accusation charging a sale to a minor and permitting that minor to remain in the premises, Counts 1 and 2 were dismissed. Count 4, charging that appellant permitted Vasquez to loiter on the premises for the purpose of begging or soliciting the purchase of alcoholic beverages, was also dismissed, based upon the

Appellant has filed a timely notice of appeal, and now raises the following issues: (1) Vasquez was not employed for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages; (2) Vasquez did not solicit the investigator to purchase a drink for her consumption; and (3) Vasquez's acceptance of the drink purchased for her by the investigator does not violate Rule 143. The first two issues will be considered together.

DISCUSSION

Appellant contends that the evidence does not support the finding that Vasquez was employed for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages.

Department investigator Robert Rodriguez and Vasquez each testified that Rodriguez invited Vasquez to join him at his table, after seeing her clearing tables and performing other waitress duties. Each also testified that he asked her if her employer permitted the waitresses to accept invitations from male customers to sit with them. Each also agreed that Vasquez ordered two beers, for which Rodriguez was charged $2 each.[3] They did not agree, however, on whether a drink had been solicited.

Rodriguez testified that Vasquez asked him to buy her a beer. Vasquez denied doing so, asserting that Rodriguez asked her if she would like to have a drink. The ALJ, acknowledging that their testimony was in conflict, chose to give greater weight to

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finding of the Administrative Law Judge (ALJ) that Vasquez was employed as a waitress.

[3] Vasquez claimed she purchased beer in bottles, Rodriguez that it was in cans. Exhibit 3, according to Rodriguez, was the can from which Vasquez drank. Vasquez denied drinking from a can.

Rodriguez's testimony.

The credibility of a witness's testimony is ordinarily 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].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them 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] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Although it could be argued from the cold record that Vasquez's testimony was as believable as that of the Department investigator, the ALJ was able to observe each of the witnesses as they testified, and his assessment of credibility is entitled to considerable weight.

Thus, we are of the view that the findings and determinations that Vasquez solicited and accepted a drink (Counts 5 and 6) must be sustained.

Appellant's suggestion that Rule 143 denies equal protection to waitresses because it permits the occasional acceptance of a drink only by a licensee or bartender

is unpersuasive. Rule 143 simply differentiates on the basis of employment function; it does not discriminate on the basis of gender or other unacceptable criteria.

However, we believe that the Department's finding and determination that appellant violated Business and Professions Code §25657, subdivision (a), must be reversed. That section requires that a licensee "employ ... any person **for the purpose of** procuring or encouraging the purchase or sale of alcoholic beverages" (emphasis supplied). There is no evidence that Vasquez was employed for any other purpose than as a waitress. Nor is there any basis for an inference to that effect to be drawn. Such evidence as there is points to the contrary.

Rodriguez admitted there was nothing unusual in the price charged for the beers, that Vasquez got no money from the bartender, and that he found no evidence of any notebooks or writings which reflected a commission scheme.

Indeed, Rodriguez admitted that the only thing that drew his attention to Vasquez was that she was "the only one closest to me that was cleaning tables" [RT 27], and that, in his opinion, had he not made contact with her, there would have been no violation [RT 45].

Appellant's counsel argued to the ALJ that the investigator's conduct constituted entrapment. Despite what may be thought of the fact that Rodriguez initiated the contact that led to the act of solicitation, his action would not be considered entrapment.

Official conduct that does no more than offer an opportunity to act unlawfully is permissible. The test for entrapment was set forth in People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459]:

> "... 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)"

It cannot be said that the investigator's invitation to Vasquez to join him at his table constituted "badgering, cajoling, importuning" or the like so as to be entrapment.

The Department ordered appellant's license revoked, but stayed revocation for a probationary period of three years, conditioned upon no cause for disciplinary action during the period of the stay, and an actual suspension of 45 days. Although appellant did not directly challenge the penalty, our partial reversal necessitates consideration of the penalty.

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].)

We believe that the penalty in this case is clearly excessive, such as to constitute an abuse of discretion. Of a six- count complaint, the Department sustained, based upon our assessment, only two counts, and those relatively benign.

The Department initially asked for outright revocation, arguing appellant's past disciplinary record justified revocation. The ALJ agreed, citing that disciplinary record as an "aggravating factor."

We question just how much emphasis should be placed on the past disciplinary record in the somewhat unique circumstances of this case. While it may be true that Vasquez solicited a drink (as the ALJ found), it is also true that Rodriguez first solicited Vasquez's company. Had he not done so, as he admitted, the violation probably would not have occurred. Indeed, in the absence of any hard evidence of any other solicitation conduct, it could well be argued that appellant had learned her lesson from the prior discipline.

Under such circumstances, and even with prior B-girl violations (three years earlier), a penalty that, for three years, subjects appellant's license to the risk of revocation for a single violation as minimal as the one in this case, seems grossly inappropriate. This is particularly the case where, as here, the record contains little information regarding the terms of the prior disciplinary orders. For example, there is no way for the Board to ascertain the period of the stay of either of the earlier revocation orders.

This void in the record resulted from a colloquy concerning whether the Department was alleging a violation of certain conditions imposed following the earlier proceedings. The ALJ suggested that the parties stipulate to the fact that the disciplinary record set forth in the accusation was accurate. The parties did so, following which the ALJ found it unnecessary for Exhibit 2 to be admitted into evidence. Exhibit 2 apparently was the documentation for the disciplinary history alleged in the accusation.

Unfortunately, without Exhibit 2, there is no way to verify Department counsel's statements about the duration and terms of the stayed revocation ordered in the earlier

proceeding. As the Department decision itself observes, the violations which were found resulted from a single act, and, as pointed out, there is insufficient evidence in the record to justify treating the prior disciplinary history as an aggravating factor. Given the marginal case made by the Department, it would seem that a penalty of revocation, even stayed revocation, is excessive.

ORDER

The decision of the Department is affirmed as to the violations of Rule 143, but reversed as to the violation of Business and Professions Code §25657, subdivision (a). The penalty is reversed, and the case remanded to the Department for reconsideration of the penalty in light of the comments contained herein.[4]

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

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[4] 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.