

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

CARMEN OCHOA	)	AB-7100
dba Solo Del Noche Vienes)	
9752 Glen Oaks Boulevard	)	File: 40-310420
Sun Valley, California 91352,	)	Reg: 97039366
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	May 6, 1999
	)	Los Angeles, CA
)	

Carmen Ochoa, doing business as Solo Del Noche Vienes (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked her on-sale beer license for permitting persons to loiter on the premises for the purpose of soliciting the purchase of alcoholic beverages, and for having served alcoholic beverages to two obviously intoxicated patrons, this being found contrary to the universal and generic public welfare and morals provisions of the California

¹The decision of the Department, dated March 26, 1998, is set forth in the appendix.

Constitution, article XX, §22, arising from violations of Business and Professions Code §§25602, subdivision (a),² and 25657, subdivision (b).³

Appearances on appeal include appellant Carmen Ochoa, appearing through her counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on August 17, 1995.

Thereafter, the Department instituted an accusation against appellant charging that on November 15, 1996, appellant's bartender, Anna Elias, sold, furnished, or caused to be sold or furnished alcoholic beverages to two patrons who were obviously intoxicated (counts 1 and 2), and that, on that same date, appellant employed or knowingly permitted a total of five females to loiter in the premises for the purpose of begging or soliciting patrons to purchase alcoholic beverages for them (counts 3-7).

An administrative hearing was held on October 23, 1997, and February 17 - 18, 1998, at which time oral and documentary evidence was received. At that

² Section 25602, subdivision (a), provides: "Every person who sells, furnishes, gives, or causes to be sold, furnished or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."

³ Section 256557, subdivision (b), provides: "It is unlawful ... (b) In any place of business where alcoholic beverages are to be sold or consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting."

hearing, the Department presented the testimony of three Los Angeles police officers, each of whom had acted in an undercover capacity on the night in question.

Officer Lorenzo Barbosa testified that he observed two females, later identified as Ana Maria Rosas and Alicia Cisnero Vargas, solicit drinks, one beer each, from a patron later identified as Ignacio Medina. Medina paid for the two beers with \$50, and was given \$30 in change. The bartender then gave each of the women \$7. Medina later confirmed to Barbosa that the two women had asked him to buy them drinks, and that he had been charged \$10 for each of the beers. Barbosa was charged \$3 for a beer he purchased for himself.

Officer Barbosa also observed two males enter the bar, each displaying what he understood to be symptoms of intoxication - a staggered gait, slurred speech, lack of coordination, red eyes, swaying, emitting an odor of alcohol. Both approached the bar, requested beers, and were served by the bartender. While this occurred, according to Barbosa, Ochoa was engaged in conversation with another female, in the area in front of the center of the bar.

Officer Michael Valdez testified that, shortly after his own purchase of a beer, for which he paid \$3 or \$3.50, he was approached by a female later identified as Ruby Delgado, who asked if she could join him. After some "small talk," Delgado asked him to buy her a beer. He agreed to do so, and was charged \$9 for a Corona beer which was served to Delgado. Delgado requested a second beer, for which Valdez was again charged \$9.

Officer Fortunato Mariscal testified that he purchased a Budweiser beer, for which he was charged \$3.50. A few minutes later, two females, Teresa Angela Medina and Alejandra Romero Rubio, approached and asked if they could sit at his table. Shortly after they sat down, first Medina, then Rubio, asked him to buy them drinks. He agreed, and when the bartender, Anna Elias, returned with two beers, he was charged \$18.

Alicia Vargas, one of the females charged with soliciting Ignacio Medina, denied having done so. She claimed to be acquainted with Ignacio Medina, and claimed he gave her \$8 to play the juke box. Contrary to Barbosa's testimony, she claimed that Medina was seated at the bar with another man when she first approached him.

Carmen Ochoa, the licensee, and Alfonso Ochoa, her husband, both denied that there had been any solicitation or service to intoxicated patrons. Both testified that the licensee had warned the employees against such practices, after an earlier charge of solicitation.

Ana Rosas also testified, and also denied having solicited Medina to buy her a drink. She said her friend, Vargas, introduced her to Medina, and she denied knowing the owner of the bar.

Following the hearing, the Administrative Law Judge (ALJ) filed his proposed decision, which the Department adopted without change, sustaining the charges of the accusation and ordering appellant's license revoked.

Appellant has filed a timely notice of appeal, and now raises the following issues: (1) the Department failed to establish that appellant employed or knowingly permitted anyone to loiter on the premises for the purpose of soliciting alcoholic beverages; (2) no

“obvious” intoxication was proved; and (3) the penalty constitutes an abuse of discretion.

I

Appellant contends the Department failed to prove that the females who engaged in the solicitation of the purchase of alcoholic beverages were either employed by appellant or knowingly permitted to loiter, one or the other of which is essential to a violation of Business and Professions Code §25657, subdivision (b).

The Administrative Law Judge (ALJ) stated his finding in the alternative - that appellant employed Rosas, Vargas, Medina, Delgado, and Rubio, or knowingly permitted them to loiter in the premises, for the purpose of soliciting the purchase of alcoholic beverages.

Appellant argues that there was no evidence that any of the females was paid a salary or commission. While that may be true, it does not require reversal. The dramatic difference in the price charged for the drinks which were solicited and those the officers ordered for themselves is, in and of itself, sufficient to support an inference of knowing permission to loiter for the purpose of solicitation. The charging of the higher price for the solicited drinks implicates the licensee, through her bartender, and refutes the notion, as appellant seems to suggest, that the women who were soliciting the purchase of alcoholic beverages were free-lancers acting without the knowledge of appellant. Moreover, the fact that at least two of the women, those who solicited police officer Mariscal, were observed performing

normal waitress duties, such as cleaning tables and wiping counters, is more consistent with employment than presence as a mere patron.

The ALJ also found that, while the acts of solicitation occurred, appellant was present in her office or in the bar area observing the bar operation. His rejection of her claim of ignorance, given the facts of record, seems justified. With as many as five different females soliciting drinks, and as much as three times the normal price being charged for those drinks, it is inconceivable that this would happen without appellant's knowledge and permission.

In any event, appellant is responsible for the conduct of her bartender, who, according to the evidence, was an essential participant in the scheme.

The ALJ clearly chose to accept the testimony of the police officers, and to reject the testimony of appellant and the witnesses presented on appellant's behalf. In the words of the ALJ [Supp. Finding A]:

"The Respondent's blanket denial of the violations ... has no basis in fact. Respondent testified as to the great care she takes in instructing employees in not soliciting drinks from patrons. Such evidence is to be taken with a 'grain of salt.' The testimony of the bar-girls is undeserving of any credit and a good deal of such testimony was inconsistent and contradictory."

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].)

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].)

It is clear from the transcripts of the three days of hearing that appellant's arguments lack merit. The testimony of the three police officers was consistent, and their testimony about the various acts of solicitation leave no doubt that, as the ALJ observed, a scheme involving some kind of profit-sharing plan was on-going. As the ALJ also observed, and as the Board is inclined to agree, the defense testimony was noteworthy for the inconsistencies and contradictions between and among the defense witnesses.

The only apparent inconsistency in the testimony presented on behalf of the Department was the difference between the price the patron was charged for the b-girls' drinks - \$10 each - and the price the officers were charged for the drinks solicited from them - \$9 each.⁴ This discrepancy does not appear particularly significant, and may only represent the bar's practice of charging all it thinks the traffic will bear.

II

⁴ In sharp contrast, the officers were charged only \$3.00 or \$3.50 for the drinks they purchased for their own consumption.

Appellant contends that the two individuals said by officer Barbosa to have been obviously intoxicated displayed minimal symptoms of intoxication when compared to the symptoms discussed by appellate courts. She asserts that only Barbosa believed the two patrons were obviously intoxicated, while the other two police officers, appellant, her husband, the security guard and the bartender failed to observe anyone who displayed such symptoms.

The symptoms described by Barbosa were more than minimal - a staggered gait, slurred speech, lack of coordination, red eyes, swaying, emitting an odor of alcohol, lack of coordination - and were sufficient to satisfy the ALJ that Barbosa's conclusions were justified.

The two police officers who acknowledged they did not see anyone displaying symptoms of obvious intoxication were focused on bar-girl activity, and the fact they did not observe what Barbosa observed does not undercut his testimony.

Appellant, her husband, the security guard, and the bartender, were interested witnesses. The ALJ, as the judge of credibility, chose to accept Barbosa's testimony over theirs.

The Board must accept a Department finding of obvious intoxication when the police officer has testified to the symptoms so frequently mentioned in appellate opinions, and the officer's testimony, not untrue or unreasonable on its face, is given credence by the ALJ, as it was here.

Appellant challenges the penalty of revocation as an abuse of discretion, arguing that the violations were not aggravated in any way, and involved only three women and a matter of minutes. Further, appellant notes that the Department did not charge a violation of Business and Professions Code §24200.5, which mandates revocation for its violation.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.⁵

⁵ California Constitution, art. XX, § 22; Bus. and Prof. Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

The record shows, contrary to appellant's contention, that there were five, not three, women involved in the acts of solicitation. The record also shows that this was appellant's second offense involving solicitation.

It is well settled that 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].), but 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].)

The violation was appellant's fourth since the license was issued in 1995, and the second bar-girl violation. It can not be said that the Department's decision to order revocation was an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁶

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

⁶ 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.