ISSUED JUNE 23, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BLANCA HEREDIA CERVANTES and JOSE LUIS SANTANA CERVANTES dba El Gallo de Oro 26726 Baseline Highland, CA 92346, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7148 File: 42-314648 Reg: 97040563 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: May 6, 1999 Los Angeles, CA

Blanca Heredia Cervantes and Jose Luis Santana Cervantes, doing business as El Gallo de Oro (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for conduct 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 §25602, subdivision (a), and §23804, and Penal Code §647, subdivision (f).

Appearances on appeal include appellants Blanca Heredia Cervantes and Jose

[1]The decision of the Department, dated May 14, 1998, is set forth in the appendix.

Luis Santana Cervantes, appearing through their counsel, Frank Weiser, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on February 1, 1996. Thereafter, the Department instituted an accusation against appellants charging them with the following: (a) having permitted co-licensee Jose Luis Cervantes to remain in the premises while in an intoxicated condition and unable to care for his own safety or the safety of others, in violation of Penal Code §647, subdivision (f); (b) appellants' bartender, Yolanda Torres, sold or furnished an alcoholic beverage, beer, to Melvin Carter, a person obviously intoxicated, in violation of Business and Professions Code §25602, subdivision (a); (c) having permitted Melvin Carter, a patron, to remain in the premises while in an intoxicated condition and unable to care for his own safety or the safety of others, in violation of Penal Code §647, subdivision (f); and (4) having violated conditions on their license prohibiting dancing, regulating entertainment noise levels, requiring door closure, and limiting hours of sales, in violation of Business and Professions Code §23804.

An administrative hearing was held on March 27, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which found that the charges of the accusation had been established, and ordered appellants' license revoked.

Appellants thereafter filed a timely notice of appeal, but have not filed a brief. In their notice of appeal, appellants raise only the following issues: (1) the hearing officer erred in allowing testimony regarding dancing, because the dancing was instigated by the investigating officer himself, constituting entrapment; (2) the hearing officer erred in refusing to permit appellants tp present rebuttal witnesses; (3) there was not sufficient evidence in support of the charge that Jose Cervantes was intoxicated in violation of Penal Code §647, subdivision (f); and (4) the hearing officer refused to permit evidence that the counts (1 and 2) relating to Cervantes' and Carter's intoxication were never prosecuted criminally.

Ordinarily, the mere filing of a notice of appeal does not sufficiently apprise the Board of issues it is asked to consider. In such circumstances, the Board has limited its review to consideration of whether appellant was afforded procedural due process in the hearing before the Department. Here, however, appellants are appearing in propria persona, and their notice of appeal is more specific than we are accustomed to seeing. Additionally, appellants retained counsel to present oral argument on their behalf. Under these circumstances, we think it appropriate to consider the issues appellants have presented.

DISCUSSION

I

Appellants contend that evidence should not have been permitted regarding dancing, arguing that since it was an investigating officer who danced, his conduct must be considered entrapment. Appellants also contend they were not permitted to present

testimony concerning the entrapment issue.

Department investigator Michael Sena testified that, after having been in the premises 20 minutes, he observed two patrons who were dancing [RT 45]. He then saw others dance, and he himself danced with a patron.

Appellant Jose Cervantes testified [RT 81] that no one was dancing until the investigators came in. According to Cervantes, the investigator asked Cervantes' sister (Yolanda Torres) if dancing was allowed, and was told it was not. The investigator, according to Cervantes, said there was no problem and asked a female patron to dance with him. They were the only dancers, Cervantes claimed.

Torres, who is also appellants' bartender, contradicted Cervantes in part, saying that the investigator asked her if a female patron could dance, to which she replied "ask her" [RT 115]. She, too, however, claimed that the investigators (with their dance partners) were the only people who danced. Her testimony, and that of her brother, were found by the ALJ to be not worthy of belief.

The test for an entrapment defense is whether the conduct of the public agent was such that a normally law-abiding person would be induced to commit the prohibited act. Official conduct that does no more than offer an opportunity to act unlawfully is permissible. (People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459].) The court explained:

> "... 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 is difficult to find anything badgering, cajoling or importuning in simply dancing or asking if dancing was permitted, which is all the evidence shows. Appellants took no steps to halt or prevent the dancing - if anything, Torres encouraged it - despite the fact that their license required them not to permit patron dancing.

It may be noted that the Administrative Law Judge (ALJ) made a specific finding (Finding VII) that it was not established that any of the undercover officers danced that night. This is clearly incorrect, since Sena specifically admitted that he had danced [RT 46]. However, there had already been other patrons dancing, according to Sena, and nothing had been done to discourage them from dancing. Thus, it cannot be said that appellants were entrapped.

Appellants claim they were prevented from presenting testimony by other witnesses with respect to dancing. While it is true that the ALJ sustained a Department objection to testimony from witnesses whose identity had not been made known to the Department prior to the hearing,[2] there is nothing in the record that would indicate whether the excluded witnesses[3] would have offered any testimony on the subject of dancing. Jorge Martinez and Janet Navarro were described as percipient witnesses,

---

[2] The accusation included a request by the Department for the discovery provided for by Government Code §11507.6, which includes witness statements and the names of persons claimed to have knowledge of the acts, events or omissions giving rise to the proceeding.

[3] Martin Torres and Yolanda Torres were permitted to testify even though their names had not previously been disclosed to Department counsel.

but there was no offer of proof of what their prospective testimony would have been. Given the prior failure to disclose their names to the Department, and the absence of an offer of proof of what they would have said, we cannot say the ALJ abused his discretion in excluding their testimony.

It has been suggested that there was something improper in the fact that investigator Sena also danced. However, Sena's testimony is that he saw others dancing, and there is only Cervantes' testimony, which the ALJ did not believe, that the investigator was the first person to dance. It does not seem to us that there is anything improper in an investigator's action testing whether a licensee will enforce a condition on his license by engaging in an activity the licensee is not to allow. This seems no different than an investigator testing whether a licensee will sell alcoholic beverages in an unlicensed patio by sitting in the patio and ordering a drink. In each case, the investigator can, and should be told, it is not permitted. On the evidence in this case, that was not done. Had the investigators been told dancing was not permitted, but danced anyway, this would be an entirely different case.

II

Although appellants' notice of appeal set forth as a separate point the claimed denial of the right to call rebuttal witnesses, they have not identified any prospective witnesses who were excluded other than Janet Navarro and Jorge Martinez. For the reasons stated earlier, there was no reversible error in the exclusion of their testimony. Without any information as to what their testimony would have been, or what other witnesses might have been called, it would be entirely speculative whether any such testimony would have been relevant or material, or might have altered the result.

III

Appellants claim the evidence was insufficient to show that Cervantes violated Penal Code §647, subdivision (f). Section 647, subdivision (f), punishes as a misdemeanor one who is found in a public place under the influence of, among other things, intoxicating liquor, in such condition as to be unable to care for his own safety or that of others.

The ALJ concluded that Cervantes' inability or unwillingness to follow the direction of Deputy Gomez, along with the symptoms of intoxication described by Gomez, were sufficient to establish Cervantes' inability to care for his own safety or that of others. Although not menacing, Cervantes' conduct in defying Deputy Gomez's instructions and warning to stay in the bar, and, instead, approaching the officer in an angry manner, yelling, coupled with his level of intoxication, could fairly be said to have crossed that line.

IV

Appellants complain that the ALJ refused to permit evidence to the effect that the two counts involving intoxication were never criminally prosecuted.

The ALJ was entirely correct in excluding such evidence.

Cornell v. Reilly (1954) 127 Cal.App.2d 178, held that an acquittal in a criminal proceeding is not dispositive of the outcome in an administrative proceeding. It would make no sense to say the failure to charge criminally is a defense when an acquittal of a criminal charge is not.

The supposed evidence or testimony that there were no criminal charges would have been irrelevant.

Although appellants did not directly challenge the penalty as excessive, it is clear they feel they should not lose their license. The Department can point to the fact that

appellants were on probation and a stay of revocation for, among other things, a condition violation. The proposed decision explained in some detail the thinking behind the order of revocation, and shows that the decision that appellants' license should be revoked was not made lightly. Given the attention paid to the matter, and the fact that there were multiple violations, it does not appear that there is any basis upon which it could be said that the Department abused its discretion.

ORDER

The decision of the Department is affirmed.[4]

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

---

[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.