ISSUED NOVEMBER 30, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JUAN S. ARTEAGA and CARMEN MARQUEZ dba Zacatecas Bar 1912 East Anaheim St. Long Beach, CA 90813, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7284 File: 48-291846 Reg: 98043332 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: October 5, 2000 Los Angeles, CA

Juan S. Arteaga and Carmen Marquez, doing business as Zacatecas Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellants' on-sale general public premises license for permitting a person under the age of 21 years to enter, remain, and consume an alcoholic beverage which had been sold to her; permitted the sale of an alcoholic beverage to a person exhibiting obvious signs of intoxication; permitted the loitering for the purpose of solicitation of patrons to purchase drinks for a commission; and permitted alcoholic beverages within the premises which

[1]The decision of the Department, dated November 19, 1998, is set forth in the appendix.

contained contaminants; being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from violations of Business and Professions Code §§24200.5, subdivision (b); 25602, subdivision (a); 25658, subdivisions (a) and (c); 25657, subdivision (a); and 25665; Health and Safety Code §§110545, 110560, and 11620; and Penal Code §303a.

Appearances on appeal include appellants Juan S. Arteaga and Carmen Marquez, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on May 23, 1994. Thereafter, the Department instituted an accusation against appellants charging violations set forth above. An administrative hearing was held on September 29, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the license should be revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the findings and decision are not supported by substantial evidence, and (2) the penalty is excessive.

DISCUSSION

The Department of Alcoholic Beverage control is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an

alcoholic beverage license, if the Department shall reasonably determine for "good cause" that 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, or proceeded in excess of its jurisdiction (or without jurisdiction).[2]

The term "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].) When, as in the instant matter, 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

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

the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

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].)

I

In raising the issue that the findings and the decision are not supported by substantial evidence, appellants argue that the bartender was not shown to have knowingly served the obviously intoxicated patron named Mario Romero (not to be confused with a female patron with the same last name); and female patron Maria Romero was not an employee of appellants and appellants did not grant permission to her to solicit the beverages.[3]

A. Service to the obviously intoxicated patron

Business and Professions Code §25602, subdivision (a) states:

> "Every person who sells, furnishes, gives ... any alcoholic beverage to ... any obviously intoxicated person is guilty of a misdemeanor."

The record shows that patron Mario Romero had such symptoms of intoxication as come within the law [RT 69-71]. The term "obviously" denotes circumstances "easily discovered, plain, and evident" which places upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (People v. Johnson (1947) 81 Cal.App.2d Supp. 973 [185 P.2d

[3]The alleged violations of bartender Haro as to Business and Professions Code §25657, subdivision (a); Penal Code §303; and Rule 143, will be considered under this issue.

105].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (Jones v. Toyota Motor Co. (1988) 198 Cal.App. 3d 364, 370 [243 Cal.Rptr. 611].) Apparently, appellants concede that patron Romero was sufficiently intoxicated to come within the prohibitions of the law.

However, appellants contend that there is no evidence that bartender Haro either saw or should have seen the symptoms of intoxication of patron Romero. The record shows that patron Romero when first seen by the Department investigator, was sitting at the bar in a slumped position. The patron thereafter left his seat at the bar counter and went to the restroom, walking in a swaying manner. Upon his return, the patron made a "couple" of attempts to regain his seat. The patron's eyes were red and watery, and speech slurred [RT 69-71].

The question raised on appeal is whether the bartender Haro saw or should have seen the symptoms seen by the investigator. The law demands that a licensee use substantial efforts in maintaining a lawfully-conducted business. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].) Also, the time necessary to observe misconduct and act upon that observation requires some reasonable passage of time. However, the observer must not be passive or inactive in regards to his or her duty, but must exercise reasonable diligence in so controlling prohibited conduct. (Ballesteros v. Alcoholic Beverage Control Appeals Board (1965) 234 Cal.App.2d 694 [44 Cal.Rptr. 633].)

The Ballesteros case concerned members of a motorcycle club who entered a bar and sat at a table. The bartender knew some of those persons to be members of the club, and had checked the ages of some of the members of the club on prior occasions. However, on this occasion, a minor, who should have been excluded because he was a minor, entered with the club members and remained in the premises unknown to the bartender for about ten minutes before a police officer entered and discovered the unlawful presence of the minor. The court determined that the bartender, while very busy, "...was inactive or passive with respect to his affirmative duty to ascertain the age" of the minor.

The Appeals Board has previously grappled with this problem of a reasonable passage of time in order to correct or act upon known facts: Alfonso's of La Jolla, Inc. (1981) AB-4785 (a waitress had from five to ten minutes to observe the youthful appearance of a minor); Belfield, Inc. (1981) AB-4912 (a bartender had approximately three to five minutes to observe two patrons walk to the bar with a staggered gait); and Barry (1982) AB-4983 (an intoxicated employee was observed for five to ten minutes staggering, stumbling, exhibiting loss of balance and poor coordination, and talking in a thick and slurred manner).

The record shows that there were two bartenders on duty, and that bartender Haro had conversations with patron Romero at some point in time, and served patron Romero a beer when he returned from the restroom [RT 72].

Appellants contend that the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], applies, on the concept that a licensee cannot be held to

a strict liability standard, as there is no evidence that bartender Haro observed patron Romero.

Apparently, appellants did not read the record carefully. The record shows two bartenders behind the bar, with bartender Haro talking to Romero and serving him a beer. The question is always whether the bartender should have seen that which was in plain sight, and the answer from the law is "yes." When the beer was served to Romero, the bartender could have seen his bloodshot and watery eyes, a sufficient signal to question the serving.

Also, the movement of patron Romero within the premises, and especially from the bar counter to the restroom and return, should be somewhat observed by a diligent bartender. Intoxication is an ever present problem to which bartenders should be cognizant. The record shows that there were only 12 to 15 customers within the premises, how many at the bar is unknown [RT 8]. With two bartenders on duty, no one could claim to have been too busy to observed what is the bartenders' duty to observe.

Taking the evidence as a whole, bartender Haro should have seen sufficient symptoms to at least cause her to inquire if the patron ordering the beer was intoxicated. Failing in this, she caused the violation.

B. Solicitation by Maria Romero

Appellants argue that there is no substantial evidence to uphold the Department's decision and there is no evidence that Maria Romero was an employee or was permitted by appellants or their employees to solicit alcoholic beverages.

The accusation alleges a violation of the mandatory revocation statute. To

come within the mandatory revocation-of-license provisions of §24200.5(b), the record must contain substantial evidence that the solicitation was "under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy." The word "plan" is defined as "a method of achieving something: a way of carrying out a design." The word "scheme" is defined as a "planned program of something to be done." The word "conspiracy" is defined as an "illegal plan or agreement."[4] These words each imply a prearranged or preplanned course of conduct.

The Appeals Board has previously reviewed §24200.5(b) matters: Cornejo & Grano (1993) AB-6330 (the solicitation was on one occasion); Macias (1993) AB-6318 (the solicitation was on one occasion); Almaguer (1993) AB-6166 (note pads were seized as evidence of a plan or scheme, the solicitations were made on four separate occasions over an approximate 30-day period); Herrera (1992) AB-6197 (the solicitations were on one occasion); Rodriguez (1992) AB-6167 (markers were used to show drinks solicited); Perez (1992) AB-6095 (orange tickets were used as markers to show drinks solicited, the solicitations were made on five separate dates); and Chaco Room (1991) AB-6048 (soliciting took place on four separate dates). The commonality of these matters is either (1) a prior history of violations concerning solicitation of drinks, or (2) the use of some type of token, marker, or other record by management impliedly to keep track of the number of the drinks solicited for the compensation of the solicitor. A reasonable

[4]Webster's Third New International Dictionary, pp. 485, 1729, and 2029, respectively.

inference would be that by a prior history or the use of markers, the licensee had instituted a profit-sharing plan or scheme.

Anthony Posada, a Department investigator, testified that when he paid for a beer for himself, he was charged $3. Thereafter, the investigator approached some females sitting together, and asked one of them, a Maria Romero, to dance, and later, to sit at the bar counter with him. At the bar, Romero solicited a beer and told the investigator the charge was $10. When the investigator paid the bartender for the beer solicited, he saw the bartender make a mark on a yellow pad beside the cash register [Exhibit 2]. The pad was later seized which pad had names on it and notations, with the name of Maria thereon. Romero while at the bar counter, explained to the investigator that she was a waitress at the premises, had received money in advance for solicitations, that the marks on the yellow pad were to keep track of the beers solicited and sold by the females, and explained in detail the compensation scheme, one which netted the premises $6 and the soliciting female $4, for each beer sold [RT 9-12, 14, 19, 31-32].

Maria Romero testified, essentially denying all that was stated by the investigator. She also testified that she went to the premises with friends to spend time, then later testified that she went to the premises alone but did sit with some women she did not know. She also stated that she did not know anyone at the bar [RT 89, 103].

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] (a case where 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].) Conflicts almost always raise questions of credibility. 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].) The decision apparently rejected the testimony of Romero.

However, counts 7 and 8 of the accusation should be dismissed, as the accusation is improperly worded. The accusation states Romero was permitted to solicit, which from the record, was clearly shown. However, the Rule states that the licensee may not allow an employee to solicit. There is no evidence that Romero was an employee. The counts as worded, are a misstatement of the Rule.

There is sufficient evidence that Romero was allowed to solicit and did solicit. But there is no proper evidence that she was an employee, and no evidence she performed employee duties, other than her hearsay (as to appellants) statement that she was a waitress. There needs to be some evidence more than a statement, such as clearing tables, etc. Romero was part of the soliciting scheme, but that is not evidence of employment.

C. Violations by the bartender Haro

Count 9 of the accusation charges a violation of Penal Code §303 alleging that bartender Haro was employed for procuring or encouraging the purchase of alcoholic beverages. The decision of the Department on the other hand, cites Penal Code §303a, and cites the language of that section, the common loitering language [Determination of Issues IV].

Count 10 is a more vexing problem. Business and Professions Code §25657, subdivision (a) states:

> "It is unlawful (a) For any person to employ upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages ...."

The Department found that bartender Haro violated the code section. The evidence in the record is that Romero gave the solicitation funds ($10) to bartender Haro who placed a mark on the yellow pad (Exhibit 2).

Count 9 should be dismissed as there is a mistake in the decision as to citing the proper code section, and the findings as shown in the decision are not supported by substantial evidence. As to count 10, the Department's brief ignores this question of whether the bartender upon the facts of this case, can be charged under B/P 25657, subdivision (a), and be found in violation of the statute. The finding fails. Haro was hired as a bartender, did no solicitation, but did mark a tablet. The whole of the statute is aimed at the violation of a person soliciting drinks, and the inclusion of the word "encouraging" does not fit the bartender sufficiently to state that she, the bartender, violated the statute.

II

Appellants contend the penalty is excessive. Appellants argue within the issue

of penalty, that the counts concerning the minor who entered and was sold beers, do not warrant revocation. Apparently, appellants concede the charges of a minor entering, purchasing alcoholic beverages, and consuming one of the beverages.

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].)

The problem with the penalty is the penalty issue is colored by the evidence of the sale to the minor. The minor bought the beers, paid for by an unknown male, one beer for the male and one beer for the minor. The minor also received a token during the service of the beers, from an unknown bartender. From conversations with friends who had previously gone to the premises, she learned these tokens were redeemable for money.

The minor's testimony shows that she paid $20 for the two beers, and received $7 dollars in change [RT 49-52, 57-59]. This dollar breakdown appears to be the same as in the solicitation by Romero ($3 for a male beer and $10 for a soliciting female beer). There is certainly substantial evidence in the record that there was the same scheme for these two different styles of solicitations.

The confusion is best shown by a reading of the Determination of Issues VII and the arguments of the Department's attorney at the hearing. The problem is that the information of the tokens was not charged in the accusation, yet the

Department attempted to enhance the penalty because of that testimony. The only consideration as to revocation, must be based on the facts of the solicitation by Romero.

The decision states:

"The Department has recommended the enhanced penalty of revocation of [appellants'] license, with none of the revocation stayed, based on the fact that [appellants'] employee permitted a nineteen-year-old woman to loiter in the premises and to accept a beer from a customer. This violation of law, while serious, by itself would not warrant the outright revocation of a license."

A colloquy between the ALJ and the Department attorney states:

"MR. LEWIS: The recommended penalty in this case initially was a revocation stay for three years and a 30-day suspension. I understand—

"THE COURT: I'm sorry. Revocation?

"MR. LEWIS: Stay for three years, plus a 30-day suspension. I have different feelings based on information that was learned here today. And I understand Your Honor's concerns about that also. But when I hear a witness indicate that she heard from a friend that if she goes in there and gets these coins, she's going to get money from them and that witness was 19 years old at the time that this occurred, I have very, very, very many concerns about it. And I understand we don't have any evidence regarding that.

"THE COURT: Well, there's no pleading to that effect [essentially telling the Department attorney he is in error, as there is much on the record concerning the minor and the coins [RT 51-53, 58-59]].

"MR. LEWIS: And there is no pleading to that effect, but for very different reasons I think this is the concern that I have on behalf of the Department. We realized – the Department realized that pursuant to Count 5, Your Honor has no discretion as it relates to recommending an outright revocation." [¶] And I personally believe that's what's justified in this on the totality of the circumstances that I have been presented with as far as this case is concerned."

"THE COURT: So what is your recommendation?

MR. LEWIS: The recommendation is going to be revocation."

It appears to us that the Department is attempting to change the revocation stayed penalty to straight revocation based on evidence of a larger scheme than the Department had heretofore realized. Enhancement of a penalty is certainly proper where the facts of a particular incident show greater culpability, such as in the case of selling beer to a 12-year old, etc. The facts were all before the parties before the hearing, so notice of the charges cannot be an issue. But here, the evidence was newly heard at the hearing, thus depriving appellants of the right to defend. Essentially, this token and the minor are a new case which should be separately charged and litigated.

It appears that the case against Romero's solicitation is more a revocation stayed matter. But the attorney for the Department told the ALJ that he, the ALJ, had no discretion due to the mandatory provisions of B/P 24200.5, subdivision (b), to rule for straight revocation. This is an untrue statement, as the Department may revoke, but stay the revocation, as the Department had decided to do in this case before the testimony of the tokens and the minor. The Department's position that outright revocation is required is untenable.

ORDER

The decision of the Department is affirmed as to counts 1, 2, and 3 (minor entering with sales and consumption); count 4 is affirmed (obvious intoxication); counts 5 and 6 are affirmed (solicitation by Romero); and count 11 is affirmed (debris within bottles); but counts 7 and 8 are reversed (no substantial evidence that Romero was an employee, and the Department misstated the Rule); counts 9 and 10 are

reversed (the code section does not appear to encompass the assumed actions of the bartender); and the penalty is reversed and remanded for reconsideration by the Department in view of the comments of the Appeals Board's decision.[5]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, 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.