ISSUED MARCH 30, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MIGUEL PRADO dba La Pantera Rosa 1809-11 Olympic Blvd. Santa Monica, CA 90403, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))	AB-7294 File: 40-167947 Reg: 98043331 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: February 3, 2000 Los Angeles, CA

Miguel Prado, doing business as La Pantera Rosa (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his on-sale beer license for violations involving B-girl activity, service of alcoholic beverages to persons obviously intoxicated, violation of a license condition, and the conduct of a female entertainer, 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 Sections 24200.5, subdivision (b);

[1]The decision of the Department, dated December 3, 1998, is set forth in the appendix.

25657, subdivisions (a) and (b); 25602, subdivision (a); and 23804; Penal Code §303; and Rules 143 and 143.3, subdivisions (1) (a) and (b), and (2).

Appearances on appeal include appellant Miguel Prado, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on March 28, 1995. Thereafter, the Department instituted an accusation against appellant charging violations of various provisions of the Alcoholic Beverage Control Act and rules adopted by the Department pursuant thereto.

An administrative hearing was held on September 22, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by four Department investigators regarding observations made by them during a series of visits to appellant's premises.

Subsequent to the hearing, the Department issued its decision which found the violations summarized above. Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the decision lacks essential elements of evidence and findings of employment and permission; (2) the evidence does not support the findings that the drinks purchased were beer; (3) the condition allegedly violated is ambiguous, and, therefore, unenforceable; (4) there is no evidence that appellant's employees had a reasonable opportunity to observe the symptoms of intoxication described by the investigators; (5) Rule 143.3 was not shown

to have been violated because (a) there is no evidence the dancer was an "entertainer" or "live entertainment" within the language of the rule; and (b) the evidence does not demonstrate simulated sexual intercourse; and (6) the penalty is an abuse of discretion. The various issues related to drink solicitation will be combined in the discussion which follows.

DISCUSSION

I

The accusation contained 45 counts directed at B-girl activity, pleaded under five different legal theories. The ALJ sustained the charges of 39 of these counts.[2] It is appellant's contention in this appeal that as to each of the different theories embodied in the solicitation counts, a necessary finding or critical element of proof is lacking.

Appellants appear to concede, in their statement of facts, the acts of solicitation, the surcharge for the drinks which were solicited, and, with a single exception, the furnishing of purple pieces of paper to the women with each drink solicited. Appellants contend, rather, that essential elements to a violation of the statutes, rule or condition alleged are lacking from the case: evidence and findings of employment; evidence and findings of permission; evidence and findings that the women were acting pursuant to a commission, percentage or profit-sharing

[2] The counts sustained are as follows: (a) Business and Professions Code §24200.5, subdivision (b): counts 7, 13, 20, 27, 34, and 40; (b) Business and Professions Code §25657, subdivision (a): 8, 14, 21, 28, and 35; (c) Business and Professions Code §25657, subdivision (b): 3, 9, 15, 22,29, and 36; (d) Rule 143: 4, 5, 10, 11, 16, 17, 19, 23, 24, 26, 30, 31, 33, 37, 38, 43, and 44; (e) Penal Code §303: 12, 18, 25, 32, 39.

plan; and evidence that the drinks were alcoholic beverages.[3] Since the proof elements for the statutes and rule vary somewhat, we will address each separately.

A. Counts under Business and Professions Code §24200.5, subdivision (b).

Counts 1, 7, 13, 20, 27, 34, and 40 alleged the acts of drink solicitation as violative of Business and Professions Code §24200.5, subdivision (b). These are the most serious of the charged violations, since the statute mandates revocation for a violation. Therefore, they will be the primary focus of the discussion regarding drink solicitation.

Business and Professions Code §24200.5, subdivision (b) provides:

> "Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:
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> " ...
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> "(b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy."

Appellants contend that there is no evidence or finding of employment, nor any evidence or finding of permission for the solicitation activity.

The B-girl activity, according to the evidence, followed an almost identical pattern on each of the three nights about which there was testimony. In each of numerous instances (the Department counts a total of 21 solicitations), a woman asked an investigator from the Department to buy her, or, in some instances, her

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[3] This contention is inapplicable to the charges based upon Business and Professions Code §24200.5, subdivision (b), and Rule 143, which do not require that the drinks solicited be alcoholic beverages.

companion, a beer. While the investigators were uniformly charged $3 for each beer they ordered for themselves, they were charged $5 for each of the drinks which were solicited. In most instances, the woman was given a $10 or $20 bill by the investigator, went to the bar, returned with a beverage in a plastic cup, together with the change from the bill given to her by the investigator, which she returned to him. She was also was given a purple piece of paper or cardboard by the bartender, who took the pieces of paper from the register or from a container next to the register. In most instances, the woman went to the bar and obtained her drink, which was an amber-colored liquid scooped from a plastic tub beneath the bar.

Key to the decision is the ALJ's finding that, with respect to the purple piece of paper the women received for each successful solicitation, it was "obvious ... that those papers would later be redeemed for payment." (Finding of Fact 5.) Thus, where there was no evidence that such a piece of paper was supplied (Counts 1, 2 and 6), those counts were dismissed. Conversely, where there was evidence that there was the passage of a purple piece of paper, the charge was sustained (e.g., remaining counts under §24200.5, subdivision (b).)

It seems clear the ALJ made a finding that the women who received the purple pieces of paper were being paid for their efforts; thus, they were employed. Appellant has offered no explanation for the distribution of the purple pieces of paper, virtually compelling the inference they were a means of keeping track of the number of drinks solicited, in order later to determine the amount of money to be

paid to the women based upon the number of drinks purchased for them.

The Board is not so naive as to believe the pieces of paper given to the women had some innocent purpose. Their nexus to the act of solicitation, the bartender's involvement, and the markup on the price of the drinks compels the conclusion, in the words of the statute, that the women were "employed or permitted to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under ... [a] commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy." It does not matter if the precise details of compensation are not shown. There was a scheme for the solicitation of drinks, permitted by the licensee.

The bartender's involvement in the solicitation scheme establishes the necessary element of permission under the statute. She was the person who charged $5 for the drinks which were solicited, and who distributed the purple markers. Without her tacit permission, evidenced by her conduct, the scheme could not have continued. Under established legal principles, her conduct is imputed to appellant. (Cooper v. State Board of Equalization (1955) 137 Cal.App.2d 672 [290 P.2d 914, 917-918]; Mantzoros v. State Board of Equalization (1948) 87 Cal.App.2d 140 [196 P.2d 657, 660].)

These counts alone are enough to support the Department's order.

B. Counts under Rule 143.

The accusation contained 17 counts charging violations of Rule 143 (counts

4, 5, 10, 11, 16, 17, 19, 23, 24, 26, 30, 31, 33, 37, 38, 43, and 44.)[4] Rule 143 provides that:

> "No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use by any employee."

Appellant contends that the absence of any finding of the employment status of the women who solicited drinks negates any finding that the rule was violated.

This argument has been disposed of. We have concluded that such a finding was implicit in the Department's findings with respect to the charge under §24200.5, subdivision (b). We think it just as proper to consider such a finding in the determination of a charge premised upon Rule 143.

Counts under Business and Professions Code §25675, subdivisions (a) and (b).

The accusation also charged violations of Business and Professions Code §25657, subdivisions (a) and (b), based upon the same acts of solicitation. Under this code provision, it is unlawful (a) to employ any person, or pay a percentage or commission, to procure or encourage the purchase or sale of alcoholic beverages, or, (b) to employ or knowingly permit anyone to loiter for the purpose of begging or soliciting alcoholic beverages for the one begging or soliciting.

Appellant contends that there must be proof the beverages procured were

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[4] The accusation charged, in an exercise of ambitious pleading, that each solicitation and each acceptance of a drink was a separate violation.

alcoholic beverages, and there was none. Further, appellant contends that either an employment status or percentage status must be established, and that neither was proven. The Department concedes (Dept. Br. at page 12) that under these Code provisions, the drinks solicited must be alcoholic,[5] but contends the evidence establishes that the drinks solicited were beer. The Department also contends that the evidence established employment as well as payment of a commission.

For reasons we have already set forth, we reject the contention that employment has not been established. The evidence clearly supports the inference that the women were being compensated for their solicitation efforts. The use of the purple pieces of paper as a measure of their efforts clearly indicates their use of a commission scheme. The extra charge for the drinks served the women further supports this conclusion.[6]

The ALJ also found that the women solicited and were served beer. The record is clear that the women asked the investigators for beer; there is evidence that one of the women ordered beer from the bartender on more than one occasion;[7] and there is

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[5] Appellant's contention that the beverage must be alcoholic before these code sections can be violated has case law support. (See Wright v. Munro (1956) 144 Cal.App.2d 843 [301 P.2d 997, 999] ("Under the statute, it is also required that the drink be an 'alcoholic' beverage."))

[6] The Department states that the $5 charged for the drinks which were solicited reflects a surcharge of $2, comparing that to the $3 charged the investigators for their beer. The Department's assessment is conservative. The plastic cups in which the drinks were served held only six ounces, according to the investigators, while the investigators were served beer in 12-ounce bottles.

[7] Investigator Pacheco testified that, twice, in his presence, Mariana ordered beer from the bartender after soliciting him to buy her a beer. This is evidence that ordinarily would support a presumption that the patron was given the beverage

some hearsay testimony that what they were served was beer. The record as a whole, however, leaves the question significantly in doubt.

The Department cites Griswold v. Department of Alcoholic Beverage Control (1956) 141 Cal.App.2d 807, 811 [297 P.2d 762, 764], for its holding that a patron is presumed to have been served what he ordered. In addition, the Department cites Penal Code §382, which makes it unlawful to sell or offer something other than what was requested without first informing the purchaser.

We do not believe the decision can be sustained to the extent it concludes the women were served beer. There is no evidence that any investigator tasted or smelled any of the drinks which had been solicited, and none was seized as evidence. In common experience, health rules aside, beer is not normally dispensed by being scooped from a plastic tub, which was consistently the case here.

The argument that the beverage can be presumed to be beer because, if not, Penal Code §382 would be violated, assumes that the women would not have known they were not being served beer. However, as participants in the scheme, it may be presumed they would know they were not going to get beer, and simply wanted the investigators to think they were.

Counts under Penal Code §303.

Penal Code §303 is very similar to Business and Professions Code §25657, subdivision (a), and it would be reasonable to give each the same construction. That

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which had been ordered. In this case, the manner in which the amber colored liquid was dispensed makes such a presumption questionable.

being so, we think the counts charging violations of Penal Code §303 (counts 12, 18, 25, 32, and 39) should also be reversed for lack of proof that it was an alcoholic beverage which was solicited.

II

Appellant argues that the counts pertaining to the service of beer to obviously intoxicated patrons must fall because there is no evidence appellant's employees had an opportunity to observe the symptoms of intoxication displayed by the two patrons, symptoms appellant characterizes as minimal.

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. 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].) 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].)

It is clear from the testimony of investigator Posada, if believed, as the trier of fact evidently did, that both of the patrons in question exhibited sufficient evidence of intoxication to put appellant's employees on notice that further service should have been denied.

In one case, the bartender was on the other side of the bar from the patron when he served him, and, in the other, the patron's intoxicated behavior was

apparent to a number of on-lookers, including the waitress.

In the last analysis, whether the bartender and/or waitress had a reasonable opportunity to observe is part of the factual controversy best resolved by the trier of fact, who hears the witnesses first hand.

We believe there was sufficient testimony in the record, if believed, to support the ALJ's findings.

III

The ALJ found that when investigators Posada and Pacheco departed the premises on August 1, appellant's security guard emptied their unfinished bottles of beer into plastic foam cups, and permitted them to take the cups with them. The ALJ found that this violated a condition on appellant's license prohibiting the sale of beer for consumption off the premises (counts 46H and 46I).[8]

Appellant contends that in the absence of evidence the investigators purchased the beer with the intent to consume it off the premises, the condition does not apply.

The holder of an on-sale beer license may also exercise, with respect to the sale of beer, the rights and privileges granted by an off-sale beer and wine license. (Bus. and Prof. Code §23401.)

However appellant's license contained a condition which expressly prohibits the sale of beer for consumption off the premises.

There is no evidence that, when the investigators initially purchased their beers, either of them intended to remove his beer from the premises.

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[8] A similar charge (count 46J), relating to a visit by another investigator on January 3, 1998, was dismissed for lack of evidence.

It would seem that the condition's intent was to prevent alcohol purchased at the premises from leaving the premises. In this case, appellant not only did not take any action to prevent drinks being removed from the premises, he, through his security guard, permitted and assisted in the removal of the investigators' beers. We think this is sufficient to bring the occurrence within the terms of the condition.

IV

We have reviewed investigator Posada's testimony regarding the conduct of the dancer, Dalia Pena. His description of the dances and "lap dances" she performed, both those in which he was a recipient and others in which he was an observer, tell us that the ALJ's findings and determinations are supported by record evidence [RT 66-72, 110-116].

Appellant claims there is no evidence Pena had a relationship with the licensed premises as an entertainer, so that her conduct would not come within Rule 143.3, which applies to live entertainment. We think this represents an unrealistic view of the evidence. Pena danced in the center of the dance floor, surrounded by tables at which patrons were seated, and then toured the area around the dance floor, offering lap dances to various patrons, including the investigator. Clearly this was live entertainment. That the ALJ's findings do not spell out in detail the conduct of the dancer which constituted the touching or simulating is not a reason to reject his determinations. The same is true with respect to the charge concerning her exposed buttocks, a charge supported by the testimony of the investigator.

V

Appellant challenges the penalty as an abuse of discretion. He argues that his discipline-free record, together with the fact that some of the counts of the accusation were not sustained, warrants some penalty less than revocation.

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].)

This case did not involve an isolated act of solicitation. The evidence clearly showed a scheme and pattern that prevailed in each of the three visits by investigators. The same women, the same modus operandi with respect to the prices charged, the beverage served, the purple markers distributed with each solicited drink, and the same bartender's involvement are, in combination, overwhelmingly strong evidence of the kind of scheme targeted by §24200.5, subdivision (b).

The solicitation conduct by itself is enough to support an order of revocation.

The fact that we have elected not to sustain some of the solicitation counts does not persuade us that the penalty needs to be revisited. The various solicitation counts were simply different theories of illegality, all based upon the same set of circumstances. Since the proof supports the charge under §24200.5, subdivision (b), which mandates revocation, there is legal support for the penalty adopted by the Department. That the Department chose not to stay revocation was a matter within its

discretion, especially in light of an express finding that mitigation was unwarranted.

ORDER

The decision of the Department is reversed as to those counts alleging violations of Business and professions Code §25657, subdivisions (a) and (b), and Penal Code §303, and affirmed in all other respects, including penalty. [9]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[9] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district 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.